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PRELIMINARY CHAMBER, A NEW INSTITUTION IN THE ROMANIAN PROCEDURE LAW

Alexandru MARIAN*

Abstract

The Prosecutor, in charge with the criminal prosecution, informs the Court through the indictment drawn up by him. Given its importance, as Court informing document, the law provides special treatment for its content and form. Both the end of the criminal prosecution and the arraignment, as distinct moments of the procedure, are parts of the criminal prosecution, considered criminal trial phase. The New Criminal Procedure Code introduced this new phase, the preliminary chamber, with the purpose to verify the lawfulness of arraignment. Thus, incorrectly drawn up files are stopped from being presented before the Court.

Keywords: *criminal trial, preliminary chamber, judge, prosecutor, judge, defendant.*

1. Introduction

An important new entry in the New Criminal Procedure Code is the preliminary chamber, an institution which leads to the new judicial position provided by art 3 paragraph 1 of this Code, specialized in examining the lawfulness of lawsuits.

The Romanian lawmaker thought that it was necessary to introduce it, given the judicial environment, in general, and, in particular, the lack of celerity in the criminal trials, especially, the lack of trust of the justice seekers in the justice action, together with the social and human costs resulted by the criminal trial, by a high consumption of the time and financial resources.

The lawmaker based the introduction of the preliminary chamber on the desire to observe to the requirements of lawfulness, celerity and equity of the criminal trial.

The preliminary chamber is a new concept aiming at creating a legal frame, able to eliminate the excessive length of the criminal procedure during the trial phase and assuring, at the same time, the lawfulness of the lawsuit and the evidence.

Also, another aim was to eliminate the deficiencies that had led to decisions of the European Court of Human Rights against Romania for exceeding length of the criminal trial.

2. Preliminary Chamber

The procedure of the preliminary chamber encompasses rules that eliminate the possibility to further return of the case to the prosecutor, during the trial phase, as the lawfulness of the evidence and the lawsuit had already been decided upon by this preliminary chamber.

The Judge of the preliminary chamber is bound to verify the conformity of the evidence produced during the criminal investigation, together with the guarantees related to the procedure lawfulness.

Thus, the lawfulness of the evidence production has been closely related to the assurance of the equity character of the criminal trial.

If the preliminary chamber judge finds necessary to invalidate the evidence proof, due to an essential violation of the procedure rights of one party, he will eliminate it as proof of evidence. The lawmaker focused on improving the justice action and the circumstances that determine the beginning of the justice administration.

The content of the provisions regulating the institution of the preliminary chamber and the solutions adopted represent the guarantee for the conditions so as the procedure during the criminal investigation have a fair character for a judgment on merits.

The presentation of the motives of the law project on Criminal Code, which became Law no 135/2010, said that: „when analyzing the deficiencies of the procedure system, appeared the need for a modern system concept, able to answer the necessity to create a justice adopted to the social expectations, and also the necessity to improve the quality of this public service”[1].

The new Procedure Code stipulates that this preliminary chamber is a new institution, whose purpose is to create a modern legal frame.

At the beginning, the initial thesis on creating the new Procedure Code, approved by the Romanian Government Decision no 829/2007, this trial phase is called preliminary step. For unknown reasons, the lawmaker gave up to this expression.

The preliminary chamber procedure is not completely new for us; such phase existed in the

* PhD Lecturer, Faculty of Law and Administrative Sciences ”OVIDIUS” University of Constanţa, Romania, (e-mail: **marian.alexandru1961@yahoo.ro**).

[1] See Part 2 called – *Reason for Making the Law* no 1 – *Description of the current situation,* of NCPP Project, p. 1.

Romanian legal system known as preliminary meeting.

This preliminary meeting was introduced b the Decree no 506/1953, abrogated afterwards by the Decree no 473/1957.

Article 269 of the first legal act provided the following: "the files received from the prosecutor are to be examined in a preliminary meeting so that the court, judging the merits, receives only the cases where the evidence is necessary, sufficient and legally administrated, and thus, the court, judging the merits, could decide whether the facts are supported by evidence or not and whether the defendant committed them or not and therefore, found guilty for this".

We can easily notice that the institution of the preliminary meeting was a procedure step similar to the preliminary chamber, easily described by the definition of the late, "a procedure step, preamble to the judging step, when the judge, especially assigned for this, according to the competence of the court, verifies the lawfulness of the court, of the evidence or of the procedure actions carried out by the criminal investigating bodies"[2].

We can see that both procedures represent preliminary steps of the trial, with the purpose to analyze the act of notification of the Court in order to find the observance of the law requirements. The aim of these procedures is to stop files that have been incorrectly drawn up, before being presented before the judging Court.

The institution of the preliminary meeting led to many judicial debates and controversies[3] on intricacy resulted from the content of the regulation on aspects on which the Court could rule decisions, such as guilt of the author or on which the Court could issue appreciations on the probative character and the truthfulness of the pieces of evidence.

Law no 3/1956 brought amendments on the institution of preliminary meeting in order to reach an agreement with other institutions of this law.

For instance "the writ of summons" became „accusation conclusions".

The same law set that the Court President and the prosecutor shall draw up a report instead of a "President's presentation" and "Prosecutor's report".

During the preliminary meeting they used to acknowledge the classification and the cease of the criminal case, and according to the same law, the Curt could re-open a criminal case after it had been ceased by the effect of classifying it in the preliminary meeting. This re-open was made only at the express demand of the prosecutor and only pursuant to the reasons proposed to be reviewed, with precise application. For this reason, the prosecutor had to attach to his request, the papers with the new circumstances to be analyzed, as base for his action. Therefore, the Prosecutor would draw up new accusations, brought before the Court, and the trial was re-begun with the arraigning phase, followed by a new preliminary meeting, carried out in the known circumstances.

In practice, new debatable aspects appeared concerning, for instance, the fact that during the preliminary meeting the Court had to decide or not, on the guilt of the defendant, and then decide on the arraignment, being sure about the guilt of the accused person. Also, another controversy was related to the circumstance where the Court decided on the probative character of the evidence, on their truthfulness, whether the case was classifiable or not if there were illegal or doubtful pieces of evidence, or pieces of evidence fought against with others proving the lack of guilt[4].

It was thought that the main characteristic of the preliminary meeting was to assure the best conditions for the judgment on merits, not being able to anticipate the solution ruled by the Court of First Instance.

The preliminary meeting decided whether the pieces of evidence were legally administrated and sufficient, leading to the preparation for the trial and helping the Court to decide if the facts were supported by evidence and the if accused found guilty for having committed them.

Proof analysis consisted in verifying whether they were legal and also whether they had been legally administrated, according to the Criminal Procedure Law. Thus, any possibility to verify the guilt of the author was eliminated.

At that time, there was an opinion about the judges of the preliminary meeting who shall not adopt "a preconceived opinion about the guilt of the accused"; that would take place during the oral contradictory and free debates in the judging session.[5]

Another issue raised by the legal text, at that time, was about the incompatibility of the presence of judges, who had taken part to the preliminary meeting, at judgment on merits. The former Supreme Court decided that judges' participation to the preliminary meeting is not incompatible with their presence in the trial court, as the preliminary meeting doesn't rule on the merits and the arraignment is not a "ruling on the merits"[6].

This, in our opinion, is debatable, because the judge, no matter how impartially he would judge, he couldn't "forget" his opinion on the accused, made during the preliminary meeting; that is why we think

[2] Antoniu G. and Bulai C, *Dictionary of criminal law and procedure*, Hamangiu Publishing House, Bucharest, 2011, p. 110.

[3] Volonciu N., *Amendments of Criminal Procedure Code of R.P.R*, archives of the University of Bucharest "C. I. Parhon" and *Magazine of Social Sciences – Judicial Sciences* 6(1956) , p.161 and follow.; Brutaru V., *Preliminary Chamber, a new institution of the criminal procedure law*, Law 2 (2010), p.2007-2015.

[4] Roman. D at the *Scientific Session* of University *Babeş Bolyai*, Cluj, New Justice 2 (1956), p.262.

[5] Kahane S. , *Course of Criminal Procedure*, Lithography of Education Bucharest, p. 227.

[6] Supreme Court, *Criminal Decision no 324/30 March 1954.*

the decision is not right and it affects the principle of presumption of innocence of the defendant and his right to a fair trial.

The preliminary meeting was justified by the Supreme Court practice[7] because they thought it has the possibility to correct the legal qualification of the facts presented by the Prosecutor; by changing the legal framing of the fact in the preliminary meeting, we can have a classification, due to the amnesty, or due to the lack of the preliminary plea or to the presence of another reason that makes impossible the beginning of the criminal trial. Finding that the alleged fact of the accused, complies with all the features of a more severe crime, the Court, during the preliminary meeting, can change the classification, without sending back the papers to the criminal investigating authorities. The case can be sent back when the evidence are not sufficient for a right qualification. The competence of the preliminary meeting, during the previous legal system, was quite generous. It had the power to rule on all law matters, both the material and the criminal procedure, provided it was not on merits, it didn't anticipate on the trial session, it didn't pronounce on the guilt or absence of guilt of the author.

About the facts, during the preliminary meeting, the Court could decide whether the facts had been or not supported by an intention, and thus, decide on bringing more pieces of evidence or classify the case.

A decision on a classification during the preliminary meeting, due to the presence of a cause which makes impossible the beginning of the criminal trial, or due to the insufficient lawfulness of the actions or data (evidence), the preliminary meeting is not replacing the Prosecutor but verifies whether there are conditions for a judgment on merits, the prosecutor still being the accusing part; the preliminary meeting becomes a preparatory step for the judgment, like an instrument for establishing the truth; the trial session has the exclusive right on stating the truth and the guilt of the author.

Another author[8,9] thinks that: during the preliminary meeting, the evidence cannot be taken into consideration in order to establish the truth as, not being definite, they cannot be considered as object of analysis; the analysis criterion is the evidence value and this value is clear only when the evidence is definitive and considered as a total. Another author thinks it is hard to believe that a judge, who, during the preliminary meeting, has studied the circumstances for arraignment, doesn't have an opinion about the guilt of the defendant. Thus, he could be contested for pre-judgment. We think that judges who presided the preliminary meeting, are no longer compatible with judgment on merits, contrary to the opinion of the Supreme Court. Many authors believe that it is impossible to decide that a charge is well grounded and not to have an opinion about the guilt of the defendant.

During the preliminary meeting, the judge has to reach a decision: whether the defendant shall be found guilty, given the evidence produced during the criminal prosecution and confirmed during the preliminary meeting, and thus the file shall be transferred to be trialed; if the evidence lead to the opposite opinion, the judging panel shall classify the case; and in case the panel cannot reach a verdict, they shall send back the case for a complete criminal prosecution, and if this cannot happen, they will classify the case (in dubio pro reo). Finding out the truth, including the guilt, is an objective both for the preliminary meeting and for the trial phase and eliminates the risk to have the judges, influenced by the actions of the preliminary phase while judging on merits in court room.

Thus we can see that preliminary chamber is not completely new to our legal system and it has predecessors in other similar institutions in compared law.

The New Criminal Procedure Code adopted a new fundamental principle – separation of judicial functions. According to art 3 paragraph 1, the criminal trial is divided into 4 judicial functions: criminal prosecution, provision of fundamental rights and freedoms during the trial, verification of the lawfulness of the arraignment and judgment. The function of verifying the lawfulness of the arraignment, carried out by the judge of the preliminary chamber, doesn't belong to the criminal prosecution phase or to the judgment. Therefore, the judge of the preliminary chamber doesn't participate to criminal prosecution action or to judgment.

The preliminary chamber institution of the New Criminal Procedure Code is very similar to other institutions in the compared law.

In the American procedure system, the preliminary hearing represents an important trial step. Its purpose is to establish whether the evidence procured by the prosecutor is sufficient to justify the accusation brought against the defendant. This preliminary hearing takes place before a judge who, after the prosecutor's speech, gives the defendant the opportunity, through his lawyer, to defend himself, deciding whether there are enough and grounded reasons to bring the case in front of a jury. The jury has the right to reject the evidence if it is not well grounded or to send it forward to the Chamber of the Grand Jury.

If the file is rejected for lacking evidence, the arrested defendant is freed at once. If he is free and the file has been rejected, the defendant is not bound anymore to observe the conditions set by the

[7] Roman D at the *Scientific Session* of University *Babeş Bolyai*, Cluj, New Justice 2 (1956), p.262.
[8] Perju N at the *Scientific Session* of University *Babeş Bolyai*, Cluj, New Justice 2 (1956), p.273.
[9] Kahane S., *Course of Criminal Procedure*, Lithography of Education, Bucharest, p. 227.

prosecution (for instance, not to leave town). Anyway, a file rejection during the preliminary hearing doesn't mean that the Grand Jury cannot lodge another accusation against the defendant, sometimes, afterwards. Thus, an accused can be prosecuted and arrested again, for the same deed, even though his file was rejected during the preliminary. Although the defendant has the right to a preliminary hearing, he can lose this right if the State gets an accusation from the Grand Jury before the preliminary hearing. It is a tactical move of the Prosecutor to avoid the "probable cause hearing".

There are cases when the defendant doesn't have the right to the preliminary hearing, such as the situation when the file is brought before the Grand Jury before the defendant being arrested or an offence, and the defendant finds out about it after the Grand Jury issued a sentence decree.

If the Judge preliminarily heard a file and this has been sent to the Grand Jury for trial, with enough evidence, the Grand Jury is not influenced by the decision of the Judge who sent the file. The Grand Jury can either acquit the defendant either reject the file for lack of evidence. The preliminary hearing shall last for a reasonable time period, meaning "no more than 10 days since the beginning of the hearing, when the defendant is arrested, and no later than 20 days, when the defendant is free".

The justice in the United Kingdom uses the preliminary hearing in order to establish whether there is evidence to justify the arraignment. The accused party has the opportunity to acknowledge the accusation brought against him/her. If there is enough evidence, the judge sends the case for trial and if he thinks there isn't, the case is rejected. The victim of the offence and other witnesses are, usually, compelled, to testify during the preliminary hearing.

In France, the judge of the first instance can use several procedure instruments, such as: issuance of searching warrants, request of producing certain evidence and annulment of others, issuance of warrants for witnesses or demands for experts opinions and testifies. The instruction judge issues and order if there is not a file; or he can decide there is sufficient evidence for a trial and can make a recommendation for the Court of Appeal for a preliminary hearing.

If the Court of Appeal supports the recommendations of the Judge of instruction, they will send the case to the Cour d'Assise, the only Court in France with jury (Court of Appeal and Cour d'Assise are part of the same instance as the Judge of Instruction). The Judge of Instruction is notified through the initial indictment issued by the Public Ministry.

3. Conclusions

The Preliminary Chamber seeks to solve matters on lawfulness of the arraignment and of the evidence.

According to art 54 of The New Criminal Procedure Cod, the judge of the preliminary chamber has competence in: verifying the lawfulness of the arraignment decided by the Prosecutor, verifying the lawfulness of the evidence and of the procedure papers drawn up by criminal prosecution authorities, solving complaints brought against resolutions for no criminal prosecution or arraignment, and also other situations, expressly provided by law.

At the same time the judge of preliminary chamber can judge certain ways of appeal against resolutions for no criminal prosecution or arraignment, but also legal disputes against resolutions on preventive measures in preliminary chamber on conclusions about the solutions of the demands and exceptions of this preliminary procedure.

The preliminary chamber procedure is a written one, of no more than 60 days since the registration of the file. This period includes also the term for solution of possible disputes drawn up, according to art 347 paragraph 1 of the New Criminal Procedure Code, by the defendant and by the Prosecutor against the solution ruled in Conclusions, by the Judge of Preliminary Chamber.

Recent jurisprudence has registered many debates on the sanction for non observance of this term, legally provided. It is considered as a procedural term and by its violation shall not affect the validity of the procedure and of the conclusions of the judge of preliminary chamber, maybe only disciplinary sanctions for him.

Another debate appeared in the jurisprudence is the one concerning the 5 day term given to the Prosecutor by the Judge of Preliminary Chamber in order to remedy possible errors. According to art 346 paragraph 3, letter a of the Criminal Procedure Code, this judge shall rule his decision about sending the case to the Prosecutor's Office if the Prosecutor hasn't remedied the deficiencies within 5 day time.

In absence of deficiencies and if the criminal prosecution was legal and well grounded, the judge of preliminary chamber decides on sending the case to the next phase, judgment on merits, complying with lawfulness, celerity and equity.

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- *Law* no 135/2010, New Criminal Procedure Code.

UNDERCOVER PARTNER

Alexandru MARIAN*

Abstract

The undercover partner takes part in the process of providing the investigating bodies with information. This institution carries out activities similar to undercover investigator. These both represent a proactive investigating instrument used by criminal authorities to obtain better results concerning the fight against criminality. Under the cover another identity, they carefully search for crimes or favorable circumstances for commitment of others new.

Keywords: *partner, investigator, investigation, prosecutor, judge.*

1. Introduction

The institution of undercover partners was introduced in the new Criminal Procedure Code by Law no 281/2003, with the purpose to fight against criminality

Previously, several acts have been adopted with provisions on using undercover investigators (for certain cases, we use "undercover policeman"), such as Law no 143/2000 on fight against drugs trafficking and illegal drug use, which by its art. 21 stipulates that: "Prosecutor can authorize the use of undercover investigators to discover facts, to identify authors and o obtain evidence in cases where there are well grounded reasons to consider that a crime related to drugs trafficking or illegal drugs use has been committed."

Law no 218/2002 on organizing and functioning of Romanian Police sets in its art. 33 that "in order to prevent and fight corruption, trans-border criminality, human trafficking, terrorism, drug trafficking, money laundry, IT crimes and organized crime, on the demand of the Romanian General Police Inspectorate, having the approval of the Prosecutor's Office of the Court of Appeal, the Romanian Police can make use of undercover informers in order to obtain information for a trial. The Prosecutor's authorization shall be issued by a Decree, for a maximum 60 day time which can be extended, provided there are well grounded reasons; each time, the extension cannot overpass 60 days. All these authorizations shall be confidential and not be made public".

Law no 39/2003 on prevention and fight against organized crime stipulates in its art 17, that "in case there are well grounded reasons that a crime has been committed by one or several members of an organized group, that cannot be proved or whose authors cannot be identified by other means, undercover policemen can be used to gather information and identify facts and authors". These policemen are employees of the Ministry of Home Affairs.

According to art 22 of Law n 678/2001 on fight against traffic with human beings, undercover investigator can be use to gather information necessary for the beginning of the criminal prosecution.

2. Undercover partner

According to art 138 paragraph 10 of the Criminal Procedure Code, undercover investigators are persons using false identity in order to obtain information and data about a committed crime. The provisions on undercover investigators provided both by the Criminal Procedure Code and by special laws, allow us to have different approaches of this institution.

According to art 141 paragraph 1, letter a of Criminal Procedure Code, undercover investigators are used when "there is reasoned suspicion about the preparation and about a committed crime against national security provided by the Criminal code and other special laws, such as crimes involving drug trafficking, arms trafficking, human being trafficking, terrorism or assimilated to them, such as financing terrorism, money laundry, counterfeiting money or other values, electronic payment instruments, blackmail, deprivation of liberty, tax evasion, in case of crimes of corruption, crimes assimilated to those of corruption, crimes against financial interest of European Union, crimes that are committed by means of IT or electronic communication devices or in case of other crimes provided by laws with punishment by prison of 7 years or more or if there is a reasoned suspicion about a person being involved in criminal activities related to the above mentioned crimes".

Using false identity, pursuant to law, undercover investigator can gather information on the crime, on the persons suspected of committing or having committed a crime. Their actions cannot be considered as constraints or encouragement to committing or continuing to commit crimes.

* PhD Lecturer, Faculty of Law and Administrative, Sciences "OVIDIUS" University of Constanţa, Romania, (e-mail: **marian.alexandru1961@yahoo.ro**).

Undercover investigators are special policemen assigned to do this with clear purpose of gathering information.

We considered necessary to make mention all these legal acts which regulate the institution of undercover investigator as the undercover partner we analyze in this work does the same actions as the undercover investigator. The law doesn't define the partner but we can adopt the definition of the collaborator of justice, as in the Recommendation no 9/2005 of the Committee of Ministers of the member states of EU on protection of witnesses and collaborators of justice[1] .

Thus, a collaborator of justice is the person who faces criminal charges or has been convicted of taking part in a criminal association or other criminal organization of any kind or in offences of organized crime, but who agree to cooperate with but who agree to cooperate with criminal justice authorities, particularly by testifying about a criminal association or organization, or about any offence related to it or other serious crimes.

The undercover partner is the person assigned to obtain information just like the undercover investigator with the purpose of gathering information about crimes and their authors.

As the specialized literature doesn't offer a definition for undercover partner, many times it was described as an undercover investigator but to use it this "to cover also the activity carried out by a person who is not employee of the police, is illegal"[2].

Others[3] think that undercover partner is the person who "within the limits of permission given by the Prosecutor carries out certain actions to discover crimes, to identify authors and to obtain useful data to establish the existence of a crime and start the process of holding authors criminally liable".

Law no 143/2000[4] on prevention and fight of illegal drugs trafficking and use, with its article 22, stipulates the employment of partners, meaning specially trained policemen acting as undercover investigators, and their collaborators who can obtain drugs, essential chemical substances, pursuant the previous authorization of Prosecutor, in order to discover criminal activities and identify criminals.

Thus, a collaborator of the undercover investigator can be a police informer or a person investigated in another case, who decided to cooperate with judicial bodies in order to discover crimes and identify their authors.

A more extended definition would say that any person, no matter if he is member of not of a police or informative structure, who helps during the actions of discovery, research, investigation and bring to justice those who committed the crime. Thus, collaborators can be both informers and persons accused for having committed crimes, but also persons who testify about crimes which are not related with them in any way.

Provisions of art 148 paragraph 5 of Law no 143/2000 state that undercover investigators obtain information, based on the Prosecutor's authorization who is the beneficiary of this information. The prosecutor surveillance and carries out the criminal prosecution.

For this, undercover investigators draw up minutes.

The fact that the undercover partner is allowed to get drugs, chemical substances and precursors, is possible due to the Prosecutor's permission, which is also mentioned in a minutes, the only document considered evidence.

The partner can be heard but only as witness with protected identity, as specified by law at art 125-130 of Criminal Procedure Code.

The importance of the activity done by the undercover investigator and partner led to the necessity of United Nations Convention against Transnational Organized Crime: each state shall take appropriate measures in order to encourage persons who participate or who have participated in organized criminal groups to supply information useful to competent authorities for investigative and evidentiary purposes on such matters as: identity, nature, composition, structure, location or activity of these groups; links including international links, with other organized criminal groups; offences that organized criminal groups have committed or may commit; to provide factual, concrete help to competent authorities that may contribute to depriving organized criminal groups of their resources or of the proceeds of crime[5].

Each state shall consider providing for the possibility, in appropriate cases, of mitigating punishment of an accused person who provides substantial cooperation in investigation or prosecution of an offence or organized crime.

These persons shall be granted protection against possible threats or acts of violence or intimidation. These references concerning the partner institution

Are provided by art 15 and art 16 of Law no 143/2000 on persons who have committed an illegal substances offence and who decided to cooperate

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[1] Recommendation no 9/2005 of the Committee of Ministers on witness protection and collaborators of justice, adopted at the 924th meeting of the Ministers Deputies, published in Romanian on https://wcd.coe.int/ViewDoc.jsp?id=1597817&Site=COE.

[2] Puşcaşu V., Undercover agents*, illegal challenge of the offence. Opinions (I). "Criminal Law Notebooks" no 2/2010*, p. 32.

[3] Dascălu I. et al, *Drugs Criminal Organization*, Publishing House Sitech, Craiova, 2008, p. 337.

[4] *Law no 143/2000 on fight against drug trafficking and illegal use*, published in the Romania Official Gazette" Part I, n 362 of 3rd of August 2000.

[5] Paşca Ioana-Celina, *Aspects on the use of undercover collaborators in Romanian criminal judgment. Their institution in the new criminal law*, Faculty of Law and Administrative Sciences, University of West of Timişoara.

with judicial authorities to identify and punish others who committed offences involving drugs trafficking. These collaborators, who committed one of the offences provided by art 2 – 10 of this law, who have cooperated and informed about other offenders, are to have their punishment mitigated by half.

On the other hand, the law stipulates also a case where the punishment is no longer enforced for the person who, before the beginning of the prosecution informs the authorities about his participation in a group or in an agreement to commit one of the offences provided by art 2-10, allowing identifying and bringing to justice of other participants[6].

Such benefits are also mentioned by law no 39/2003 on prevention and fight the organized crime[7].

Art 9 paragraph 2 of this law states half of the legal punishment for the person who committed one of the crimes provided by art 7 paragraph 1 or 3 of the same law and who, during criminal prosecution or judgment, informs and facilitates the identification and the bringing to justice of one or several members of a criminal group.

This category of collaborators is not regulated by Criminal Procedure Code or by any other law; that's why we think that any person can become a collaborator. This does the same things as the undercover investigator, without being a police officer or agent and therefore we can ask about the difference between them.

We also remark that the lawmaker didn't state anything about the conditions or limits of the partnership or its duration

Compared to the informer who is a person who is not involved in the criminal activity and who informs about facts he accidentally found out, the collaborator is a well known in these criminal groups and often collaborates with judicial authorities.

According to provisions of art 148 paragraph 5 of the Criminal Procedure Code, only investigators can carry out investigating actions. Thus, thinking that collaborator enjoys the same authorization as the investigators is an extended interpretation of the law.

Assignment of an investigator and the choice of a collaborator imply necessary measures of recruiting, selection and training.

Both of them must be familiar with the world of criminality, its modus operandi, its slang; they must be members of the action zone, have the same origin or, at least, the same education like other criminals; they must have self esteem, be able to assess correctly reality and have good memory and patience.

Many expressed their opinions[8] about the fact that the papers the collaborators draw up are absolutely null for the criminal investigation process, according to art 102 paragraph 2 of the Criminal Procedure Code related to art 280 Criminal Procedure Code.

Therefore, the only possibility to contribute to unveil the facts and identify the author is the hearing a witness according to art 114 of the Criminal Procedure Code.

Jurisprudence often encounters situations where a person commits offences and draw up several reports in order to obtain several reductions of the punishments.

The High Court of Cassation and Justice motivated a rejection of the appeal made by a defendant, pursuant to art 19 of Law no 682/2202 and art 16 of Law no 143/2000, stating that: "the person who committed on of the crimes provided by art 2-10 of Law no 143/2000, and who during the criminal prosecuting informs and helps to identify and bring to justice other offenders related to drug crimes, enjoying the mitigation by half of the punishment limits according to art 16 of Law no 143/2000, cannot be granted a new mitigation by half of the punishment as the provisions have the same content"[9].

As using collaborators is a common practice, sometimes their activity exceeds their competences and become similar to the provocateur.

There are opinions[10] according to which "in order to enter under the incidence of art 101 Criminal Procedure Code, the provocative activity of a crime must have clear form of instigation to initiate in a person's mind the idea to commit an offence; it cannot be represented by requests, deception, innuendos, false promises, threats, blackmail, harassment or repeated demand based on mutual sympathy.".

The High Court of Cassation and Justice decided that[11] "there is no violation of art 101 paragraph 3 of Criminal Procedure Code, as it is not a instigation to commit offences, given the fact that the defendant involvement in drug trafficking was known both by the collaborator and the defendant. In other words, the defendant already had a tendency to commit such offences (taking into account that at that time he was already brought to justice for similar actions); the fact that the defendant committed the offence after he had been contacted by co defendant, who had talked with collaborator on buying a drug quantity, doesn't confer the later a provocateur feature as it is provided by art 101 of Criminal

[6] Art. 15 of *Law no 143/2000 on fight against drug trafficking and illegal use.*

[7] *Law no 39/2003 on prevention and fight against organized criminality*, published in the Official Gazette. Part I no 50 of 29th of January 2003.

[8] Heghelegiu L., *Undercover investigators*, Magazine of Criminal Law no2/2005, p. 119.

[9] High Court of Cassation and Justice, Criminal Section, *Decision no* 545/2004, published in Magazine of Criminal Law *no 2/2005*, p.155.

[10] Florian C., *Undercover investigators*, Magazine of Criminal Law *no 2/2007, p. 133.*

[11] High Court of Cassation and Justice, Criminal Section, *Decision no 3547/4th of November 2008.*

Procedure Code and sanctioned by the European Court of Human right in its jurisprudence".

That is the reason for which there should be no confusion between the activities of determining, of inciting, if there is no clear evidence of intention, wand those of creating some opportunities or some favorable conditions to carry out an illegal action, conceived and continued on his own.

Sometime, it the collaborator who incites, determines or pushes, even by material cooperation, to commit a crime so that afterwards he should benefit from a reduction of the punishment, as set by law.

That is why we strongly think some clear regulations to be adopted to state the circumstances where we have instigation and to forbid these practices as the content of art 101 paragraph 3 of Criminal Procedure Code stipulates the elimination of the illegal evidence.

The only documents that regulate the institution of the collaborator are the special laws. The competences of the undercover collaborator were considered similar to those of the undercover investigator.

The tasks of the undercover partner have been set by the extensive interpretation of the definition of the definition of the undercover investigator.

Thus, the Criminal Procedure Code decided to make use of undercover investigators and therefore of collaborators only when "the measure is necessary and proportionate with limitation of fundamental rights and freedoms, given the characteristics of the cause, the importance of information and of evidence[12]".

Collaborator can be heard as witness as it is set by art 125-130 of Criminal Procedure Code, defining a new category of witness, the threatened one who receives additional protection, according to art 126-129 of Criminal Procedure Code.

3. Conclusions

Using the undercover investigator and partner helps to obtain information concerning crimes. The undercover investigator has to report to the Prosecutor in charge with the case periodical reports on his activity. Such reports are confidential and they are drawn up by investigators based on the data obtained, together with all the details of the activities carried out by them, all focused on serious offences, committed or which are being prepared to be committed, and on their authors.

The partner obtains data and information, sometimes even pieces of evidence, that he gives to the undercover investigator. This one writes the minutes about the actions undertaken by him and by the partner.

Both of them can be heard as witnesses during a trial, according to art 125 of the Criminal Procedure Code, without being asked about their person.

Authorities want to keep their identity confidential, in order to offer protection to them and their families and at the same time to continue their activity inside criminal groups and protect the methods.

When there is a risk concerning the hearing of these persons during the trial, the prosecutor can inform the judge for rights and freedoms on anticipated hearing according art 308 and 352 of the Criminal Procedure Code. If, afterwards, during the trial, this is no longer possible, and if they have already testified before the prosecuting bodies or the judge for rights and freedoms, pursuant to art 308 of the Criminal Procedure Code, the Court shall decide that the statement be read and taken into account while judging the case.

In our opinion, the Romanian law doesn't offer a satisfying explanation on the fact that these undercover investigators or partners, or collaborator in justice can commit offences in order to gain respect and confidence of the members of the criminal groups.

We consider that the crimes committed inside the criminal groups must be thought absolutely necessary and less serious than those for which they obtained permission from the prosecutor and totally proportionate to the envisaged purpose.

Therefore, we think that our legal system should consider offering clear rules concerning this issue.

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THE PRINCIPLE OF SEPARATION OF JUDICIAL FUNCTIONS

Denisa BARBU[*]

Abstract

The fundamental principles of the criminal procedure are general rules applicable throughout the criminal procedure in order to achieve its purpose. The fundamental principles are covered by art. 2-12 C.C.P. and are: the legality of criminal procedure, separating the functions of the judiciary, the presumption of innocence, finding out the truth, ne bis in idem, a requirement for moving and exercising penal action, is fair and reasonable term of the criminal trial, the right to liberty and security, the right to defence, respect for human dignity and privacy, the official language and the right to an interpreter. The European Court of Human Rights is conscious that by protecting the fundamental principles it does not only aim at the protection of super eminence of the inextricably right tied to the state of law. These principles represent a set of obligations imposed on the State that has as the sole purpose the protection of fundamental rights and freedoms.

Keywords: *right to defence, presumption of innocence, guaranteeing the freedom of the person, the legality, the separation of judicial functions.*

1. Introduction

The current criminal procedure code brings important changes to some of the old code of criminal procedure, but devotes a number of new institutions, which have not existed in our criminal procedural legislation. All of these changes are reflected primarily in Title I of the General Part of the Code, which governs the procedural criminal law principles[1].

In connection with the principle of separating the functions of the judicial doctrine, the following conclusion was reached, namely, that there are 3 functions: judicial prosecution, defense and jurisdiction (criminal law conflict substantially in the courts of law), showing that they are resolved, by the authorities of their respective differentiated parties involved in the criminal proceedings.[2]

It may thus be inferred that the legislature did not take into account the doctrine opting for regulating four functions which are incompatible with the exercise of other functions, unless the function available on the rights and freedoms of individuals during criminal investigation and verification of the legality of sending or not sending to court, which are compatible with one another; cf. art. 3 para. 3 C.c.p.

A number of issues concerning the incompatibility of judicial functions in the same case were put into the jurisprudence of the ECHR, laid down a clear situation regarding the impartiality of the Court which adjudicates the case fund and the judge who ordered the preventive measure of preventive arrest or arranging the sending to court.[3]

So, the jurisprudence of the ECHR is labile, and felt that taking preventive measure by the Court is not sufficient to establish bias judgment, but there must be objective justified grounds with regard to its impartiality.[4]

Thus, such acts are related to the function available on the rights and freedoms of individuals in the phase of the criminal prosecution, as was provided for in the present Code of criminal procedure, providing however an incompatibility between it and the function of the Court, while the two functions are not incompatible in terms of the ECHR's jurisprudence.[5]

2. Content

In the framework of the principles which guarantee respect for the rule of law, we find:

- the legality of the criminal process;
- the separation of the judicial functions
- finding out the truth
- ne bis in idem

As shown in literature, we can define the General principles of law as the fundamental prescriptions containing essential ideas must permeate any rule of law with a legal phenomenon, having a creator role, but also by the fact that they

[*] Assitant Professor, PhD, The Faculty of Law and Administrative Sciences, Valahia University of Târgoviște, (e-mail: **denisa.barbu77@yahoo.com**).

[1] D. Barbu, *Principiile procesului penal*, Ed. Lumen, Iasi 2015, p. 13.

[2] M. Damaschin, *Dreptul la un proces echitabil în materie penală,* Editura Universul juridic, București, 2009, p.108.

[3] CEDO, Decizia *Garrido c. Spania* din 22 martie 2000.

[4] CEDO, *Hauschildt c. Danemarca*, 24th May 1989; G. Mateuț, *Tratat de procedură penală. Partea generală*, vol. I, Editura C.H. Beck, București, 2007, p. 270.

[5] D. Barbu, *op. cit.*, pp. 17-18.

basically contain objective conditions which need to be in any law.[6]

The separation of judicial duties is a fundamental principle that binds rather judicial functions by the separation of the incompatibility.

The resolution of the criminal case involves the exercise of several judicial functions throughout the criminal process[7]:

A. the function of prosecution[8]: the prosecutor and the criminal investigation bodies gather evidence to determine whether or not there are grounds for referring to court.

B. the function available on the fundamental rights and freedoms of the individual in criminal investigation: the judge of rights and freedoms (with the exceptions stipulated by law) has on the acts and the measures under criminal prosecution that restrict the fundamental rights and freedoms of the individual (the right to liberty, to privacy, etc.)[9]

- judicial review through the judge of rights and freedoms guarantees the rights and freedoms of persons involved in criminal proceedings.

Within this function, the judge of the rights and freedoms pronounces with regard to:

a) preventive measures:

- taking the measure of pre-trial detention or arrest;[10]

- the confirmation of the mandate of preventive arrest issued in absentia;

- the extension of the pre-trial detention measure or arrest;

- the replacement of judicial control or measure of judicial control on bail with the measure of arrest at home or arrest;

- the settlement of termination by operation of law, revoking, replacement of the measure of pre-trial detention or arrest;

- the complaint lodged by the defendant against the order of the Prosecutor took the measure of judicial control or judicial review or control on bail, etc.

b) the consent searches or domiciliary or the use of special informatics methods and techniques of monitoring or research, as well as other methods of proof:

- the settlement proposal authorizing the Prosecutor to carry out an informatics or domiciliary search;

- the resolution of the Prosecutor's proposal for approval of technical supervision;

- the confirmation of technical supervision measure authorized under the emergency conditions by the Prosecutor;

- the resolution of the Prosecutor demand extension of mandate of survey;

- the settlement proposal authorizing the Prosecutor to obtain general data or processed by providers of publicly available electronic communications networks, other than the contents of communications and retained by them;

- the settlement proposal authorizing the Prosecutor to obtain data on the financial status of a person.

c) precautionary measures:

- the resolution of the appeal brought against the order of the Prosecutor regarding precautionary measures;

- the resolution of the Prosecutor' s proposal to capitalize the assets, when there is no consent of the owner;

- the resolution of the appeal brought against the conclusion of the recovery of seized assets, when there is no consent of the owner;

- challenging the Prosecutor's solution of things.

d) provisionally safety measures:

- the obliging to the provisional medical treatment/ provisional medical hospitalization of a suspect or accused in the criminal investigation phase;

- the lifting of the provisional measure obliging to the medical treatment/provisional medical hospitalization of the suspect or accused;

e) other procedures under C.c.p.:

- hearing the witness in accordance with anticipated hearing;

- taking, extension, revocation of the measure non-voluntary hospitalization in the clinic to carry out forensic psychiatric expertise;

- physical examination of a person in the absence of the consent of the person concerned;

- the issuance of the mandate of remembrance at the request of the public prosecutor in which to execute the mandate of remembrance is necessary the penetration without consent in a home or establishment, in the framework of criminal prosecution;

- the opposition concerning the reasonableness of overdue the criminal prosecution;

These two functions are exercised within the criminal investigation phase.

C. The function of checking the legality of bringing or non-bringing to trial is exercised by the judge of the preliminary room which verifies the legality of bringing to trial act and the evidence on

[6] M. Niemesch, *Teoria Generală a Dreptului,* Editura Hamangiu, București, 2014, p.62.
[7] D. Barbu, *op. cit.*, pp. 23-30.
[8] I. Neagu, M. Damaschin,*Tratat de procedură penală.Partea generală,* Ed. Universul juridic, București, 2014, p.61.
[9] *Ibidem*, p. 7.
[10] In the competence of the rights and judgments there is also the conclusion of the defendant request regarding home arrest, in order to permit leaving the house.

which it is based and also check the legality of the solutions for bringing to trial.

D. The Court Function[11] shall be carried out by the Court in legality established panels (art. 3 para. 7 C.c.p.). It specifies the phase and consists of:

- the management of the probation
- the assessment of the evidence for the purpose of the pronouncement of a judgment
- the verification of the claim made by the solidity of the Prosecutor, to the parties and to the trial subjects being guaranteed the rights in the article 6 of ECHR.

From our point of view, although the legislature has omitted, there is also the function of the enforcement of criminal judgments.

From these judicial functions, there are exceptions:

- under article 3 paragraphs 3, the function of checking the legality of bringing/not-bringing to trial is compatible with the function of the judgment-judge of preliminary chamber will participate in the preliminary judgment of the case (art. 346 para. 7 – the Chamber judge which ordered the start of the preliminary judgment exercised the function of the Court in question).
- by default, it has been waiver form the provision on the rights and freedoms of the individual, these tasks can be fulfilled by other judicial bodies:
- art. 141 para. 1 of C.c.p.- authorization by the Prosecutor of the interception of calls for a maximum of 48 hours;
- art. 209 of C.c.p.- suspect apprehension or accused of the criminal investigation or Prosecutor for not more than 24 hours;
- art. 203 paragraph 2 of the C.c.p. Prosecutor has judicial preventive measure control against the culprit[12].

The effects of the separation of judicial functions[13]:

- It strengthens the protection of the fundamental rights of the persons concerned in the criminal proceedings;
- by separating the function of criminal prosecution of the provision with regard to fundamental rights and freedoms, it protects the right to liberty of the person, the right to privacy;
- by separating the function of criminal prosecution of the verification of the legality of sending trial protections, a fair trial is carried out[14].

3. Conclusions

What should be noted is that this principle takes into account only judicial bodies with competencies in criminal procedure, without the injured individuals or on the defendant. Thus, it refers only to the separation of the activities of judicial bodies, regardless of the phase they are in criminal procedure, regulating a situation in fact and giving an important role of defense by erecting a correlative function at the level of the indictment.[15]

However, the legislature did not expressly enshrine the separation of the judicial functions of the Court, the prosecution and the Defense - for various reasons, primarily because it does not provide a clear principle of prosecution, because the Prosecutor cannot withdraw charges after bringing into court by seizing the appeal court, so as not to be possible to continue the trial in the absence of criminal accusation.[16]

Also, it was not expressly regulated the function of defense, although the code enshrines the fundamental principle for the rights of defense.

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PROTECTION OF THREATENED WITNESSES

Nadia Claudia CANTEMIR-STOICA*

Abstract

First, I wish to make a presentation of historically institution and subsequently parallels between past and current regulators to expose whether the legislature has reached desire - namely ensuring effective protection of witnesses threatened and vulnerable. Also, I decided to analyze the topic from the perspective of the criminal procedural provisions of Law 682/2002 and witness protection, which are republished to expose the conditions and criteria by which to ensure this status. I also want to present besides theoretical and practical ways in which the National Office for Witness Protection gives effective legal provisions. Not least, I will bring criticism of current regulation and not by law ferenda proposals.

Keywords: *hear witnesses, protective measures, threatened witness, danger, vulnerable witnes.*

I. Introduction

One of the most important guiding ideas of the criminal trial is finding out the judiciary truth, meaning the achievement of consistency between the surrounding reality at the time of an offense and conclusions the judicial bodies reached following the submission of evidence in criminal proceedings.

At the foundation to establishing the truth in a criminal case are witness statements that are useful to judicial bodies so that any person who has committed an offense provided under the criminal law to respond according to his/her guilt and no innocent person may be criminally prosecuted.

Relative to this category of procedure subjects, as the jurist philosopher Jeremy Bentham sustains, in conducting a difficult criminal trial, the witnesses are believed to be called the eyes and ears of the justice. The statement of these procedure subjects is particularly critical in the proceedings, and not infrequently the courts have tipped the scales of justice based on these confessions. Regarding the testimony, Alfred Binet said that a testimony can be accurate and also completely false.

In criminal proceedings several people can be heard, witnesses also being included in their category. Pursuant to provisions under Art. 114 C.p.c. *any person who has knowledge of facts or circumstances which constitute evidence in criminal case can be heard as a witness.*

In the fight against organized criminal groups in particular witnesses are the only people who can provide conclusive evidence to the judicial bodies so those who commit such crimes to be held criminally accountable. Very often, those who violated the legal compliance relation are trying to prevent these witnesses to testify, resorting to teasing or even aggressive techniques and methods. Given the fact that these witnesses fear for their or their family life or health, call for support from the state against blackmail, intimidation which they could be exposed to.

Witness protection is the process whereby procedural and non-procedural specific witnesses protection measures are ordered for those who testify in criminal proceedings in order to efciently ensure their safety - and sometimes for their relatives - before, during and after their testimony[1].

II. Generalities about the status of threatened witness

Threatened witnesses institution is not a new aspect in the new coding but it should be noted tha fact that substantial changes have been made that make the new provision to enjoy the clarity of the legislature.

The legislature intends to qualify this category as being a distinct one when considering how the magistrate will decide upon assessing the evidence. Thus, the samples do not have a predetermined value and they are subject to free assessment of the judicial bodies following consideration of all the evidence in the case. However, inasmuch as the judge considers that in that case a solution of conviction, waiver of punishment or sentence postponment should be applied, judgment can not be based mainly on statements of the investigator, of collaborators or *protected witnesses*.

We welcome the position that the legislature sought to amend the legal provision and regulate the fact that these statements should be viewed with skepticism and to be useful in order to establish the truth only to the extent that they can be corroborated by other evidence.

Separate from the provisions that we find in the Code of Criminal Procedure we observe that Law 682/2002 on the protection of witnesses also ensures the protection and assistance of witnesses, of whose

* Permanent Attorney-at-law in the Bucharest Bar, PhD. Discipline of criminal procedural law Nicolae Titulescu University (e-mail: **av.nadiacantemir@yahoo.com**).

[1] Remus Jurj-Tudoran Special surveillance methods and protection of witnesses in complex criminal cases, C.H. Beck Publisher.

physical integrity and liberty is threatened. We find that there is no overlap between the two rules invoked, the provisions of the special law being more comprehensive and useful to supplement the provisions of the common law.

III. Methodology of granting the status of threatened or vulnerable witness

We note that we will analyze the institution subject to discussion on one hand in the light of the provisions of criminal procedure and on the other hand considering Law 682/2002 on witness protection. At the same time, we make reference to the old provisions of the criminal procedure code to expose the innovations brought by the legislator to the procedural legislation.

Thus, the witness is granted this status on the suspicion that life, physical integrity, freedom, property or professional activity or family member[2] thereof may suffer changes following the elements is about to provide to judicial bodies.

The institution was introduced in the old criminal procedure code by Law 281/2003 and it was governed under Articles 86^1-86^5. We find that on one hand the legislator has broadened the scope of the situations in which a threatened witness status may be attributted, namely when the goods or professional activity of the witness could be in danger and on the other hand extension of the effects is only limited to family members and not on any other person, as it was stipulated before.

According to the special law the notion of witness means the person who is in one of the following situations:

1. is a witness, according to the Code of Criminal Procedure, and by his/hers statements providing information and data crucial for finding the truth about serious crimes or which contribute to prevention or recovery of major damage that could be caused by committing such offenses;

2. without a procedural capacity in the case, by crucial information and data he/she contributes to uncovering the truth in cases of serious crimes or to prevent major damage that could be caused by committing such offenses or their recovery; this category includes a person who is a defendant in another case;

3. he/she is executing a custodial sentence and, through crucial information and data that he/she provides, he/she contributes to uncovering the truth in cases of serious offenses or to prevent or to recover major damage that could be caused by committing such offenses.

Also, according to the special law, the protected witness is a witness, his/her family members (spouse, parents and children) and close persons thereof (the person to whom the witness is connected through strong affective relationships).

We find, therefore, that Law 682/2002 on witness protection conferres this quality to more categories of people, expanding the scope of those who will contribute to finding the truth in a criminal case and who is necessary to benefit from state protection.

The provisions of the criminal procedure are consistent with the considerations of the decesions of the European Court of Human Rights which state that Article 6 of the Convention does not explicitly requires consideration of the interests of witnesses in general and of victims of the crime in particular. However, their life, freedom or safety may be jeopardized, as well as other interests that fall within the scope of art. 8 of the Convention. Such interests of victims and witnesses are protected in principle by other substantial provisions of the Convention, which means that the signatory states should organize their criminal proceedings in such a way that those interests are not put unduly at risk[3].

Leaning over the provisions of criminal procedure, we find that the legislature does not confer the status of threatened witness to a person depending on the seriousness of the offense committed in that case, so the institution can apply whatever penalty provided by law for the offense concerned.

The literature states the view that the notion of threatened witness or vulnerable witness should be extended to co-accused who is willing to provide statements that bring criminal liability of the other perpetrator because: in factual terms, there is no distinction between actions that could be exercised against him/her and the consequences he/she might suffer in comparison with those brought against a witness.[4]

Pursuant to provisions under Art. 113 C.p.c. the injured party and the civil party benefitis from protection measures regulated by the legislator for threatened or vulnerable witness, when the conditions provided by law are met. Also, undercover investigators and collaborators with real identity or another assigned identity can be heard in criminal proceedings, taking into account the special

[2] according to Article 177 C.C. a family member means: ascendants and descendants, brothers and sisters, their children, and people became by adoption law, such relatives; husband; persons who established relationships similar to those spouses or betwen parents and children where they live toghether. The provisions of criminal law concerning family member within the limits provided in par. (1) shall apply in the case of adoption, and its offspring or adopted person in relation to natural relatives.

[3] See ECHR judgment of 26th of March 1996 in Case Doorson v. The Netherlands, par. 70.

[4] Nicholas Volonciu, Andreea Simona Uzlău, Raluca Moroşanu, Georgiana Tudor, Daniel Atasiei, Corina Voicu, Cristinel Ghigheci Victor widow, Teodor Viorel Gheorghe Catalin Mihai Chirita new Code of Criminal Procedure, commented, Hamangiu Publishing House, Bucharest 2014, p. 311.

provisions where threatened witnesses are heared. It is stated in the legal doctrine that the same protection should be given to the experts.

IV. Protection measures that may be ordered for witnesses

During the criminal proceedings, when the witness is given the status of a threatened person, the prosecutor, will compulsorily have to apply the following steps to protect the life, integrity or property of the person providing relevant information to the judicial bodies:

witness home or temporary housing surveillance and security providing;

escorting and securing witnesses or members of his family while traveling;

Identity Data Protection, by giving a pseudonym the witness will sign the testimony with;

examination of the witness without him/her present, by means of audiovisual, transmitting with voice and image distorted when other measures are not sufficient.

These safeguards regulated by the legislature are aimed on the one hand to anonymisation of witness so the suspect or defendant or intermediates thereto may not recognize the witness person such as to be unable to exert pressure or threats thereof or worse than this in order not to threaten his/her life or integrity.

Analyzing the covered measures we note that we face two hypotheses relative to the person of the witness. Thus, the first assumption is that the identity of the witness was never known by the suspect or defendant and in such case a pseudonym should be granted and also his/her hearing by audiovisual means and the second hypothesis is that the real identity of the witness is known and pressures or threats have been exercised thereof or on family members, and in such circumstance arises the issue of his/her protection, in which sense it is required to be supervised and accompanied to ensure a permanent protection.

Under the special law, the legislator lists additional safeguards and specialized assistance, such as witness protection in a state of detention, arrest or serving a custodial sentence, in conjunction with the bodies administrating the detainment, identity change, change of appearance, reinsertion in another social environment, professional retraining; job change or security; providing an income until inding a job.

Safeguards consisting of surveillance and guarding the house of the witness or providing a temporary shelter and companionship or providing protection of the witness or members of his family during travel will be enforced by people who work in the National Office for Witness Protection that is an operating unit of the Ministry of Internal Affairs, directly subordinated to the General Inspectorate of Romanian Police having general jurisdiction, by the police units operating in that case, prison administration, educational center or detention center.

Looking at both the provisions of the criminal procedure law and the special law rules, we raise the question whether this status of threatened witness will be assigned only with the witness approval or the judicial body could do it even against his/her will. We find that Law 682/2002 states that the consent of the witness is required in order to be included in a protection program. In our opinion, it is also necessary the manifestation of will in a positive sense by the witness where he/she was granted refugee status under the rules of criminal procedure, because this one can assess clearly whether life, integrity, goods, professional activity could be threatened by the information he/she provides in a criminal investigation.

V. Judicial bodies competent on the status of threatened witness

Judicial bodies competent on granting this status to the witness are the prosecutor, judge of preliminary chamber or trial court depending on the stage of the proceedings in which lies the criminal trial at the time the witness is exposed to one of the situations presented by law. Thus, a request to the judge for rights and freedoms requesting the arrangement of such a measure or verification of its legality will obviously be rejected as inadmissible.

We shall note that the prosecutor may order the protection of the threatened witness either ex officio or upon the request of the witness, of one of the parties or a procedural subject. It will decide by a reasoned order that will not be found in the case file because of the confidentiality reasons. Thus, if the witness would be given a pseudonym, the identity and actual address will be mentioned in a register which also will be kept under special conditions.

The protection measure taken in the prosecution stage will be maintained as long as the cause that determined its establishment exists and the prosecutor will have the obligation to check at reasonable intervals whether it is still necessary. If the threatening condition did not stop, the protection measure can be maintained throughout the criminal proceedings. Drawing a parallel with Law 682/2002 and Government Decision no. 760 of 14 May 2004 approving the regulation implementing Law no. 682/2002 on the protection of witnesses we find that the measure can be maintained as long as necessary, even after the completion of criminal proceedings.

In the preliminary chamber procedure we find that this measure may be ordered by the judge for preliminary chamber ex officio if it finds that there was a threat for the witness or upon the notification

of the prosecutor. We find as objectionable this legal text by the fact that on one hand the witness, parties or injured person is/are not conferred with the possibility to require the implementation of protection measures and on the other hand we deem impossible the hypothesis according to which the preliminary chamber judge finds that the witness is in one of the situations where protection is required, given that in this procedure no evidenceis administered. Perhaps the legislator has given an opportunity to make such requests only to the prosecutor and preliminary chamber judge, because at the time when the criminal code of procedure entered into force, the defendant only and not the other parties or the injured person could participate in the preliminary chamber procedure. To the extent that such a situation occurs, in our opinion, the witness may make a request to the preliminary chamber judge and if he shall deem appropriate, he will take this measure of protection.

In practice, the courts[5] before the entry into force of the Criminal Procedure Code, it was decided that the request of the petitioner, before the court, to be included in the Program of witness protection is inadmissible because the law stipulates cumulative fulfillment of the conditions laid down in art. 4 of Law 682/2002 and governs a special procedure in this respect, initiation of which falls within the jurisdiction of the criminal investigation body or of the prosecutor verifying the compliance with the requirements of law in order to formulate a proposal for inclusion in the program, the Court having no capacity from this perspective.

In front of the court, the legislator rightfuly understood to establish the same holders as in the prosecution stage except the suspect given the fact that this procedural subject cannot participate in this capacity during trial. The ex officio court may also order one of the protection measures listed above and additionally may decide to not make public the trial session at the hearing within which the witness shall be heard.

On the termination of these protection measures, we note that, in the prosecutor's case only, the legislator stated the obligation to check if the conditions that determined the protection measures shall be maintained and that the possibility for the trial court to rule on their termination was no regulated. We believe that in such a situation, the judge is competent to order, pursuant to art. 52 and art. 351 par. 3 Ccp because, after the case came within the competence of its administration, any measure can be taken by the court only, being inadmissible - for reasons of independence of the magistrate in the settlement - for another body to decide the case, even on incidental matters[6].

Depending on the person making the request, we note that the legislator establishes distinct ways to prove that the witness is in threat. Thus, if the prosecutor makes the proposal, the request shall contain the name of the witness to be heard during the trial and the actual reasons on the severity of the threat and the need for the measure. Instead, if the request is made by the other holders, the court may order the prosecutor to conduct some research on the merits of the request for the establishment of protection measures. That means that during the trial, the prosecutor may perform prosecution activities that will be considered by the trial court.

The procedure is conducted in a closed session, in the presence of the prosecutor and in the absence of the person who made the request. The trial court will decide in a ruling that is not subject to appeal and it shall be kept in confidence in a specially provided place at the court.

VI. Hearing of the protected witness

Both in the criminal prosecution and during the trial, the witness whom was given a protected identity will be heard by audiovisual transmission means without having to be physically in the office of the criminal investigation body or the court. Specifically, he will be in another room or location and a live voice distorted and blurred image transmission will be performed.

The practical application of these procedures require certain organizational measures, such as:

determining the location (room) in which the witness will be in order to be heard and making the connections between the equipment in the session room / room for the hearing of the criminal investigative body and the one in the location where the witness is;

prior adjustment of the equipment prior to distort the voice and image, making thus impossible the recognition of the person; the statement and questions must be understood;

if both rooms are in the same building, the protected movement of the witness, so as not to be noticed / recognized when entering / exiting the building[7].

The second paragraph of article 129 of the Criminal Procedure Code which was repealed provided that *at the request of the judicial body or of*

[5] www.legalis.ro – see decision no. 2955/16.09.2009, Iccj, Criminal Division.

[6] Nicolae Volonciu, Andreea Simona Uzlău, Raluca Moroşanu, Georgiana Tudor, Daniel Atasiei, Corina Voicu, Cristinel Ghigheci, Victor Văduva, Teodor-Viorel Gheorghe, Cătălin Mihai Chiriţă, New Criminial Procedure Code, commented, Publisher Hamangiu, Bucharest 2014, p. 315.

[7] Nicolae Volonciu, Andreea Simona Uzlău, Raluca Moroşanu, Georgiana Tudor, Daniel Atasiei, Corina Voicu, Cristinel Ghigheci, Victor Văduva, Teodor-Viorel Gheorghe, Cătălin Mihai Chiriţă, New Criminal Procedure Code, commented, Publisher Hamangiu, Bucharest 2014, p. 316.

the heard witness under par. (1) a probation officer can participate in the hearing, who has the obligation of keeping the professional secrecy regarding the data he acknowledged during the hearing. The judicial body has the obligation to inform the witness on the right to request a hearing in the presence of a psychologist.

Therefore, by repealing this text we note that the hearing of the witness will not be attended by a probation officer or psychologist, in our opinion the reason of the legislaton being that of limiting the number of persons who become aware of the identity of the person heard.

After the witness is heard by the judicial body, the main proceeding subjects, the parties or their lawyers can address questions to the witness. According to the legal provisions, this hearing of the witness is registered through technical means and is reproduced entirely in writing. By comparison with the normal procedure for hearing the witness we note that the registration of the statement is optional and remains at the discretion of the prosecuting authority or upon the express request of the witness.

This statement shall be signed by the prosecuting authority, the prosecutor, the judge for rights and freedoms or the presiding judge and the witness and will be kept as confidential at the prosecutor's office or at the court. We find that the only situation in which the witness could be heard by the judge for freedoms would be in the anticipated hearing procedure.

The media on which the witness statement was recorded shall be kept as confidential at the prosecutor's office and after the decision to send to trial the defendant this mean will be kept at the court so that only persons authorized to take note of it. Confidentiality should be also considered by court personnel from the time of the request in order to avoid those interested in finding out the identity of the witness. Therefore, the request must not be filed to the public file of the case, but a separate volume, non-public, kept in a special place, must be made[8] .

To the extent that such information on the real identity of the witness is disclosed, individuals who are guilty of this incident are subject to criminal liability under the accusation of disclosure of confidential or nonpublic information (art. 304 Criminal Code), negligence in keeping the confidentiality of information (art. 305 Criminal Code) and, in the circumstance of offenses committed intentionally, an offense on the undercover investigator, the protected witness or person included in the Witness Protection Program was committed, the punishment is harsher[9].

VII. The evidentiary value of threatened witness statements

The statement of the threatened witnesses enjoy divisibility but not retractability. Thus, the judicial bodies can appreciate as valid certain statements made by the witness but if such witness withdraws its statements, declaring other things, he might respond in terms of criminal law. We find that this category of statements is not subject to the principle of free assessment of evidence, but according to art. 103 par. 2 Code of Criminal Procedure, the decision to convict, waive the sanction implementation or defer the sanction cannot rely decisively on the protected witness statements.

Given that at the beginning of the study I mentioned that these provisions can be applied to investigators with real or protected identity and to collaborators, the injured person, civil party or experts, then in such case, too, their statements shall not be decisive in assessing the conviction of a person. Thus, in order to avoid mistrials based on such evidence and considering the derogating conditions of hearing these people, that restrict to some extent the possibilities of defense, the law restricted in its turn th evidentiary value of the statements of the investigators, collaborator, protected witness[10].

In an older practice, the European Court held that a breach of the art. 6 para. 1 and para. 3 letter d of the European Convention occurred, as anonymous testimonies were the sole basis of conviction, after they had represented the sole ground for prosecuting. Or, during no stage of criminal prosecution or trial the plaintiff had no opportunity to question the anonymous witnesses, while the absence of any confrontation deprived him of the right to a fair trial[11].

Given the recent jurisprudence of the European Court, I believe that *mutatis mutandis*, the rule that

[8] Nicolae Volonciu, Andreea Simona Uzlău, Raluca Moroşanu, Georgiana Tudor, Daniel Atasiei, Corina Voicu, Cristinel Ghigheci, Victor Văduva, Teodor-Viorel Gheorghe, Cătălin Mihai Chiriţă, New Criminal Procedure Code, commented, Publisher Hamangiu, Bucharest 2014, p. 315.

[9] Art. 20 of Law 682/2002 (1) The act of disclosing intentionally the true identity, domicile or residence of the protected witness and other information that may lead to his identification, whether they are likely to endanger the life, physical integrity or health of the protected witness, shall be punished with imprisonment from 1 to 5 years. (2) the punishment is imprisonment from 5 to 10 years if: a) the act was committed by a person who had knowledge of such data while performing his duties; b) a serious physical or health injury was caused to the protected witness. (3) If the act resulted in the death or suicide of the victim, the punishment is imprisonment from 15 to 25 years. (4) If the act in para. (2) let. a) is committed by negligence, the punishment is imprisonment from 2 to 5 years.

[10] Nicolae Volonciu, Andreea Simona Uzlău, Raluca Moroşanu, Georgiana Tudor, Daniel Atasiei, Corina Voicu, Cristinel Ghigheci, Victor Văduva, Teodor-Viorel Gheorghe, Cătălin Mihai Chiriţă, New Criminal Procedure Code, commented, Publisher Hamangiu, Bucharest 2014, p. 318.

[11] See E.C.H.R., Saidi versus France, decision dated 20 September 1993, para. 44.

the court cannot rely a conviction exclusively or decisively on statements of the witnesses that could not be heard in court (exclusively or decisively) suffered a slowdown in Europe and in the protected witness matter, so that a solution of conviction based on those statements is not considered by the court as incompatible with art. 6 para. 3 letter d of the European Convention as long as the inconveniences resulted from the protection of witnesses are counterbalanced by other available procedural guarantees; one must consider that art. 103 par. 2 NCCP took over the conventional standard before the Al- Khawaja and Tahery jurisprudence, and consequently, at the moment the law provides a standard of protection which is superior to the conventional one that is binding on national courts[12].

VIII. Comparative aspects with other states and threatened witnesses institution regulation at EU level

The threatened witness institution is based on the Resolution of the European Council dated 23 November 1995 on the protection of witnesses in the international organized crime fight, the Resolution of the European Council dated 20 December 1996 on individuals who cooperate in the judicial process in the fight against organized crime and Recommendation of the European Council No. R (97)13 on the intimidation of witnesses and the rights of defense adopted on 10 September 1997 by the Committee of Ministers and addressed to Member States.

Most EU Member States have regulated provisions on the protection of witnesses in the Criminal Procedure Code or special laws. Poland has instituted an extraprocedural witness protection program and where the health or life of key witness or the person closest to him/her are in danger they can be assisted by state organs to change place of residence, service, or they may receive new identity documents in order to leave the country or even perform surgical interventions.

Switzerland considered when discussing the new unified code of criminal procedure that is necessary to have provisions on the protection of witnesses in a federal criminal procedure code. As such, it considers that it is necessary to consider the interest of finding the truth rather than the necessity of a physical protection of witnesses.

In the United States, starting from the extent of intimidation of witnesses and the enormous impact it has on solving some major criminal cases, in 1970 the Control of Organised Crime Act was adopted, which laid the foundation for Federal Protection program, now called the Witness Protection Reform Act of 1984, which is the source of programs worldwide.[13]

IX. Conclusions

In the legal doctrine[14]was raised the issue on the witness who received a new identity according to the old criminal legislation and who participates in the criminal proceedings after 1 February 2014. After the entry into force of the new Criminal Procedure Code, it is mandatory for the court vested with prosecution of such cases to review the situation of the witness to see whether protection measures regulated by the legislator should be taken, given that the laws have changed.

In a recent interview given to a publication known among legal practitioners[15], the director of the National Office for Witness Protection has provided some interesting information about the activity of the institution he leads. Thus, at the moment, in Romania 60 witnesses, Romanian and foreign citizens (70% of Romanian citizens were resettled in Romania, the remaining 30% in other countries) are offerred protection. Identity of the individuals, most of them officers of the Interior Ministry, is not public, because through them interested persons may identify witnesses who are offered protection. Referring to the site of this Office, we find that indeed, the only information available to us at the contact details is the address where the institution has its headquarters.

The person who enters the program may be forced to change jobs, and the state although it has a partnership concluded with the Ministry of Labour cannot compel an employer to relocate the witness in that institution, the Office only providing support based on the activity to be performed by the witness. At the same time, he and his family benefit from health insurance and if problems occur and visits to a doctor are required, the Office will initiate actions so as to be seen by a specific doctor, while the identity is further protected. Also, the protected person and family members will receive financial support until the witness finds another job. In order to ensure full protection, he can benefit from holding a lethal defense weapon and the contact with members of the Office shall be held by a single contact person.

We tried in this study to provide information on the threatened witness institution according to the

[12] Criminal Procedure-General part-Mihail Udroiu, Publisher C.H.Beck, Bucharest 2015, p. 316.

[13] Gheorghiță Mateuț, Protecția martorilor.Utilizarea martorilor anonimi în fața organelor procesului penal. Publisher LuminaLex, Bucharest, 2003, p. 72.

[14] Bogdan Micu, Comparative analysis of threatened witness institutions, respectively witness with protected identity and transitional situation arisen after the entry into force of the New Criminal Procedure Code, in the magazine Dreptul No.1/2016.

[15] http://www.luju.ro/institutii/politia-romana/secretele-protectiei-martorilor-casa-masa-bani-arme-restrictii?pdf

current regulations and, making special reference both to Law 682/2002 and the old Criminal Procedure Code, to criticize the legal provisions when it was imposed, and also to welcome the position of the legislator when adapted the procedural rules in the light of the European Human Rights Convention

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COMPARED LAW ISSUES REGARDING THE JUDGE SUPERVISING THE LIMITATION OF FREEDOM

Gabriela-Nicoleta CHIHAIA*

Abstract

According to Law no. 254/2013 regarding the execution of sentences and custodial measures ordered by the court during the criminal trial, the judge that oversees the limitation of freedom process to monitor and control the execution of sentences and ensures the legality of custodial measures. Although Spanish and Italian law systems influenced the institution of this judge it did not copy the regulation from this countries, but continues the line started in our country by Law no. 275/2006, which regulated the judge delegated for the execution of custodial sentences.

This study aims without trying to be exhaustive, to present different models adopted by European countries in the matter of justices that control the activity during the execution of custodial sentences. Thus we analyzed the laws of Italy, Spain and Germany.

Without trying to prioritize these European regulations, the paper aims to present the legal nature of the activity of this type of justice in relation to the regulated activity of the Romanian legislation, which mentions that his or hers responsibilities are administrative and also administrative jurisdictional. We also note the similarities between the powers of this type of judge in the European countries presented, regarding, for example, the complaints of inmates against prison conditions or infringements of their rights, but at the same time the difference which will be highlighted in particular in relation to the status of these judges.

In the last part of the paper we present a number of problems and we propose possible solutions to their law by adopting new legal provisions taken from the laws of the European countries analyzed in this study.

Keywords: *judge, supervision, control, deprivation of liberty, comparative law.*

1. Introduction

This paper aims to present some aspects of the laws of European countries with tradition in criminal law in general and penal execution law, especially concerning the judge of supervising the custodial sentencing phase. We will analyze existing legislation in this field in Italy, Spain and Germany. Incidentally, the first two countries have been a source of inspiration for the Romanian legislature when we created this institution of the judge in charge of regulatory oversight of deprivation of freedom in our land, as it appears in Law no. 254/2013 on the execution of sentences and custodial educational measures ordered by the court during the trial[1].

However, the Romanian legislature just inspired itself from the laws of other European countries, keeping the line that began with the adoption of Law. 275/2006 on execution of punishments and measures ordered by the court in criminal proceedings[2], which repealed the outdated provisions of Law no. 23/1969 and other previous laws, and updated the criminal execution legislation in Romania. This law was the first legislative measure in Romanian which concentrated in a single framework imperatives and rules of enforcement regarding measures and penalties involving deprivation of freedom, through it the matter of sentencing came to rally the international acts of significance, such as the Universal Declaration of human rights, the European Convention on human rights and fundamental freedoms Recommendation of the Committee of Ministers of the Council of Europe R (87) 3 of 1987 on the European prison rules and is also intended to create a near optimal national legislation similar to that in other EU countries[3].

This paper intends to present similarities, but especially the differences, primarily between the status such judges in Romania and the judges responsible for supervising the execution of sentences of the three European countries, and at his place of work. Romania is the only country, at least of those that are mentioned in this study in which the judge in charge of supervision of the deprivation of freedom operate effectively in places of detention or prisons, centers for detention and remand centers, educational centers and detention, in all other states his activity is done in the courts. It also notes, as we

* PhD Candidate, Faculty of Law, "Nicolae Titulescu" University, Judge, First instance of Ploiești, criminal section (e-mail: **gabriela.nicoleta.chihaia@gmail.com**).

[1] Law no. 254 of July 19, 2013 on the enforcement of sentences and custodial measures ordered by the court during the criminal trial, published in the Official Gazette no. 514 of August 14, 2013.

[2] Law no. 275 of 4 July 2006 on the execution of punishments and measures ordered by the court in criminal proceedings, published in the Official Gazette no. 627 of 20 July 2006.

[3] Costel Cristinel Ghigheci, Mihaela Vasilescu, role and place of the delegated judge for the execution of custodial sentences in the Criminal Law Review, no. 1/2008, p. 147.

will show below that in some countries, eg Germany, the work of judges with responsibilities on the execution of custodial sentences are carried out in chambers, meaning a body of judges, consisting of three members.

We will check and analyze the tasks that these judges have with regard to the execution of custodial sentences and we see the main purpose of these is to supervise and control the legality of sentencing and the resolution of various problems that may arise with regard to the rights of individual freedom for the prisoners in this four countries.

In the last part, the paper aims to identify possible solutions, taking into account the laws of the three European countries mentioned, which can be adopted by our country, to improve the status and role of the judge in charge with supervision of deprivation of liberty, proposing some solutions needed in the law on the regulation of this institution.

O the romanian regulation of this institution, particularly important for enforcement of custodial sentences, but exercising supervision of the legality of enforcement of preventive measures executed by prisoners as subjects to be addressed are not only convicted persons but also those who are in remand, reason which does not make clear the status of judge. The vast majority of written work, otherwise not many on the problem of Criminal Sanctions Enforcement, does not address the institution of the judge in charge of supervision of deprivation of liberty and merely present legal provisions concerning the designation and its powers. We believe that because of this, the regulations of the three countries may still be a source of inspiration for the Romanian legislature in an eventual completion and / or amendment of laws in this matter.

1. Supervision judges in Italy (Giudici di sorveglianza)

Italian law regulates a whole judiciary oversight as part of the Italian judicial system, which is responsible for overseeing the functionality of enforcement. It is regulated by Law no. 354 of 26 July 1975 on the penitentiary rules and the application of restrictive measures of deprivation of liberty[4]. The law implementing the provisions of article 27 of the Italian Constitution, according to which criminal liability is personal, the defendant is not considered guilty until final conviction. However, the punishments can not consist in treatment contrary to humanitarian principles and should aim to re-educate prisoners, excluding the death penalty[5].

The law confers such judge in Italy an expanded role that includes resolving issues concerning the rights of prisoners during the sentence, and prison management including alternative sanctions or their arrangement either for the final part of the sentence or the period before execution. Thus, this type of judge in Italy operating in the field of criminal execution after his conviction became final.

While in other legal systems we note that the execution of the sentence, even in detention, has an administrative nature, in Italy it has a full jurisdiction[6].

Italian law does not regulate the institution of this type of judge as the sole judge, as happens in our country, but provides two judicial bodies, the first being the magistrate surveillance, operating in small groups as part of the Office of Probation, competent for part or all district Court of Appeals, and the second is the Probation Court, established as a branch since 1986 with jurisdiction extended to all Courts of Appeal[7].

Regarding magistrate surveillance it should be noted that according to Italian law this type of judge is the only judge, so although the name in Romanian institution of law Criminal Sanctions Enforcement Italian is "magistrate surveillance", in this paper we prefer using the term "judge in charge of supervision" not to create confusion about the jurisdiction of the magistrate in our country, knowing that according to Romanian law, magistrates are both judges and public prosecutors.

Judge supervision decisions are subject to appeal to the Court of Probation, but in many cases they are executed provisionally, as the Court does not decide cases only after a few months, thus exceeding the term of forty-five days mentioned by law.

In turn, the judgments of the Court of Probation can be appealed.

By decree of the President of the Court of Appeal, a judge may be delegated temporarily to exercise oversight functions as a magistrate when he or she is missing. The magistrates exercising oversight functions must not exert in the same period other judicial functions.

Law no. 354 of 26 July 1975 in article 69 provides that the judge in Italy has the following responsibilities:

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[4] http://www.ristretti.it/areestudio/giuridici/op/opitaliano.htm, accessed January 25, 2016.

[5] Italian Constitution, translated into Romanian, https://constitutii.files.wordpress.com/2013/01/costituzioneitaliana-rumeno.pdf, http://codex.just.ro/Tari/IT, accessed 3/3/2016.

[6] Alessandra Crushing, *La magistrate di sorveglianza e caratteri definizione, pubblicato in criminal processuale it diritto* 06.16.2015, http://www.diritto.it/docs/37152-la-magistratura-di-sorveglianza-definizione-e-caratteri, accessed January 17, 2016.

[7] Giulia Giangregorio, Il ruolo e del Giudice di sorveglianza to funzione nella sua Azione della pratica. Indagine presso it tribunals di sorveglianza di Firenze, L'altro diritto - Centro di su documentazione carcers, devianza's marginalia, 2008 http://www.altrodiritto.unifi.it/ricerche/misure/giangreg.htm, accessed December 19, 2015.

1. monitor prevention and punishment organizing institutions, reporting to the Minister, the needs of different services, the most attention heading towards rehabilitation measures;

2. to inform the Ministry of Justice on the need to implement new services in prisons;

3. exercise, among other things, direct supervision to ensure that the execution of custody of the accused is implemented in accordance with the law and regulations;

4. oversees the implementation of the measures of personal security;

5. Reviews the degree of social danger of a convict, in accordance with paragraph 1 and 2 of art. 208 Criminal Code, the application, implementation, transformation or revocation, even anticipated, of safety measures.

6. by decree approve the rehabilitation treatment program for each prisoner or, if it considers that there are elements which constitute an infringement, he returns it with comments. Also approved by decree is admission decision of the administration of the detention as a prisoner working outside it. He or she also gives during medical treatment, provisions designed to eliminate any infringement of the rights of detainees or internees.

By order, which may be appealed only at the Supreme Court, decides on complaints of prisoners and internees involving the compliance of rules on the allocation of prisoners to jobs, reward and remuneration thereof, as well as training activities in labor and social security and on the conditions for the exercise of disciplinary power, the sanction, the statement of objections and the right justification;

7. decides by decree with reasons about permissions, the period of semi-freedom for the prisoners and hospitalisation, and approves changes in probation programs, social services and home detention.

8. decides by ordinance on reducing the penalty before full execution of the punishment, and to reduce debt.

9. expresses a reasoned opinion on the proposed pardoning of prisoners.

10. carries out other duties prescribed by law.

At the same time, this judge shall be given extensive powers, regarding complaints of prisoners that are object of carrying out labor in detention and regarding disciplinary action. For exercising its discretion, the law expressedly provides supervisory judge obligation to go frequently to listen prisoners in jail on the complaints they make.

It should be noted that before the 1986 reform, on issues regulated by sections 4, 5, 6, 7, the judge shall decide on all measures by service order , but by Law no. 663 of 10 October 1986 was implemented a full jurisdiction by eliminating service orders and there was adopted so the judge's decisions can be appealed at the Court of Cassation Court (Supreme Court).

Court supervision, constituted as I stated earlier in the Courts of Appeal, is a collegial body and specialized, consisting of magistrates fulfilling these functions exclusively with help in their work by experts in various fields, such as psychology , social services, education, psychiatry and criminology and forensic science teachers.

Court supervision is led by a president who is now responsible on the leadership and organization of court supervision, the proposal of the Superior Council of Magistracy on appointing experts or members to help the tribunal, to insure the replacement of judges in case of absence and works in emergency activities designated by law and by regulations.

Court supervision functions as both first instance and the appeal court on judge's decisions.

As a first instance tribunal is competent on the supervision regarding the granting and revocation of alternatives to detention, probation and optional execution of custodial sentences. As the court of appeal, the Court decides on some of the surveillance measures ordered by judges supervision.

The actual work is done in a full four members, two of whom are judges, one being the president and the other are two experts, a change in the judges or experts leading to the invalidity of the decisions. Court always decides ordinance, passed in a closed hearing.

Court oversight has the powers to grant and revoke sanctions alternative measures to deprivation of liberty, such as house arrest, probation, parole, postponement of punishment.

As appears from powers presented an important role is supervisory matters the judge of parole / early persons sentenced to imprisonment (art. 70-71 of the Law no. 354/1975).

Thus, the judge of probations shall adopt, by ordinance, in a closed hearing without the presence of the parties request for release early, no later than 15 days after an opinion from the prosecutor in this regard, but can even in his absence. Against this ruling, appeal may be filed by the convict's lawyer, the prosecutor and the convicted person, within 10 days from notification to supervisory tribunal.

2. The superivison judge in Spain (El juez de Vigilancia penitenciaria)

By establishing the position of judge in charge of supervision of deprivation of freedom(prisons), the Organic Law General Penitentiary since 1979[8] has sought to create a specialized judge, to be

[8] General Penitentiary Organic Law no. 1 / 09.26.1979, http://www.institucionpenitenciaria.es/web/export/sites/default/datos/descargables/legislacion/LEY_ORGANICA_GENERAL_PENITENCIARIA_1979.pdf, accessed January 20, 2016.

invested with certain powers and to perform a number of tasks in order to ensure execution of sentence of imprisonment on a person who has been convicted and receive appeals to resolve on amendments that could arise during the execution of punishment. Prior to this law, the execution of imprisonment in Spain was in the hands of the Administration[9].

Under Spanish law, the judge in the position of supervision of deprivation of freedom means strengthening security for penalty, which is governed by the principle of legality.

As a result, the judge shall perform the following tasks:

1. duties incumbent upon the court in controlling the actual execution of punishments and the rest of the powers derived from extending the right to exercise powers with respect to this type of control.

2. through the Organic Law General of Prisons, the Judge is also entrusted with the judicial review of the Prison punishment affecting fundamental rights or the rights and privileges of inmates in their execution.

As a result of the above, via Article 76.1 of the Law, shall be assigned the task of protecting the rights of detainees and address the abuses and irregularities that might occur within a prison sentence. This stems primarily from the need to guarantee individual rights of detainees. Judges exercises control in all matters involving both regime and that could influence the treatment and rights of detainees in the absence of this feature as fell to the administrative jurisdiction.

So, in Spain, the judge guarantees the proper functioning of prisons, to the extent that it can directly affect the rights and privileges of prisoners.

Effectively, the Organic Law General Penitentiary gives judges the right to submit proposals to the General Directorate of Prisons on: organizing and conducting supervision services, coordination of cohabitation in the prisons organization of the workshops tuition / education / training, health, religious and economic administrative activities and prison treatment. On the other hand, decisions on requests or complaints by prisoners against the regime and treatment in prisons as far as they affect fundamental rights or their rights and privileges at the prison.

Spanish law establishes, however, some limitations regarding judges' supervision, he has no right to modify or change the destination of a convicted prisoner or to order the transfer of detainees to other prisons because these matters are within the competence of administrative bodies in according to Article 77 of the General Penitentiary Organic law judge surveillance just having the right to address proposals Administration.

In Spain, judges in charge of supervision operate in the courts of first instance and appeal.

According to the law, in the Court of First Instance, these judges have jurisdiction to rule on the motions for conditional release of prisoners and agree the revocation of enforcement which could translate to execution of the sentence in custody. Regulation of 1996 on law enforcement, provides that the dossier forwarded to the judge before the execution of three quarters of his sentence, he verifies the compliance with rules of conduct during detention in the Criminal Code of 1995.

Spanish Penal Code provides for two exceptional situations when one can get parole, in both cases the prior consent of the judge's oversight of the custody situation where the prisoner has already conducted two thirds of the sentence and was marked by constant progress of activities through work, cultural or occupational, prisoners who have reached the age of seventy years, those who are to meet this age during the end of the penalty or for those suffering from incurable diseases serious, regardless of the duration of execution of the sentence.

However, as a member of the Court of First Instance, the judge has the right to revoke parole, if the person released commits a new crime or do not follows the rules of conduct that have been imposed and the right to approve the proposals of the prison on the sentence reduction privileges involving the division of inmates in isolation cells, authorise permission from prison exceeding two days.

In the Court of Appeal such judges have jurisdiction to hear appeals on decisions of an administrative nature, namely: to rule on appeals against disciplinary sanctions imposed on prisoners, to rule on appeals on initial classification and advancement, promotion or relegation. Regulation enacted in 1996 on enforcement law, extends the period of handing down the decision on the status of the initial two months to be able to analyze more closely the behavior of the prisoner. Moreover, every six months is necessary to analyze carefully each inmate in order to review, if appropriate, the execution of his sentence. If not a change of regime / status of the prisoner, this is notified to the person concerned. In this case, the detainee may request a report by the Director, who will decide on maintaining or regime change. Against the judgment of directors can bring supervisory appeal by the judge.

According to the Organic Law on the Judiciary, rulings by Judge surveillance deprivation of liberty may be challenged through petitions for review, appeals or complaints.

[9] Ramón García Albero, Núria Torres Rosell El juez de Vigilancia penitentiary https://www.exabyteinformatica.com/uoc/Dret/Ejecucion_y_derecho_penitenciario/Ejecucion_y_derecho_penitenciario_(Modulo_6).pdf, accessed January 3, 2016.

The petition may be directed against all actions taken by Judge surveillance custody. Such appeal shall be submitted to the same judge who delivered the judgment against which we act, within three days after the last notification of the decision. The advantage is that if the request for review does not require the presence of a lawyer or a prosecutor.

According to the Organic Law on the Judiciary[10] there are two types of decisions that can be challenged in this way: decisions on execution of punishments, unless they have been issued with the aim of resolving the appeal against a judgment of administrative unconnected status prisoner and decisions that make reference to the prison regime if they were not delivered with the aim of resolving administrative appeal against a judgment.

Given that the provisions of the Organic Law on the Judiciary ha certain inconsistencies, it was later established that one can resort to appeal and complaint in the following cases: against decisions on the status of the detainee and against decisions on prison regimes, namely: approval of sanctions isolation for a period exceeding fourteen days to establish measures to be taken in case of complaints or requests by inmates on the regime and treatment of prisons which affects their fundamental rights, licensing permission for a longer period of two days, except third-degree prisoners, the transfer of detainees in prisons for enforcement in closed regime based on the recommendation of the Director of the prison, against decisions relating to enforcement.

The appeal may act against the decisions can not be challenged by appeal. This type of action to be submitted to the same body in which power is call.

3. Judges of supervision in Germany (Richter Überwachung Freiheitsberaubung)

In Germany, the regulation of the judge supervising the execution of punishment is regulated by the Prison Act, act concerning the execution of prison Sentences and Measures of rehabilitation and prevention involving deprivation of liberty[11], but the law requires more than one individual judge, but a room / full criminal Court (Straf Landsgericht) - second degree court in whose jurisdiction the penitentiary is, which has special jurisdiction and exclusive execution of sentences, both custodial and non-custodial.

Decisions shall be taken as a Chamber composed of three judges, including the judge acting as president.

Among the powers of this room includes, inter alia, the determination of appeals on measures penitentiary administration governing individual matters regarding the execution of the imprisonment or execution of reform and prevention in the deprivation of liberty, whether the applicant argues that rights have been violated by adopting a measure or if it has been refused or omitted. This includes disciplinary action on detainees in detention. Parties to the case are the applicant, the detainee and the prison authority that ordered the measure challenged or refused or failed to apply a measure, the prosecutor and a lawyer is not compulsory.

The court will rule without a hearing, an order that will include a brief description of the essential elements of facts and the dispute status. As for the details, they can be found in the documents in the dossier, containing its source and the date they were issued, so that documents can support the facts and the dispute status. The court is not obligated to explain the reasons for its decision can not be challenged if it contains the motivationg, as stated in the decision. There may be a prisoner hearing by audio-video system.

If a measure is unlawful, the prison administration is wrong or other rights have been violated if the detainee Court will annul the measure and when the measure has already been applied, the court may decide that the measure be canceled by the prison authority. Even if the measure became meaningless after the previous withdrawal or otherwise, the Court may decide to request that the measure was unlawful, whether the applicant has a legitimate interest for such a statement.

Against this judgment only to appeal, which will be submitted to the judgment of the General Court, within a month of the decision.

Another task of the Court of execution is the delivery of early release after serving condemned by at least 2/3 of their sentence. This sitting is done by a sole judge, unless the ordering parole from a sentence of life imprisonment where there is need for a panel of three judges, after serving at least 15 years of imprisonment. To dispose conditional release, the court receives a report on prison inmate behavior during detention. The detainee is heard, but this can also be done by video, not necessarily that it be physically presented to the court.

The procedure on conditional release is not public and is conducted without the presence of the prosecutor, who, however, send the file a report. The decision handed down by Judge supervisory appeal on both the prosecutor and the detainee, the call will be resolved by a higher court, the Court of Appeal.

[10] Organic Law on the Judiciary. 6 of 07.01.1985, as amended by Organic Law 5/2003 of 27 May, whose provisions have been amended by Organic Law no. Organic Law 5/2003 and no. 7/2003 Publicado en BOE 02 de Julio 1985, http://noticias.juridicas.com/base_datos/Admin/lo6-1985.l1t4.html, accessed January 3, 2016.

[11] Prison Act of 16 March 1976 (Federal Law Gazette Part I p. 581, 2088), as last Amended by Article 7 of the Act of 04.25.2013 (Federal Law Gazette I p. 935), https: //www.gesetze- im-internet.de/englisch_stvollzg/englisch_stvollzg.html, accessed November 29, 2015.

4. Considerations on the similarities and differences between judges surveillance of imprisonment in European states presented and Romania

It is noted that the laws of the three European countries covered by this study, regarding the judges supervising the execution of custodial sentences judicial is not one striclty administrative-jurisdictional, as regulated by Law no. 254/2013 in our country. Their work aims at precisely the issues on, for example, protecting the rights of detainees do not undergo an administrative review, but a judiciary one. Thus, complaints of inmates against the limits of their rights during detention is performed by judges supervising the execution of punishment as a court, in a first instance, and not as an intermediate stage / preliminary inspection.

I conclude that the legislation offered by European countries could be adopted by our country, in the sense of recognizing judge oversight of the custody status completely as a magistrate judge who exercises powers exclusively jurisdictional and to work in the enforcement court. It could thus be established in the courts or a special section on execution of punishments in the case of larger courts or some specialized in this respect, the courts with a personel scheme reduced.

Thus, these judges would not have the administrative duties for the purposes of the present (chairing the conditional release), but would settle directly release prisoners prematurely, solve detainee complaints against decisions of the prison, and on the administration regarding rights or decisions of the committee to establish, individualization and regime change execution of custodial sentences as judges chair with full jurisdiction in the matter of enforcement.

It may issue verdicts that can be appealed to by them, to appeal to a higher court, the Court having jurisdiction over the place of detention where there was also a subsection specializes in criminal section on execution of punishments.

However, I believe that these specialized panels could take over tasks that currently meet them as judges delegates at the offices of enforcement, on the issuance of warrants of execution, the execution of educational measures custodial and non-custodial supervision and control sentencing and other non-custodial sanction ways (waiving of punishment, conditional sentence, suspension of sentence under probation, parole) in close contact with the Probation Service.

Conclusions

This study aimed to present the judge institution regulating suprevision of deprivation of liberty in three European countries, Italy, Spain and Germany, with a long tradition in the field of penal execution, the first two of them being a source of inspiration for the Romanian legislature.

In Romania, the judge was introduced by Law no. 254/2013, but it has largely continued the previous law regulating sentencing, Law no. 275/2006, its role is to oversee and control the execution of custodial sentences and custodial educational measures (which apply to those who committed crimes during the minority), the powers of the legislature even being qualified as administrative tasks and Administrative - jurisdictional.

We have made a short on the three other European countries, although judges conduct also administrative activity, represented for example by performing checks at places of maintenance, their main business is a full jurisdiction court in the courts in which it operates. It is noted that these countries have preferred the creation of sections or rooms court specialized in the field right Criminal Sanctions Enforcement, in which the magistrate supervising the execution of sentences in the criminal courts or in addition, unlike the Romanian legislation which provides that judge in charge of superivision of deprivation of liberty, although part of a court, is named as such in a prison or place of detention, working exclusively in that prison.

In the absence of papers addressing this issue, we considered it useful to present how they solved sentencing supervision of European countries, these regulations can be a source of inspiration for any legislative amendment. I wish that this work will pave the way of other studies on the right Criminal Sanctions Enforcement in general, and activity of the judge in charge of supervision of freeom, in particular, to come to a knowledge and understanding of the role of particular importance in the custodial sentencing phase.

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ISSUES ON SCIENTIFIC RESEARCH IN PLACES OF HOLDING

Ioan CHIŞ[*]
Oana Alexandra CHIŞ[**]

Abstract

Scientific research in prisons is not a new problem. New is the way of granting benefits to persons who show such while serving sentences of imprisonment. Some shortcomings in establishing the criteria, rules and way of determining the authors, led to the emergence in 2016 of over 300 works published under the name of condemned authors.

Keywords: *scientific research in prisons, innovations and inventions, books in prisons, intellectual work in prisons.*

Topic discussion

A controversial issue lately is the possibility of scientific research in prisons, the development of published papers, innovation and inventions, work performed by persons convicted and serving sentences of imprisonment.

Execution of custodial sentences aims, among others, to "form a correct attitude towards the rule of law, to the rules of social coexistence and to work, as to reintegrate into society of persons detained or hospitalized."[1]

As such one of the activities considered essential for socialization is lucrative activity, open and semi-open detention schemes being directly related to participation in work of the convicts, even more, parole is about following the steps of the two regimes. Under these conditions, in prison, work becomes an essential support for socialization activities, thereby obtaining the necessary revenues to improve living conditions, payment of obligations to the state and civil injured parties or directly supporting the families of those convicted prisoners.

Physical labour, skilled or unskilled, industrial type of work or provision of services, work in the interest of the prison, work under voluntary activity as a hobby are known, in prison, as the most frequently used. Intellectual work in places of detention, although rarely highlighted, is possible, where those sentenced had such concerns before sentencing, being part of social groups where work of this kind was the basic concern of those regarded.

Even during the totalitarian era, the use at work represented the main pillar of "re-educating" prisoners, who were considered "special labour force" for achieving industrial and agricultural objectives, and when "forces of skilled labour were satisfied, those who have a professional qualification could be used even for unskilled labour."[2] Intellectual work had a greater appreciation at that time, money legally assigned for this type of activity being 50% of those charged "as a reward for inventions, innovations and rationalizations"[3], compared to the 10% of incomes allocated, resulting from the use of skilled and unskilled labour. Although there was no emphasis on any intellectual activity of prisoners, it was recognized that there may be such a source of income, 50% of the reward for such work being done was considered income to the state.

After the great reforms in Romanian criminal law, introduced by the advent of new criminal, procedural criminal, criminal executional and probation legislation, forms and methods of re-socialization of convicted or institutionalized persons reflect European views on the matter, especially after the implementation of Council of Europe Recommendation no. 2006/2, which states as an organizing principle of programs in places of detention the idea of not differentiating work of intellectual activity. Concretely, it is established that all the advantages enjoyed by those participating to work, would be recognized for those participating in intellectual activities (education, training, social and educational activities, scientific research or intellectual work)[4]. The provision includes the idea, in principle, of the prohibition of financial or other penalty for participating in educational activities.

Law 275 of 4th of July 2006 on the enforcement of sentences, at this moment repealed as a result of the new provisions in executional criminal law, had generous provisions on the assimilation of

[*] PhD Professor, Faculty of Law, "Nicolae Titulescu" University of Bucharest (e-mail: **profchisioan@gmail.com**).
[**] Law Master Candidate, "Nicolae Titulescu" University of Bucharest, IPJ Ilfov Officer (e-mail: **oana.tofoleanu@gmail.com**).

[1] Law 254/2013 art. 3, para 2.
[2] Law 23/1969 art. 9.
[3] Law 23/1969 art. 11.
[4] Recommendation of the Committee of Ministers to member states on the European Prison Rules Rec (2006) 2 of 11 January 2006, art. 26 point 6 and art. 28 section 1 and section 4.

intellectual work with manual labour[5], even pay by the minimum wage to those who participated in such activities, which was actually a positive discrimination to all citizens who were enrolled in some form of study[6].

Recommendation No. R(87) establishes a more pronounced correspondence between work and intellectual activities, rule 78: "Education should be regarded as an activity of the prison regime as well as the productive activity - the same status and the same basic remuneration, provided that it be integrated into normal schedule of activities and part of the authorized individualized treatment program."

Stimulating the participation of convicts in formative activities such as schooling, job qualifications, retraining, specialization, individual study of fictional or scientifical literature, scientific research, innovation and inventing activities, writing of fictional, scientific or other type of papers, participation in creation workshops (theatre, music, painting, hobby), participation in religious events and holidays, meetings with volunteers, participation in organized collective sessions (conferences, lectures, contests like "Who knows wins", literary evenings, and others) are particularly monitored and classified as degrees of socialization through which they accumulate "credits". In addition to those activities, there can be organized formative cultural and recreational activities that contribute to the intellectual development of convicts.[7]

Among the manifold activities of the universe of prison, scientific research and the innovation and inventions activities occupy a modest but important place, especially since some convicts, benefiting from the absence of clear regulations, became "writers' overnight, with works that were published in various publishing houses, then invoking the provisions of Law 254/2013 benefited from days considered executed, when analyzing the conditions for parole proposal.

No wonder that in prisons there are people who can invent, discover what others have not been able to, write books or can even address specific science areas. It is natural because those sentenced come from society, and conviction does not apply to what they know but to the crimes that they committed. Long gone is, we hope, the time during which by court orders, orders of the Services or by abusive administrative measures, men of culture, science, researchers in various fields were sent behind bars precisely because they belonged to a higher class that did not accept leadership by a pseudo intellectuals.[8]

Over time, during the long days and nights of solitude in the cell or by the company of other prisoners in the same room, prisoners were trying to create objects, instruments, tools, toys, books, paintings, tattoos in order to complete the period of sentence more quickly or were attempting to manufacture weapons of offense or defence tools needed for the escape from the places where they were detained, drugs, alcohol, braids to dress, or all sorts of figurines used to sell or in the try to corrupt other detainees or even those who were guarding them.

With the humanization of detention regime, the multitude of goods and objects that are allowed to be in the keeping of convicts are very many and can increase the degree of civilization of days of detention, and even create a false illusion that the detention life is similar to that of freedom, that detainees are granted rights, again and again, well above what they deserve, especially those who have committed acts condemned not only by law but also by public opprobrium.

Given that, by Sentencing Law 254/2013 and its implementing regulation, and by administrative

[5] Art. 57 section 10: "It is equated to work the activity done by convicted persons who participate in activities for education and training".

[6] Art. 61 pt. 3: "Persons sentenced to imprisonment that participate to educational courses or qualifications or retraining receive, during courses, monthly, a remuneration equal to the minimum wage".

[7] M.J. Order no. 2199 / C / 2011:

Article 105: Artistic activities are such as: a) painting, drawing, graphics, pottery, sculpture, technical applications, fretwork, handicraft, embroidery, tapestry, basketry, fabrics, garments; b) reading groups, literary clubs, theatre, music, dance; c) other artistic events.

Article 106: Cultural dissemination activities are of the following type: a) exhibitions, films, performances; b) conferences, lectures, debates, book reviews, book releases, editing magazines, local radio and TV broadcasts. Article 107: Sports activities aim to maintain a physically and psychologically tonus and an adequate health status.

Article 112: Activities to be held in a community could be like: viewing and presentation of shows, participation in religious services, participation in sport and occupational activities, organization and viewing of competitions, organizing and viewing of exhibitions, book presentations, visits to cultural sites, public and private institutions, governmental organizations and NGO's, trips and camps.

[8] Law 254/2013 art. 96 Part of the penalty is deemed as served based on the work performed and /or training school and training:

"(1) The punishment deemed as served based on work performed or training school and training in order to grant parole is calculated as follows:

a) in the case of paid employment there are deemed 5 days to 4 days of work performed;

b) in the case of unpaid work there are deemed 4 days 3 days of work;

c) if the work is done at night, there are deemed 3 days for two nights of work;

d) in case of participation in general education for compulsory general education forms there are deemed 30 days for completion of a school year;

e) in case of participation in training courses or retraining, there are deemed 20 days for completion of a qualification or requalification;

f) in case of published papers or patented inventions and innovations, there are deemed 30 days for each scientific paper or patented invention and innovation.

(2) The reduction of penalty faction which is deemed as served based on work performed or training school and training cannot be revoked. "

decisions, convicts are allowed to have on them, in the holding chambers, an impressive variety of goods, new methods of spending time in detention began to appear, through creative, sports, cultural, social activities, hobbies and manufacturing of items, goods, equipment, crafts, scientific works, innovations and inventions serving prisoners for barter, to "buy" various services from other inmates, to corrupt staff, to demonstrate to socio-educational services the "progress in resocialization", to win days deemed as executed according to an algorithm established by law, to send for marketing outside the prison different items, to give to orphanages, retirement homes garments made by the convicts.

Besides this so-called legal "occupations" of convicts in realizing various products that can be useful and harmless for the detainment or staff supervision, using objects received legally can help in the making of a number of other prohibited items to find on prisoners during detention. Nothing prevents inmates to manufacture from players or radios, from the microprocessors of electronics, equipment used for listening or transmission of information or data, nothing stops them to manufacture weapons like stiletto, knife, electric shock guns, chemical 'weapons' that can burn skin or eyes, or even more to "create" alcoholic beverages, hallucinogen or toxic substances.

In the aftermath of the events of 1989, prisoners have been granted by the state with far more European-style rights, constitutional rights as well as specific features and output permissions, which enabled them to buy, legally or illegally, objects that "they need "to break the law. By law, regimes were established on a progressive basis, in the sense that convicts may take various personal conducts with control becoming less severe, which facilitates their activities outside supervision, control, searches. In these conditions, the time in which they can make up things or objects is increasingly out of concern that they will be discovered.[9]

Daily, in prisons, there are found mobile phones, drugs, alcohol, and crafted weapons. It is well known that prisoners "prepare" meals on makeshift stoves, realize sweets, drinks, various desserts for them or to trade them for cigarettes or items of clothing or shoes. Crafting games of chess, backgammon, dice, playing cards, is no longer an occupation for convicts, those above being allowed to prisoners as social games, like listening to music or reading magazines, newspapers, books. In these conditions of humanised regimes of imprisonment, the fact that some convicts with upper intellectual qualifications use their knowledge to write books of literature, research, travel, history or in various fields seems to be quite a positive fact.

The question is whether writing papers in prisons, along with innovation and inventing solutions to problems are possible in such conditions. To what extent should prisoners have the benefit of such occupations? Yes, we believe that the development of works of any kind is consuming time out of a day of work, and if this time is counted in hours and the work, the paper is part of the individualized socialization programme, it can be considered "intellectual work" with all the positive consequences that can be drawn from it. We must always bear in mind that for every convicted person, on the occasion of commencement of the deprivation of freedom, an individual program of social reintegration[10] is designed, which will consider:

- determining educational, psychological and social needs, identified in the prison population, requiring the development of new programs;
- development of the program itself;
- submission to advisement and approval by superiors at the place of detention;
- submission for approval by the specialized department;
- piloting the program and recording observations necessary to adapt the content;
- review of the program in terms of content or methodology of work;
- submission to advisement by superiors and for approval by the head of the unit of the revised program;
- the implementation of the revised program;
- submission by the specialized department for the dissemination in all places of detention.

Whether these works are "scientific" or not should not be concern of the detention facility, but of those institutions and state bodies (institutes relevant for organization of those activities, universities, Romanian Academy, polytechnics, publishers or other such institutions) that have jurisdiction of such assessment, approval, recognition, issue of patents, certificates or diplomas such as to assess the scientific nature and importance of the work or the quality, originality or novelty, usefulness, popularity enjoyed by the public.

Like other authors[11], we believe that errors in the assessment of such works, which appeared after 2014 and have been the delight of the media[12], were

[9] In the period after the 1989 Revolution, during riots in the year 1990, in the detainment places occupied by convicts there were made hundreds of crowbars, knives, daggers, incendiary bottles, a cannon with nails and carbide the Jilava penitentiary, a bomb made of an oxygen tube, wrapped in grease and tied to electricity cables to be armed within distance, at the prison Baia Mare.

[10] ORDER by Ministry of Justice no. 2199 / C / 2011, art. 10.

[11] Marin Bucur - „A legislative monster created sham and debauchery in prison!" - Source SNL Penitentiary internet site.

[12] Speech of the Justice Minister in the SCM meeting: "You must know that the number of papers in preparation is growing exponentially and I will give some figures. December 31 (...) there were 45 papers in preparation, according to data that are given to me by the National

also due to misunderstanding of responsible parties such as Justice Minister, whose opinions were rejected by the Superior Council of Magistracy in the meeting on January 28, 2016.

The errors of assessment were due to the fact that although Law 254/2013 provided that the authors of works would gain days considered executed, there is no implementing regulation of Law 254/2013 (not even the day I was working on this paper the regulation was not published) to detail their rules under which the assessment in the Commission for conditional release must be made, therefore, taking advantage of the lack of regulations, some prisoners have "written" and "published" even 5 works each benefiting for every one of 30 days considered as executed, which seems a nonsense.

National Penitentiary Administration was forced to use a decision of the Director General No. 619 of 2011, which was anyway repealed by the appearance of Law 254/2013, which set rules about publication in journals recognized by CNCSIS or publishers recognized by CNCSIS or that were part of the communications published in the proceedings of international or national conferences. It also required a recommendation from a professor in the specialty of the content or work objectives.

I believe that the view of SCM on the need to create "objective, fair and transparent criteria in terms of establishing the scientific character of the works developed and published, as well as some more rigorous criteria for the drafting of the work" is in the position to determine the correct executive procedures.[13] Looking for the "guilty" among members of the parole committee, among judges who have ruled over parole commission proposals, among prison directors or general manager of NAP, is only a matter without support, since the chronology of the regulatory framework has produced such a situation. If Law 275/2006 introduces the possibility of parole and accumulation of days considered as executed by developing scientific works, its implementing Regulation HG 1897/2006 does not introduce the procedures and criteria of assessment, requiring the issue of Decision 610/2011, which sets the methodology. This Decision shall ultra activate even after the advent of Law 254/2013, as there hasn't appeared within the statutory period (or 3 years) a regulation implementing that law. Here's how the detainees came to write in 2015 331 works, 5 times more than in 2014, noting the possibility of gaining days considered as executed on "written and published papers."

Compared to the old regulations where the convict gained 3 days considered as executed for 2 days spent working on the development of a scientific paper, Law 254/2013 introduces a new system by which you gain 30 days considered executed for each published work. Convicts with outstanding financial possibilities saw the opportunity to publish even five books a year, designed under entirely unclear conditions, but certainly not by their own research, so that publishers have received a number of works, some of which are particularly valuable, not having the ability to verify the authors. Moreover, parole commissions recorded that the papers were published, the authors on the cover were the convicts requesting release and, not having expertise on the scientific character or scientific content thereof, had no choice but to grant them the 30 days considered executed. Certainly shallow work in the committees was due to lack of investigating the charts of working days, of working hours, space and utensils or tools used, not investigating, even randomly, if the "authors" know the contents of works purported to be written by them. The role of public opinion and the media was decisive in taking measures to halt the charade of "prison academics."

In January 2016 the Judicial Inspection performed a control in all prisons[14], to identify the administrative and judicial practice concerning the application of Law 254/2016 art. 96 para. (1) f), followed by a report to the Superior Council of Magistracy, which decided to refer the Ministry of Justice with the following proposals:

The urgent adoption by GD of the Implementing Regulations of Law no. 254/2013 on the execution of sentences and custodial measures ordered by the court during the criminal trial.

Inclusion in the draft Regulations to Law no. 254/2013 of the definition of the term 'scientific work', used by the legislator in art. 96 para. (1) f) of Law no. 254/2013, regulating the procedure for drawing up scientific papers, the criteria for granting winning days and the procedure for contesting the

Administration of Penitentiaries. January 6th, there were over a hundred works and nobody knows the figure right now. And I make this conversation in SCM because we are not talking here only about teachers, publishers, we are talking about delegated judges, we are talking about courts before which these works were presented. I want to say it is just as discriminatory for so-called intellectual labour, although I do not have any reason at this time to identify a work from the list of 2015, which by European standards can be considered scientific, so I see that we have a very detailed procedure (...) I say that point of law did not apply and that is to say by the prosecutors, not me. But the result is over 350 written works, and the benefit is 30 days, so we still discriminate between physical work, where we get a day off for four days of work, and give 30 days to a collection of papers which is called scientific work. And I, as Minister of Justice, have the obligation to see this."

[13] http://www.romaniatv.net/scandalul-cartilor-scrise-de-detinuti-judecator-csm-renuntarea-la-reducerea-pedepselor-poate-crea_270875.html#ixzz3yXjnB5r0

[14] Judicial Inspection Report no. 5619/IJ/3329/DIJ /2015 regarding the identification of administrative and judicial practice in the application of art. 96 para. (1) f) of Law no . 254/2013 by judges of custody and supervision of the courts.

measures taken by the commission for granting such rights.

It is necessary to establish rigorous prerequisites to be satisfied cumulatively, namely:

- development of scientific works only in areas where university studies are organized;
- proof of specialization of custodial person in the field in which he wants to develop a scientific work;
- specification by the custodial person of the type of scientific work that is intended to be developed (treaties, research reports, studies, articles, scientific papers, etc.);
- the estimated time necessary to elaborate the scientific work, taking into consideration its complexity;
- written recommendation on relevant topics in the field chosen from a professor or an associate professor in the specialty of the paper to be drafted, with their handwritten signature, confirmed by the university where they belong and accompanied by a provisional work plan which includes the main issues to be addressed, a structure of the work, bibliography to be consulted, minimum information sources and an estimate of the volume of work;
- the custodial person must present, both the teacher / associate professors who give the recommendation, and the board of education and psychosocial assistance, an initial plan of work, the theme / themes to be addressed, the structure, sources of information, means of writing / editing;
- the commitment of the person who ordered the work of scientific development to comply with the rules of good conduct in scientific research, technological development and innovation;
- it should be required that the person would give an affidavit, under penalty of criminal law (art. 326 Criminal Code regarding false statements), of showing that he is the author of the work developed and the work is not plagiarism;
- setting by the Commission for selection and allocation at work of the time appreciated as necessary to elaborate the scientific paper based on documents that accompany the request of the custodial person and recommendation of Professor / Associate Professor.

Regulating of objective, fair and transparent criteria in establishing the scientific nature of the work developed and published, namely:

- scientific character of a paper drafted by custodial persons must be determined by the National Authority for Scientific Research from the Ministry of Education and Research, the only institution empowered nationwide with responsibilities in this regard;
- attaching to the request, additional to the scientific work, a copy of the manuscript, compiled by the custodial person as submitted in original to the publisher, in order to remove any doubt regarding its development during the period of execution of sentence;
- regulating how to quantify the benefit of the work of several authors of scientific papers, among whom there are custodial people, using a similar document sheet FRACS (Chart of Reporting scientific research) used by higher education institutions with the approval of the National Authority for Scientific Research;
- granting a different number of gained days as a result of the elaboration of scientific work, depending on the type and complexity of scientific work developed.

Preparation by the specialized committees in prisons, completely, thoroughly and in accordance with the proposals previously formulated of minutes, based on which the court can verify how they have been granted certain benefits (gained days / compliance or not with conditions of parole);

Altering or supplementing of legal provisions, by providing the supervisory judge / the court the procedural tools necessary in order to check and censor proposals / measures taken by committees in the penitentiary, enabling them to remove the reducing fraction on the punishment prescribed by the Commission, in case it is found that the measure was taken in violation of the law;

Removal, through legislative change, of the finality attribute of the measure to reduce punishment fraction, considered as executed based on work performed or training school and training, according to art. 96 para. 2 of Law no. 254/2013. "[15]

Following CSM Decision no. 37 of 27 January 2016, the Government decided to suspend the application, until September 1st 2016, of the legal provisions relating to the reduction of sentences for prisoners who publish scientific papers. Regarding the timing of this decision many different opinions may arise, personally I consider that authors of papers, inventions and innovations among convicts will open lawsuits on failure to apply Law 254/2016 because of an act without legal force.

Pending the completion of rules, criteria and executive procedures on scientific research in places of detention, draws attention a particular invention inspired by a convict, V.B. Convicted as a hacker to 5 years for establishing a criminal group with the purpose of cloning and use of credit cards, V.B. has created one of the most popular inventions in the world: a new type of ATM fraud-resistant by hackers. The invention, filed with OSIM 2010 "Method and system for securing the use of cards with magnetic strip", called anti-skimmer, received at the 41st edition of the International Exhibition of Inventions in Geneva, the Press International award

[15] Judgment of the Superior Council of Magistracy no. 37 of January 27, 2016

and attention of all Swiss banks. This award is ranked 6th in the 50 of the Exhibition. We shall see whether he receives 30 days considered as executed.

Conclusions

Scientific research in prisons, the development of published papers, innovation and inventions performed by persons convicted and serving sentences of imprisonment is a legal activity, as provided by the Law 254/2013 and the New Criminal Code and New Criminal Proceedings Code. The many discussions and issues that arise from this activity are due to the fact that the Parliament and the Ministry of Justice have failed to concieve and pass regulations for a correct implementing of these provisions.

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PREVENTIVE MEASURES - EXCEPTION TO THE PRINCIPLE OF THE RIGHT TO LIBERTY AND SECURITY

Marin-Alin DĂNILĂ*

Abstract

Considering the specific obligations arising from the exercise of criminal action and civil action in criminal proceedings and taking into account the need to ensure a better conduct of activities that are undertaken in solving criminal cases, it sometimes appears necessary, taking certain procedural measures.

Procedural measures were defined [1] as institutions available for criminal procedural law and criminal judicial bodies consisting of privations or certain constraints, real or personal, of the conditions and circumstances under which the criminal proceedings are being realized. By the function pursued by the legislature, these measures work as a legal means of prevention or suppression of circumstances or situations likely to jeopardize the effectiveness of the criminal proceedings through the obstacles, difficulties and confusion which they can produce [2].

Procedural measures arise as opportunities, but not being specific to any criminal case, judicial bodies take measures according to the specific circumstances of each criminal case. From this derives the adjacent character of the criminal procedural measures to the main job [3].

Keywords: *procedural measures, legislator, coercion, suspect, fundamental values.*

1. Introduction

1.1. General considerations on procedural preventive measures

Procedural measures are also provisional and may be revoked when the circumstances which compelled their decision disappear.

Preventive measures are criminal procedural law institutions, with a nature of coercion, and the suspect or defendant is prevented from carrying out certain activities that would have a negative impact on criminal proceedings or on achieving its aim [4].

The new Romanian Criminal Procedure Code, adopted by the Law no. 135/2010 regarding the Code of Criminal Procedure, as amended and supplemented by Law no. 255/2013 for the implementation of Law no. 135/2010 on the Criminal Procedure Code and amending and supplementing certain acts which contain criminal procedure, is rethinking largely the system of preventive measures applicable to individuals, according to the principles derived from relevant international regulations on human rights and accumulations resulting from the jurisprudence of the European Court of Human Rights and the national courts one [5].

Stressing the functionality of preventive measures, the law (art. 202, para. 1) shows that those are taken if necessary, in order to ensure the proper conduct of criminal proceedings, of preventing absconding the suspect or the defendant from prosecution / trial or the prevention in committing another offense.

Given the fact that a persons liberty is one of the fundamental human values, between the legislative changes that have occurred since December 22, 1989, there were enrolled also the ones regarding the system and the regime of preventive measures. In this regard, the previous Code of Criminal Procedure was amended successively, in the field of preventive measures by [6] laws and the Constitution. Also, legal provisions on preventive measures were the subject of numerous decisions of the Constitutional Court. Not lastly, the legal regulations of the preventive measures have led to instances of inconsistent application of the criminal procedure law, causing the delivery, by the High Court of Cassation and Justice of numerous decisions in solving appeals on points of law promoted in this matter.

Given the fact that by the imposition of preventive measures, it is caused a prejudice to individual freedom, national and European legislation instituted a series of legal safeguards to prevent abuse and arbitrariness in taking and keeping them. Therefore, whenever the question of taking, maintaining, extending or confirming a preventive measure is being posed, beyond the provisions of the Criminal Procedure Code, account must be taken on other provisions applicable, in particular the provisions of the Romanian Constitution (Article . 23) and the European Convention on human rights and fundamental freedoms (particularly art. 5 on the right to liberty and security, as interpreted by the European Court of human rights), the Constitutional Court decisions, decisions of the High the Court of Cassation and Justice in solving appeals on points of law [7]. With a principle value, art. 9 (2) NCPC

* Faculty of Law, „Nicolae Titulescu" University of Bucharest (e-mail: **Danila_Marian_Alin@yahoo.com**).

states, as mentioned above, the exceptional character that preventive measures must have in criminal proceedings based on the rule established in para. (1) EC.

Incidentally, in full accordance with the values expressed by the European Convention, whenever the Criminal Procedure Code provides for measures during the criminal trial that restrict the exercise of fundamental rights, the legislature has provided that the restriction of these rights is permissible only by law and if it is necessary in a democratic society.

Introducing in the criminal procedure law, in 1990, the provisional release on bail and provisional release under judicial control available to judicial authorities were set as tools for a better individualization of the measure of preventive arrest and at the same time, there was a balance between the prevention custodial and non-custodial preventive measures.

Through the provisions of the Code of Criminal Procedure it has been achieved a conversion of provisional release preventive measures and the interdiction to leave the country or locality in the contents of a single preventive measures, judicial control, provided in two ways, proper judicial review and judicial control on bail.

Being a legislative novelty, in our legislation was introduced the preventive measure of house arrest, measure of restraint by which the defendant is deprived of freedom of movement outside his home.

To conclude on aspects with an introductory character, we emphasize that preventive measures have their basis in the needs created by the highest interests of attaining the criminal proceedings [8], and their regulation in all codes of criminal procedure is another argument on the necessity of such institutions, even if between the fundamental principles of the criminal trial, the presumption of innocence is also a part.

According to art. 202 paragraph (4) the preventive measures that can be placed on the suspect or the accused (as an individual) are: detention, judicial, judicial bail, house arrest and preventive detention.

If there are special reasons justifying a reasonable suspicion that a legal person committed an offense under the criminal law, and only to ensure the smooth conduct of criminal proceedings, there may be ordered the following preventive measures, according to art. 493 par. (1):

a) the prohibition of initiating, or, where appropriate, the suspension of the procedure of dissolution or liquidation of the legal entity;

b) the prohibition of initiating or, where appropriate, the suspension of the merger, the division or capital reduction of the legal entity, began before or during prosecution;

c) the prohibition of patrimony operations likely to involve reduction of the assets or the insolvency of legal entities;

d) the prohibition on concluding certain legal documents, set out by the judiciary;

e) the prohibition on activities likely to those during which the offense was committed.

2. Content

Given that by taking preventive measures the fundamental right of inviolability of the person [9] is being prejudiced, the legislature has established solid procedural safeguards which require strict observance of laws that allow such procedural measures.

Procedural safeguards mentioned above consist precisely in many conditions to be fulfilled cumulatively in order to have a preventive measure. Choosing the preventive measure to be taken is done in the light of its purpose, seriousness, the manner and circumstances of committing the offense and the person against whom it is taken.

In order to take preventive measures, there must be realized cumulatively a number of general conditions, analyzed below.

I. To be evidences or indications which point to the reasonable suspicion that a person has committed a crime.

We consider as superfluous establishing this first condition for taking a preventive measure, because preventive measures, species of the procedural measures, involv necessarily the existence of a legal framework or the phase of the proceedings, which can not exist without evidence or indications of which results that an offense has been committed [10]. Also, being personal procedural measures, the decision on taking certain preventive measures implies the existence of the suspect quality (only for assumption of apprehension) or defendant (for the other preventive measures).

In these circumstances, when it is determined the opportunity of taking any one of the preventive measures in the law, in the case file there is necessary an evidence on which was ordered the prosecution against a specific person or the initiation of criminal proceedings, procedural acts that have in common the premise of a reasonable suspicion that the person committed the offense.

II. Preventive measures are necessary in order to ensure the proper conduct of criminal proceedings, preventing the suspect or the defendant from absconding prosecution or trial or to prevent commission of another offense.

By regulating this requirement, the legislature established the driving force in making any preventive measures, namely to ensure the proper conduct of criminal proceedings. It is estimated that this objective is ensured by preventing the

absconding of the suspect or defendant from carrying out judicial activities. Additionally, by taking preventive measures, it cand be aimed the general prevention, by preventing new crimes.

III. The preventive measure must be proportionate to the gravity of the accusation against that person on whom is taken and necessary for achieving the goal through its arrangement.

In connection with this condition, some work [11], estimated that between preventive measures and the system of criminal sanctions is needed a certan consistency, because, in this view, the state of freedom in criminal proceedings should correspond, to a certain extent, to the one existing after the criminal sanction and beig given the seriousness of the accusation on the person against whom criminal repression begins during prosecution or trial of the case.

In this respect, it is considered that a criminal sanction would be inappropriate as a non-custodial completion of a trial in which the defendant was found in custody. Such a situation would be likely to highlight a certain disparity between hardness or the harshness ritual in criminal trial and the penalty imposed as a result of its conduct.

IV. There has to be no cause preventing the exercise of criminal action or movement.

V. The suspect or defendant must be heard in the presence of the chosen or appointed ex officio lawyer.

From all the rules of criminal procedure results that these five general conditions must be met for any of the preventive measures taken by the law. Beside the general conditions set out above, in order to take certain preventive measures (eg, detention, judicial review, etc.) are required also some specific conditions.

In order to ensure personal freedom, our legislation provides that preventive measures are taken, usually by the judge of rights and freedoms, the judge of preliminary chamber or court (depending on the phase in which the criminal proceedings are) and prosecutor, the only measure that the criminal investigation authorities can take is retaining for less than 24 hours.

According to Art. 203 par. (1), the detention measure may be taken against the suspect or defendant by the criminal investigation body or by the prosecutor, only during prosecution. The procedural act during wich the decision of ordering the detention is the decree. Regarding the enforcement of detention, the prosecuting authority will draft a letter to the administration of the prison where the suspect or defendant will be executing [12] the preventive measure.

Judicial review and judicial control on bail may be ordered against the defendant by the prosecutor or judge of rights and freedoms during the phase of criminal prosecution, by the judge of preliminary chamber, during the procedure of preliminary chamber, and by the court during the trial. The procedural act when the prosecutor takes the decision on measures as judicial review or judicial control on bail is the decree. This preventive measure it is ordered by the judge of rights and freedoms, preliminary chamber judge or by the court when reasoned.

In order to implement preventive measures, the judicial authority shall notify, through a letter prepared under art. 82 of Law no. 253/2013 on the execution of penalties, educational measures and other non-custodial measures ordered by the court in criminal proceedings, the institutions able to monitor compliance with the obligations imposed on the defendant.

Preventive measures of house arrest and detention shall be ordered against the defendant by the judge of rights and freedoms during the phase of criminal prosecution, the judge of preliminary chamber, the procedure preliminary chamber, and the court during judgment. The procedural act ordering these preventive measures is a motivated decision. Regarding the execution of preventive arrest the competent judicial body will issue an arrest warrant.

Regarding the content of the act which disposes a preventive measure, the current regulation does not contain express provisions showing common elements that must be included in the procedural act.

The rightfull cease of preventive measures is a legal obstacle in maintaining them. So, whenever the law provides that the preventive measure ceases, the court is obliged to order its dissolution.

In art. 137 of the Criminal Procedure Code were previously laid down general provisions regarding the act of taking preventive measure. Thus, in the act ordering any of the four preventive measures were indicated: act that was the subject of the accusation or indictment, the legal text where the punishment provided for the offense was mentioned. Assuming detention and arrest, the act taking these measures should indicate the additional case provided for in art. 148 and the concrete bases of which arose its existence. In the case of the obligation not to leave the city or country, the document that such action had to show concrete reasons that have determined the measure, without referring to any of the cases provided for in art. 148.

Cases where preventive measures rightfully cease are provided for in art. 241, ranked in cases of general cease, applicable to all preventive measures, and specific cases only regarding arrest and house arrest.

General cases of legal preventive measures cessation.

First, preventive measures cease on deadlines provided by law or determined by judicial bodies.

Arguably, it can be said that the deadlines provided by law in cases where preventive measures were placed on the maximum length of time limits provided by law are expired; for example, the preventive arrest of the defendant ceases as it had been taken for 30 days and that period expired. Thus, the period of the arrest of the defendant is not more than 30 days and after such period, during prosecution, if it wishes to maintain this measure, the judge of rights and freedoms has a constitutional and criminal obligation to decide to extend the arrest.

When the judicial body has set a preventive measure for a period longer than the maximum period provided by law and this deadline set by the judicial body has elapsed, it can be said that the measure of prevention has rightfully ceased as it was the deadline set by the judicial body.

Preventive measures shall be stopped automatically or under the circumstances when it was given a solution for the suspect or defendant to be exonerated from criminal liability. In this respect, art. 241 paragraph (1), lit. b) indicates that preventive measures shall automatically be stopped in cases where the prosecutor has a solution not to indict or the court gives a solution to pay, giving up criminal proceedings, waiving penalty, postponing the penalty or suspension of sentence under supervision, although not final.

Also, according to art. 241, paragraph (1), lit. c) preventive measures cease the date of the final judgment, when the defendant was convicted. Lastly, preventive measures cease in other cases specifically provided by law. By this expression are considered to be covered art. 399, para. (3) according to which preventive detention measures cease while court issues:

a) An imprisonment not more than the duration of detention and arrest;

b) A prison sentence, suspending the execution under supervision;

c) A fine penalty, which accompanies imprisonment;

d) An educational measure.

3. Conclusions

It is also thought as being still relevant the jurisprudence of the Supreme Court in solving the appeal on points of law, prior to the current Code of Criminal Procedure, which established that in case of the court's failure to check, during the trial, of the legality and validity regarding the preventive arrest of the accused before the end of the period provided by law, draws the rightfull cease of preventive arrest and an immediate release of the arrested defendant. Although the decision relies only on stopping the preventive measures, it is considered that the failure to check the legality and merits of any preventive measure by the judge for preliminary chamber or the court leads to the cessation of the preventive measure.

Particular cases of preventive arrest and house arrest ceassing, according to art. 241 par. (1):

a) During the criminal investigation, on reaching the maximum duration of 180 days;

b) During the trial of the first instance, on reaching the maximum term provided by law;

c) During the appeal, if the measure has reached the term of the penalty imposed in the sentence. Regarding the cease of preventive arrest during the appeal, it is being noted the provisions of art. 399 par. (6) under which the defendant convicted by the first instance and found in preventive arrest is released as soon as the duration of detention and arrest are equal to the length of the sentence handed down, although the judgment is not final.

While ceassing preventive measures is a legal obstacle in maintaining them, the revocation of preventive measures is a procedural act which opportunity is estimated by the judicial organs. Given the provisions of art. 242 par. (1), the revocation of preventive measures appears as a procedural act for the judicial bodies to abolish preventive measures when the reasons that caused disappeared or new circumstances have arisen, resulting the illegality of this measure. In a slightly different wording it is observed that revocation of preventive measures is taken in the same procedural regime as in the earlier legislation.

The repeal of preventive measures can be made on request or ex officio. In case of repeal regarding the detention or preventive arrest, it will be ruled, simultaneously, the release of the suspect or defendant, if he is not arrested in another case.

For knowing permanently the opportunities in maintaing or repealing the measure, if the preventive measure was taken during prosecution by the prosecutor or the judge of rights and freedoms, the criminal investigation body is obliged to immediately inform, in writing, the prosecutor about any circumstance that could result in repealing the preventive measure. If it considers that the information justify the repeal of preventive measure, the prosecutor rules it or, where appropriate, refers the matter to the judge of rights and freedoms that took the action, within 24 hours after receiving the notice. The prosecutor must also notify ex officio the judge of rights and freedoms, when it finds himself the existence of any circumstances which justify repealing the preventive measure taken by it.

From provisions in art. 242 results that repealing the preventive measures is an act by which either the body that ordered the measure or other competent judicial body may go behind a decision, revoking it if the measure was taken illegally or if the grounds for adopting it have ceased. In this

respect, it is on record that the regulation seen as a principle, contained in Art. 9 paragraph. (4) wich states that when it appears that a measure deprivating or restricting liberty was imposed unlawfully, the cognizant judicial bodies are obliged to decide repealing the measure and, where appropriate, the release of the detained or arrested person.

Preventive measures, as procedural measures, are interlocutory and are being taken based on specific circumstances related to the criminal case and the person og the perpetrator.

It is possible that, during criminal proceedings, there could intervene items that require the replacement of the initially taken preventive measure with another preventive measure. In this regard, in the Code of Criminal Procedure was performed the distinction between replacing the preventive measure with a lighter or heavier one.

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ACCESS TO A COMPUTER SYSTEM. BETWEEN LEGAL PROVISIONS AND TECHNICAL REALITY

Maxim DOBRINOIU[*]

Abstract

Nowadays, on a rise of cybersecurity incidents and a very complex IT&C environment, the national legal systems must adapt in order to properly address the new and modern forms of criminality in cyberspace. The illegal access to a computer system remains one of the most important cyber-related crimes due to its popularity but also from the perspective as being a door opened to computer data and sometimes a vehicle for other tech crimes. In the same time, the information society services slightly changed the IT paradigm and represent the new interface between users and systems. Is true that services rely on computer systems, but accessing services goes now beyond the simple accessing computer systems as commonly understood by most of the legislations. The article intends to explain other sides of the access related to computer systems and services, with the purpose to advance possible legal solutions to certain case scenarios.

Keywords: *cybercrime, access to computer system, cyber-attacks, information society services, botnet, email access, point-of-sale, web access, criminal law, offence.*

1. Introduction

In a very complex virtual environment, at the European level, the applicable national legislations on cybercrime are mainly based on the Council of Europe Convention on Cybercrime, concluded in 2001 in Budapest. A good document and a real beacon for law enforcement and judicial systems across Europe (and many other countries) for more than a decade. But we now witness that some of its provisions seem to be far away behind the nowadays technological developments and the actual operation tools and methods used by the criminals in cyberspace.

Some countries understood the need for a more comprehensive legal approach of the new improvements in the criminal cyber-activity, while others still remain bound to the old concepts and try to improvise in the search for the correct solutions in complex cases involving new sort of cyber-attacks and new IT&C means of committing cyber-related crimes.

2. Terms and definitions

The CoE Convention defines the computer system as "any device or group of interconnected or related devices, one or more of which, pursuant to a program, performs automatic processing of data".

Computer data is regarded as "any representation of facts, information or concepts in a form suitable for processing in a computer system, including a program suitable to cause a computer to perform a function".

Meanwhile, the service provider means "any public or private entity that provides the users of its service the ability to communicate by means of a computer system", as well as "any other entity that processes or stores computer data on behalf of such communication service or users of such service".

Sometimes, mistakes are made in the understanding computer programs and data as indispensable parts of computer systems, and thus, people wrongfully regards the user's interaction with them as an interaction (see access) with computer systems. For example, a simple interaction with an antivirus application installed on a PC cannot be regarded as an access to (entering) the remote antivirus server belonging to a certain IT security company.

3. Access to computer systems versus access to information society services

Acting as a source of inspiration for national legislations, the CoE Convention on Cybercrime provided for, in Article 2, the illegal access to a computer system as "the access to the hole or any part of a computer system without right", while at point 46 of its Explanatory Report, the European legislators came with much deeper conclusion, stating that the access should be seen and interpreted as "entering of the hole or any part of a computer system (hardware, components, stored data of the system installed, traffic and content-related data)".

This understanding provided for national legislations the grounds of incriminating acts like "hacking", "cracking", "computer trespass" or any other operation in which the perpetrator illegally succeeds to "enter" or to "break into" a computer system, either it is a standalone one or a remote workstation connected to a network.

[*] Nicolae Titulescu University, Bucharest (e-mail: **office@e-crime.ro**).

Furthermore, a common agreement concluded that there is no (and shouldn't be) "access to a computer system" in situations like: sending an email message from one computer system to another or file transfers between systems.

The meaning of "enter", "break into", "hack into" and likewise terms is that of the creation of a direct and continuous virtual liaison between an individual and a machine, of a nature that allows the individual to treat the computer system almost like a physical location (ex. a house), having the possibility to perform different actions while inside (ex. turning the light on/off, resting on a sofa, opening the fridge in search for food, using the toilet etc.).

Once this direct link is somehow disconnected (irrespective whether it is resumed in the future) the virtual presence of the individual into the machine is over and is quite similar to getting out or leaving the "house".

Over time, either by interpreting the CoE Convention on Cybercrime (and its Explanatory Report) or creating their own provisions, national legislations preferred the term of "access to" in order to identify and further prosecute certain interactions between individuals and computer systems. But, in reality, taking into consideration the above mentioned considerations and the technical ways such interactions occur, one could notice that just few of the real situations are properly covered by the legal articles involving the "access to" expression, as it could be exampled herewith.

Access to a Computer System

In its simplest way, the access to a computer system (network) requires a direct interaction with the peripherals (keyboard, mouse) in order to launch commands to the Central Processing Unit and make the system work.

Furthermore, using a system's functions and the possibility of processing data could also be regarded as "access" to that system[1], because the interaction and the continuously "logical" liaison between the user and the machine is one of the kinds that creates the conditions for the existence of a virtual presence of that specific user "into" the system.

From a distance, there are multiple possibilities to have an access to a system, especially when, using his own system and specific tools, the user finds a way to (re)create and administer the virtual continuous liaison with the targeted computer (in the same network or in Internet). Is the well-known case of using a Remote Access Tool (or Remote Administration Tool), a software that creates a continuous communication channel between two separate systems, with the possibility for a user to virtually be present in another one's system (with the purpose of performing administration tasks or solving specific issues).

The problem with some of the national legislations is that the "access to computer data" is conditioned by the "access to a computer system", while the real life shows multiple ways to get hold of computer data without actually "enter" or "hack into" a computer system.

In either the situation presented, the key factor for the "access" is the existence of a (direct or remote) continuous communication channel able to provide a virtual presence of a user within a computer system.

A particular instance of the "computer system" is represented by the smartphone or tablet (communication equipments with operating systems). Any unauthorized use of either such terminals may be easily regarded as a crime of "illegal use of a communications terminal equipment" (if available in legislation[2]), in legal conjunction with the crime of "illegal access to a computer system", taking into consideration that the use of the terminal equipment is equivalent with the "entering in" that "system".

Access to a Web resource

Accessing an Internet resource, such as a webpage, may rather be regarded as the obtaining (remotely) of computer data than an access to a computer system (ex. the web-server).

Technically, it is commonly understood that, when requested by a user (upon entering the respective URL), a copy of the targeted remote webpage is being sent by the hosting web-server directly to the user's browser and then showed him on the monitor. All the operations (at physical, network, TCP[3] or application level) are performed without user's acknowledgement or intervention, while the data traffic simply follow the TCP/IP and HTTP[4] protocols.

It is clear that, in this case, the user cannot (and does not) access the remote web-server and he does not actually "enter" the computer system that operates as web-server in searching for the desired webpage content (computer data). It is more a data exchange, during an established bidirectional and sequential communication between user's browser (PC) and the remote web-server.

As a matter of fact, it is a classic act of a transfer of computer data from a computer system. When committed without right, this is a crime prosecuted and punished by the majority of national legislations. Surprisingly, this situation was not

[1] See Section 1 (1) *Unauthorized access to computer material*, in UK Computer Misuse Act of 1990.
[2] See Article 256 Penal Code of Spain, and Article 230(2) Penal Code of Romania.
[3] Transport Control Protocol.
[4] Hyper Terminal Transfer Protocol.

comprised in the CoE Convention on Cybercrime, but there are suspicions that the European drafters thought of it in the context of the "illegal access to a computer system with the intent of obtaining computer data".

As a particular case of accessing a web resource, the situation when the web-servers send and install in users' PCs the so-called "cookie files" (the same time they send to browsers the desired webpages) may also not be considered as an "access to a computer system", because these files cannot ensure a continuous virtual link between a person (ex. webpage owner) and the destination PCs. They are just small scripts (computer programs) that record and track users' online activity on certain webpages and "help" webpage administrators to easily direct them adware or similar content during the next visits (browsing).

Using "cookie files" is merely a subject of an "illegal interception of computer data" (as a form of cyber-surveillance), but is not considered as a crime (by the majority of national legislations), due to the fact that the users' consent over reception, installation and operation of such software is legally expressed by acknowledging the situation clicking a visible alert available on most of the websites.

Access to an E-mail account

This is a very much disputed situation, both in academia and judicial practice.

It is commonly known that an E-mail account is a space allocated on a Mail server for a specific client (user), identified by a unique E-mail address. The authentication methods usually consist of a username and a password.

E-mail, as generic perceived by people, is not a computer system. It is not a computer program either. It is an information society service or, simply, a "publicly available electronic communications service"[5]. Or, a communication performed by electronic means.

According to Article 2 point (h) of the European Directive 58/2002, the electronic mail is "any text, voice, sound or image message sent over a public communications network, which can be stored in the network or in the recipient's terminal equipment until it is collected by the recipient".

From this technical reality, when it is about an "illegal access to an E-mail account" the judicial system must ensure that there exist a crime of "illegal access to a computer system" or just something else.

Irrespective of the tool a person use for interaction with a remote Mail server – through an E-mail client software (computer program) or a Web Mail service (ex. Gmail, Yahoo etc.), the act of sending, receiving or just reading electronic messages is very hard to be considered as an access to a computer system (the Mail server).

In this case, an eventual offender is not entering the remote Mail server, nor breaking into or hacking into that system. The user simply benefits from the functions of that particular system, which are: receiving, sending or storing E-mail messages from, to or on behalf of the legitimate account owner.

Even when an E-mail client software or a Webmail service is used, messages are often sent or received as copies of specific computer data. Data processed inside or outside a network or between multiple networks.

So, it is merely a sequential communication of data, and thus not a continuous virtual relationship (interaction) between the user and the remote machine (the Mail server), and therefore not a real access.

Surprisingly, we do have an access. Not an "access to a computer system", but rather an "access to an electronic communications service" or simply an "access to a computer service". As mentioned before, E-mail is a computer service, and its usage by a person better fits into this context of "access" seen as a possibility to obtain, to benefit from or to effectively use that service.

Access to Cloud Accounts

Cloud Computing is a general term for the delivery of hosted services over Internet[6]. In Cloud Computing, users access software applications remotely through the Internet or other networks via cloud applications service providers[7].

Simply, cloud computing is a service. An information society service available for users (clients) based on certain access credentials. However, those users don't actually "enter" or "get-in" the remote servers, so there is no "access to a computer system". The files the legitimate users are working on are not stored locally, but on remote servers, while the users interact only on electronic copies of those files (that are transferred to local machines for each particular purpose – read, write, modify, delete).

In case of a perpetrator using, without right, a cloud computing-type service, thus obtaining computer data as results (photos, personal information, financial, official, classified or any other type of information), from a criminal law perspective there is merely an "unauthorized transfer of computer data" (computer data is identified and extracted by the attacker), in conjunction (if the case) with a "data interference" (data is altered or suppressed in any way), a "computer-related fraud" (if a loss resulted), a "computer-related forgery" (if a legal consequence was created), etc.

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[6] http://searchcloudcomputing.techtarget.com/definition/cloud-computing
[7] http://www.financialforce.com/resources/what-is-cloud-accounting/

For all that, the existence of a distinct criminal law provision of "illegal access to an electronic communications service / information society service" would be a better legal solution in this scenario, too.

Access to ATM and POS

There is no doubt that an Automated Teller Machine (ATM) is a computer system. In fact, it is a computer linked to a cash dispenser.

When used by a credit card holder in order to take out cash or to perform certain financial transactions, the interaction with this terminal should always be considered as an "access to a computer system". Thus, in the situation of the access to the ATM by a person with a fake (forged, cloned) credit card or by a person with a valid credit card but with no right or consent from the legitimate holder, there will be an offence of "illegal access to a computer system" along with an offence of "unauthorized conducting of financial operations"[8] or "circulating forged electronic payment instruments"[9].

A Point of Sale (PoS) is an electronic device that operates with the purpose of authenticating an electronic payment instrument (credit card) and its holder to the financial computer system in order to validate a transaction (ex. purchase). Being an electronic device interconnected with an electronic payment system, one should consider it as a part of the whole computer system.

Thus, a person who presents a forged card to a PoS or a valid card but with no consent from the legitimate holder may be liable for committing the offence of "illegal access to a computer system" in legal conjunction with the offence of "unauthorized conducting of financial operations". Irrespective if the interaction between the PoS and the valid card is through embedded chip or wireless[10].

Access to Online Banking

This is another misinterpreting of the term "access to a computer system".

It may look pretty much as an access to a computer system when a person logs in and use the online banking facilities, but, again, the technical realities come to reject this solution.

A portal for online banking is primarily a web interface, an electronic communication service or an information society service, provided in certain conditions by a financial institution (a bank) to its clients. The legitimate users may have access to the information on their bank account (balance, credits, list of transactions etc.) or they may perform some bank-specific operations (online transfer of money to other bank accounts, foreign exchange etc.). But in no circumstance, the user (bank client) is "entering" the bank's computer system. He only relies on the specific data the bank is sending to him, via the web interface (portal), based on his online requests. And, as mentioned before, this is just a sequential bi-directional communication of data (like email exchange) and not a continuous virtual communication channel, as required for the existence of an "access to a computer system".

The same rationale applies in the situation of Mobile Banking, an electronic financial service provided by the banks to their clients, with the purpose to be used on mobile phones, in the form of mobile applications. These mobile applications act as the online interface with the (financial) service offered by the bank, and, through them, a user just only communicate (with the meaning of information exchange) with the bank's computer system or network, while not actually accessing ("entering", "hacking-into") that system.

So, in the case of an attacker using without right an online financial service, there should not be an indictment for "illegal access to a computer system", but merely an indictment for "unauthorized use/access of/to an internet society/electronic communications/online financial service" (in a theoretically possible legal connection with the crime of "unauthorized transfer of computer data" from the bank's computer system, and a "computer-related fraud").

Access to Wi-Fi Hotspots

Different approaches have been recorded, either in academic studies or practical cases, related to the situation of an electronic device (ex. smartphone or a laptop) connected to a Wi-Fi Hotspot in order to get connected to Internet. The legal solutions offered by specialists and authors varied from "illegal access to a computer system" to "illegal interception of data" or simply "theft".

From a technical point of view, a Wi-Fi Hotspot (or Access Point) is a real computer system, because it fits the definition provided by CoE Convention on Cybercrime and numerous national legislations. But the attention of an individual is not focused on the device itself, but on the electronic signals broadcast by the router, carrying TCP/IP packets of data, allowing the connection to Internet. Irrespective if the signal is unencrypted or encrypted with WEP, WPA or WPA2 PSK.

For this reason, this type of wireless connection (to Internet) eliminates the legal possibility of incrimination based on the provision of "illegal access to a computer system" and even on the provision of "illegal interception of data".

In this particular case a possible legal solution would be the incrimination of "the connection

[8] See Article 250 of the Romanian Criminal Code.
[9] See Article 313 of the Romanian Criminal Code.
[10] See PayWave provided by VISA.

without right to a network", with good results in prosecuting the unauthorized access to Internet through Wi-Fi Hotspots.

Access to Computer System through Malware

Hourly, computers and networks from around the world are infected, directly or remotely, with malware. This malware reaches targeted computers via multiple ways of propagation: external storage devices, infected E-mail attachments, infected websites (see Watering Hole Attack), P2P connections, File Transfer operations etc.

The most common infections are Viruses, Worms, Trojans, or Keyloggers. Most of them have a disruptive program to run in order to alter, modify or delete computer data on host system or to affect its good functioning. Some of them are just creating backdoors to perform further actions against the host or to use the host's computing capabilities to launch other virtual operations.

Depending on the design and operation features of such malware, we may have various possibilities of computer-related crimes.

If the malware installed into a computer is of a kind that modify or erase data there should exist the crimes of "data interference" and "system interference".

If the malware operates as a Keylogger, there should only be the generic crimes of "illegal interception of computer data" and "unauthorized transfer of computer data from a computer system".

If the malware contains a software module acting as a RAT[11], there is a crime of "illegal access to a computer system", for the reasons already described.

In Cybercrime and Cybersecurity literature, as well as in real life cases, there were disputes on the opportunity of an indictment of "illegal access to a computer system" in the situation of a Botnet creation.

As commonly defined, a Botnet is a group of computers connected in a coordinated fashion for malicious purposes[12]. Attackers often target unprotected computers and get control over them by infecting with viruses, worms or Trojans. By the use of such collection of "zombie" computers, attacker could further perform multiple Cybercrime specific activities (ID and Data Theft, DDoS[13], Spam, Phishing, etc.). While some of the IT Security specialists may consider that the creation of a Botnet has the technical ingredients for the existence of an "access to a computer system" (taking into consideration the way the Botnet Herder[14] remotely controls and gives instructions to the infected computers), there are also technical arguments that there is no "illegal access to a computer system" on the grounds that a continuous virtual communication channel is missing in the "relationship" between the Botnet Herder and each of the infected machine.

As it is regulated now, in most of the legislations, the "illegal access" ends immediately after the "entrance" of the perpetrator into the target system (directly or remotely), while there are no (or just few) provisions for the rest of the actions the attacker might further perform once "inside" the system.

In this case, a good solution would be the existence of an indictment of "*the access to a computer system that resulted in an unauthorized influence of the function of that computer system*".

Access to Externally Stored Computer Data

Apart from the information stored or processed within a computer system, there are multiple cases when the offenders are looking for computer data stored in external storage means, like Hard Drives, USB Flash Drives, CDs, DVDs, etc.

While most of the national legislations addresses just the obtaining of computer data that is stored, processed or transmitted in/from/to a computer system, almost none provides a solution for the situation data is obtained from a storage mean or device.

Usually, in order to access (see, obtain, process etc.) that electronic data, a user must connect the external storage device to a computer system. His own or another one's, but operated in legitimate conditions. Technically, when such connection occurs, data is temporarily copied into the RAM's host computer in order to further be displayed or available to the user.

Although there is no sign of an "access to a computer system", as defined by the CoE Convention on Cybercrime or the national legislations, there is a "transfer of computer data from a storage device", which, if is performed without right, may result in an offence of "unauthorized transfer of computer data from a storage device"[15].

On the other hand, for a more clear legal situation, *de lege ferenda* should be created a distinct provision incriminating the "unauthorized access to computer data" – as recommended by the CoE Convention on Cybercrime, but not in the general context of the data stored, processed or transmitted in/from/to a computer system, similar to the

[11] Remote Access Tool.
[12] https://www.techopedia.com/definition/384/botnet
[13] Distributed Denial of Service (cyberattack).
[14] The person who controls the Botnet.
[15] See Article 364 of the Romanian Criminal Code – "the unauthorized transfer of computer data from a computer system or a data storage device".

incrimination of the "unauthorized access to online child pornography materials".

4. Final remarks

The above analysis, from both technical and legal perspective, unveils various circumstances where the representatives of the legal sector may wrongly use the criminal charge of "illegal access to a computer system" when the cases actually deal with electronic communications services or information society services.

While still complying to the general recommendations of the CoE Convention on Cybercrime, national legislations should look forward to identifying new and comprehensive legal solutions in order to solve actual controversial situations from real life, and to prepare to properly address (through tough criminal provisions) the new improvements the cybercriminals add to their activity against computer data and computer systems.

Least but not last, national legislations need to focus their criminal provisions on the real impact the electronic communications services already have on the societies, economies and people, creating those solutions that better fit their law enforcement requirements, but from a technical perspective that goes beyond the simple "access to a computer system" way of thinking and interpretation.

Resources:

- Council of Europe Convention on Cybercrime, available at: http://www.europarl.europa.eu/meetdocs/2014_2019/documents/libe/dv/7_conv_budapest_/7_conv_budapest_en.pdf
- Explanatory Report on the Convention on Cybercrime, available at: https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=09000016800cce5b
- http://www.cybercrimelaw.net

FIGHTING THE CLASSICAL CRIME-SCENE ASSUMPTIONS. CRITICAL ASPECTS IN ESTABLISHING THE CRIME-SCENE PERIMETER IN COMPUTER-BASED EVIDENCE CASES

Cristian DRIGĂ[*]
Svetlana PURICI[**]

Abstract

Physical-world forensic investigation has the luxury of being tied to the sciences governing the investigated space, hence some assumptions can be made with some degree of certainty when investigating a crime. Cyberspace on the other hand, has a dual nature comprising both a physical layer susceptible of scientific analysis, and a virtual layer governed entirely by the conventions established between the various actors involved at a certain moment in time, defining the actual digital landscape and being the layer where the actual facts relevant from the legal point of view occur. This distinct nature renders unusable many of the assumptions which the legal professionals and the courts of law are used to operate with. The article intends to identify the most important features of cyberspace having immediate legal consequences, with the purpose to establish new and safe assumptions from the legal professional's perspective when cross-examining facts that occurred in cyberspace.

Keywords: *cybercrime, criminal law, digital evidence, cyberspace, forensic investigation.*

1. Introduction

Bringing criminal cases involving computer generated or stored evidence, as well as crimes committed entirely through information systems to justice is a major challenge for the legal system in general and for all the actors involved, ranging from the investigators, to prosecutors, judges and defense attorneys. The judicial system relies heavily on assumptions developed during a long time in processing physical-world crime cases. The rapidly-evolving digital age crimes, being partly or totally committed inside a new medium with different properties than the physical world, requires major changes in the way in which the legal professionals regard the criminal cases. While the laws slowly adapt, a more rapid adaptation can be achieved through understanding cyberspace and its governing "laws" as well as through putting aside the classical crime-scene assumptions and developing new ones. This article intends to identify such assumptions that cannot be used anymore in the digital crime cases and attempts to identify new assumptions that are safe to operate with in the pursuit of justice in the digital society.

2. Generic assumptions in regular crime cases

If a common crime takes place in a closed room, chances are that at the crime scene, evidence on how it was committed could still be found intact. On the other hand, for crimes committed in the street and public places, chances to find the same evidence intact are almost zero, given the multitude of elements that could destroy it. Similarly, while in closed space crime cases the possible suspects could be narrowed down to those having access or entering that particular room, in public-space crime cases, anyone passing by leaves a trace, thus being a potential suspect. These are typical assumptions that can be made with some degree of certainty when starting a forensic investigation in the physical world.

The key role of such assumptions is to help streamlining the first step in the forensic investigation[1], namely establishing the perimeter from where relevant evidence could be collected, the possible sources of information, the methods and tools that should be used and the type of evidence that could be obtained, and, in the court of law, to help analyzing the results of the investigation.

3. Assumptions in cyberspace crime cases

In criminal cases involving computer generated or stored evidence, as well as in crimes committed entirely through information systems, a new dimension is added to the traditional three dimensional space of the perimeter to be established as a first step in investigation: the cyberspace[2].

Be it the personal digital space or the greater public Internet, its unique properties like the ability

[*] Attorney at law Cybercrime Research Centre Assoc., Iasi, Romania (e-mail: **contact@cybercrime.org.ro**).
[**] Ph.D. student Svetlana Purici, Moldova State University, Faculty of Law, Chisinau, Moldova (e-mail: **purici.svetlana@gmail.com**).

[1] U.S. Department of Justice, Office of Justice Programs, National Institute of Justice, *Crime Scene Investigation: A Guide for Law Enforcement (2000)*, 19.

[2] http://thelawdictionary.org/cyberspace/

to cross the limits of rooms and buildings, national borders or even continents, as well as the multitude of devices and electronic services which may be part of it, raise a whole set of issues both for investigators as well as for the legal professionals. In such cases neglecting one possible source of evidence or failing to correctly establish the digital perimeter of the investigation[3], could easily lead to either failing to prove the offender guilty beyond any reasonable doubt, or worse, to grave judicial errors.

Even if it contains the notion of "space", the cyberspace does not possess the same properties the physical world has, rendering unusable many of the assumptions the legal professionals are used to operate with in the real life crime cases. Even if the forensic investigation ultimately examines physical devices seized from a specific physical location and the information stored inside them, prosecuting, judging or defending a suspect in a computer related crime case requires a good understanding of the nature of cyberspace and its properties as well as putting aside some of the real-world crime case assumptions.

Possibilities such as remote access and control of computer systems, automation of computer crime through malware programs, on-line identity theft, anonymization techniques as well as hijacking network identity, are but a few of the extremely common situations in cyberspace with significant legal consequences that need to be tackled since the early stages of the forensic investigation and thoroughly examined during the trial phase in the courtroom. The difference between guilty and not guilty can ultimately go down to the difference between 0 and 1 in a bit of information discovered inside an information system which was either neglected or correctly understood.

For instance, the closed room assumptions are not applicable to computers connected to the Internet no matter if the room containing the computer was even locked from inside. Also, if the computer through which the crime was committed belongs to a certain person does not make that person the author of a particular crime. On the contrary, given the statistical occurrence of computers being part of automated bot networks committing crimes[4], or the frequency of the computer malware infections providing remote access to perpetrators, transforms the personal virtual space into a public place, making it more likely in some cases to reverse the initial assumptions or to establish new ones, in order to safely operate when investigating cyberspace in the pursuit of justice.

As a different medium with its own unique properties and interactions, the cyberspace can provide relevant evidence which correctly understood as nature and properly collected, preserved, analyzed and interpreted, could make the difference between sound cases from the legal point of view and terrible prosecution failures. In courtroom, understanding the nature of electronic evidence, the interactions that could take place and the unique properties of the cyberspace, could level up the degree of certainty when sentencing the offender.

4. The nature of cyberspace

Traditional dimensions VS. dimensions established through conventions

The physical-space forensic investigation has the luxury of being tied to the laws of the science governing the investigated space or the nature of the objects in question (physics, chemistry etc). Cyberspace on the other hand, has a dual nature which brings in new variables into the forensic equation which are of critical importance from the legal point of view in establishing the truth in criminal cases:

The physical layer or the infrastructure - governed by the laws of physics (namely electricity, mathematics, etc) and comprising of the actual physical information systems, devices and networks subject to containing the evidence in form of digital information;

The virtual layer - built entirely from the data stored in or circulating the systems and networks, it comprises the software programs and services available at a certain moment in time, together with their automatic or user generated information, the usage rules and possible actions and interactions between systems, programs or services, the intended behavior or the actual behavior at given time of certain devices, software programs, services or computer systems. It basically defines the landscape in the digital space, the actions that could be taken by an individual and the data either automatically or user generated. As a distinct medium, the virtual layer is governed entirely by the conventions established between the various actors involved at a certain moment in time.

Both layers are of great importance when analyzing the virtual crime scene. While the former provides the actual information bits, the latter, correctly identified and analyzed allows the re-construction of the facts as they happened in a particular case.

The physical layer, being the closest to the physical world, thus susceptible of scientific analysis, defines certain characteristics of the information it could contain, leading to mandatory actions and precautions to be taken in the forensic

[3] U.S. Department of Justice, Office of Justice Programs, National Institute of Justice, *Electronic Crime Scene Investigation: A Guide for First Responders*, Second Edition (2008), 19.

[4] Romanian Computer Emergency Response Team, *REPORT on Cyber Security Alerts processed by CERT-RO in 2014,* (2015).

investigation in order to produce results admissible in court as evidence. The virtual layer instead, being the sum of both formal and informal conventions between software developers, hardware manufacturers and/or service providers to which we add the user actions and the user generated information, is subject to continuous evolution, its properties continuously changing, hence the impossibility to establish the same principles and assumptions from the classical criminal cases. However, being the layer where facts occur, it is of the utmost importance in assessing the events in a manner that could be relevant for the court.

5. Legal issues in virtual-space crime cases

Lawful usage, Terms of usage, Liberty of usage.

Regulating the Internet and the cyberspace in general is a hot legal topic under continuous development at international level[5]. Laws and treaties are developed to establish standards to which the various actors should adhere, in order to bring in some predictability in cyberspace that would allow more in depth enforcing of the real world established laws into the virtual society, shaping at least part of the virtual space through legal means.

As a trend in regulating cyberspace we see tremendous efforts in imposing new laws to the service providers which offer the infrastructure for the information society. However, beyond the physical infrastructure, few laws manage to properly regulate the actual virtual cyber-landscape in a manner that would increase the number of assumptions which can be made in investigations, therefore, efforts should be made in each case and trial stage for assessing the degree in which the perimeter of the crime, through its actors, was compliant with the applicable legal provisions.

Laws attempting to regulate the actual virtual space are usually implemented by the service providers through technical means enforcing a certain behavior or usage scenario, as well as through terms of usage of services, placing the legal responsibility to the end-users. Both aspects may become relevant in some of the cases in court in an attempt to determine the actual circumstances of a case.

Trust-related issues in cyberspace investigations.

Being established through conventions between multiple entities, as opposed to the physical space in which laws of physics, chemistry and other sciences are always applicable, cyberspace as a forensic investigation perimeter requires assessing the medium-specific properties, the boundaries and the applicable "laws" at the moment when the crime was committed. Being spread across multiple systems, networks, regions and participating entities, the investigated perimeter is highly dependent on the trust that can be attributed to each and every actor involved.

One important step, easy to neglect when starting an investigation, is to establish a thorough list of the participating entities from which, further on, the entities that can be trusted should be established both as source of evidence and for crossing them out from the list of suspects. The Internet being a public place, the open-street scenario and assumptions are the safest to apply even for computers with apparently a single user in a room locked from the inside.

In courtroom, the *presumtion of innocence* and the *benefit of the doubt* as two of the founding blocks in criminal justice, are most likely to throw out cases in which the aspect of throughly identifying the participating entities and properly addressing the issue of trust for each of them was neglected.

Discovering the perpetrator earlier, without assessing the "circle of trust" and delimiting it from the "circle of possible suspects" can be considered at most a lucky occurrence. Indeed such event reduces the costs and the investigators can move to the next case. From a technical point of view the findings may even prove right, but without the admission of committing the crime or without other non-digital evidence to corroborate the facts in the absence of admission, chances are that either the defense will appeal to the benefit of the doubt or, in case all parties ignore the issue, judicial errors might occur.

Time-related issues.

Being a continuously changing landscape, the cyberspace, even if it comprises of a single device, puts pressure on the investigators to capture a snapshot of the virtual perimeter at the moment when the crime occurred, either by reconstructing it from the recovered digital evidence seized from storage mediums belonging to the suspect, or by literally freezing parts of the information circulating through trusted provider's networks and servers using the proper procedural legal means.

The time issue, from the legal point of view is directly dependent on the trust issue and failing to assess if the time was correctly set and recorded in the investigated systems and in the network or service provider's systems, can lead to errors in identifying the perpetrator, especially in cases where identification relies on this correlation as the only means to connect the crime to the suspect's computer.

Network infrastructure assessment and legal compliance.

One such aspect relevant in court of justice, in cases where the device investigated is connected to

[5] Organization for Economic Co-operation and Development, *The role of internet intermediaries in advancing public policy objectives*, (2011).

the Internet, is the degree in which the service providers (Internet service providers ISPs, On-line service providers, etc.) comply with the applicable laws (for instance by implementing all the technical means required by the law) thus offering some degree of certainty regarding the evidence they provide and the facts that occurred in a certain criminal case.

Aside from the problem of jurisdiction under which a certain piece of the personal virtual space of the suspect or some of the digital evidence resides, assessing the real status of the Internet service provider offering connectivity to the suspect is more likely to be cross-examined by the defense in search for vulnerable spots of the investigation.

The *presumtion of innocence* in case of computer networks requires eliminating all other scenarios in which the perpetrator is somebody else than the suspect. For instance, if by any chance the ISP is not a legally established service provider but instead an individual providing Internet in a private network spanning several flats or buildings, the circle of suspects is mandatory to be enlarged to all the systems in the network and to their owners. Same situation applies when the connection to the outside word is made through a network switch instead of a router, or without having implemented proper technical means to detect or eliminate the impersonation of the suspect's computer by someone else in the network. Failing this assessment and to correctly identify the limits of the physical network at the time of the domiciliary raid can either lead to judicial errors or to providing ammunition for the benefit of the doubt defense strategy in court.

At procedural level, of a special importance are the legal instruments chosen to complete the steps of seizing and collecting the digital evidence from the service providers. Non-repudiation, juridical responsibility for the contents and integrity of the data, are but two of the most important legal aspects subject to scrutiny in the court of law.

The Entry Points legal issue.

The virtual space being collectively built and designed for interaction and spanning numerous devices, networks, software programs and services, presents as many entry points for someone to commit a crime as the multitude of elements comprising it.

This specific nature of the virtual space makes it impossible for digital investigations to address all the entry points in a manner that would eliminate entirely the possible alternative scenarios of committing a crime. The reason for this assumption is mathematical and is based on the myriad of combinations that can be achieved by inter-connecting the physical elements sustaining the virtual space, to which we add the possible combinations between the software programs, services and human elements interacting and defining the investigated virtual space.

To tackle the multiple entry points problem, the best-practice manuals always recommend performing classical police investigations in addition to the digital investigation prior to submitting the case to court. Classical evidence would short-circuit some of the most common defenses which appeal to the benefit of the doubt derived from the possibility that the crime was committed by someone else.

From the legal point of view, failing to address the physical open points in which the perpetrator could've commit the crime by hijacking for instance the network identity of the suspect through IP spoofing or ARP spoofing techniques, will always be exploited by the defense.

Other commonly met defense scenarios in the court of law exploit the software related entry points, such as the possibility of remote controlling a computer system as well as the automation of such control through computer viruses and similar means, the Trojan Horse defense[6] being such an example scenario, in which the defendant denies responsibility for committing the crime given the presence of viruses inside his computer systems which could either provide remote control capabilities to the actual criminal located somewhere else or could automatically commit the crime, in both cases without the knowledge of the defendant.

Staying current with the latest developments in the cyber-security field, given the raise of numerous new methods of penetrating a network or someone's computer, and especially with the statistics regarding the occurrence of certain types of attacks and exploitation of IT infrastructure can also indicate some of the alternative perpetrator scenarios that should be addressed and eliminated when building the court case.

6. Final remarks

Given the volatile and always changing nature of cyberspace, classical crime-scene assumptions are but a source of errors for the legal professionals in re-constructing the facts that occurred in committing a computer related crime. The legal system is used to rely on technical experts to gather the relevant data and to “translate” it into the concepts with which the legal professionals are used to operate.

Given the distinct nature of cyberspace, no matter how good the “translation” is, the findings and the information that can be obtained from the technical experts, processed using the physical-space crime-scene assumptions, could lead to miss-interpreting the evidence. Without understanding the properties and the possible actions in the investigated medium, the cross-examination in

[6] Susan W. Brenner, Brian Carrier, and Jef Henninger, *The Trojan Horse Defense in Cybercrime Cases*, 21 Santa Clara High Tech. L.J. 1 (2004).

courtroom is more likely to fail in discovering the truth and the parties involved in the trial are often put in the impossibility to grasp the relevant aspects and nuances of the facts, in order to further ask the experts the right questions.

The forensic examination of the physical electronic devices is subject to standardization. Adherence to standards is key to securing the evidence and collecting it in a forensically sound manner.

But the physical devices are but a small part of the cyberspace. The rest of the investigated perimeter, where the facts actually occur, being so volatile and differing from case to case, can only be subject to best-practice manuals in an effort of establish common would-be standards. To cope with this problem, understanding the cyberspace nature and a thorough examination of the virtual landscape in all stages of the trial as well as staying informed with the latest relevant evolutions in the field become mandatory even for legal professionals.

In the pursuit of justice, in cases involving digital evidence and cybercrime, the common assumption that being related to computer systems makes it solely the job of computer experts to understand the nature of cyberspace, becomes the most important assumption to put aside.

Resources:

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HUNGER STRIKES AND FORCE-FEEDING IN PRISONS

Radu-Florin GEAMĂNU[*]

Abstract

This study will try to give an overview and assess the international and European standards regarding the management of hunger strikes.

We will analyse the international and European standards regarding the force-feeding a prisoner on a hunger strike.

The paper will focus on the study of the ECtHR judgements regarding the force-feeding of hunger strikers.

Also, we will address the U.S. case and the force-feeding of prisoners which is considered to be, in certain cases, an act of torture based on the international human rights standards.

To close with, the study will attempt to go through the recent developments in the Romanian legislation, analysing the legislation and its conformity with the European principles and recommendations, bearing in mind the prohibition, in absolute terms, of torture or inhuman or degrading treatment or punishment.

Keywords: *hunger strike; force-feeding; prison; ECHR; Declaration of Malta; Romanian legislation.*

1. Introduction

Hunger strike is a severe form of protest of convicted persons with possible negative consequences mainly on their health or life, but also in general on the enforcement of custodial sentences and on the safety of detention facilities.

Perseverance in hunger striking can have irreversible effects on the person's health. Given that during detention convicted persons are in the custody of the state, the state has a very important role: to ensure enforcement conditions which can guarantee the protection of life, health and physical integrity of detainees. Against this background, perseverance in hunger striking can pose serious problems to the state agents as soon as the status of the hunger striker degrades to the extent that the person's force feeding becomes necessary.

As a consequence, the tension between the duty to secure the right of a prisoner to life and the duty to respect the autonomy of the individual needs to be addressed, in accordance with medical ethics and also with the legislation of the particular country.[1]

The controversial and emotive issue of forcible feeding of prisoners who are on hunger-strike raises the difficult question weather, and if so when, the infliction of painful but potentially life-saving treatment may constitute prohibited ill-treatment, despite a refusal of consent. In essence the argument is between two principles: respect for the moral autonomy of the prisoner, against the responsibility of the state for the fate of those it has deprived of liberty.[2]

2. Content

2.1. World Medical Association (WMA) standards

It was said that one of the most spectacular violations in recent history that were brought before the public and widely discussed involved force-feeding of hunger strikers by health care professionals.[3]

The WMA Declaration of Tokyo[4] provides some general principles regarding the clinical independence of the physician and the force-feeding of the prisoners: *A physician must have complete clinical independence in deciding upon the care of a person for whom he or she is medically responsible.*

Where a prisoner refuses nourishment and is considered by the physician as capable of forming an unimpaired and rational judgment concerning the consequences of such a voluntary refusal of nourishment, he or she shall not be fed artificially. The decision as to the capacity of the prisoner to

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[*] PhD candidate, Faculty of Law, "*Nicolae Titulescu*" University, Bucharest; Legal Adviser, Romanian Ministry of Justice (e-mail: **radurfg@yahoo.com**).

[1] A. Lehtmets, J. Pont, *Prison health care and medical ethics. A manual for health-care workers and other prison staf with responsibility for prisoners' well-being* (Strasbourg, Council of Europe, 2014), 40-41, accessed March 25, 2016, http://www.coe.int/t/dgi/criminallawcoop/Presentation/Documents/Publications_HealthCare_manual_Web_A5_E.pdf.

[2] N. S. Rodley, M. Pollard, *The treatment of prisoners under international law*, 3rd edition (Oxford: Oxford University Press, 2011), 419.

[3] G.J. Annas, *Hunger strikes at Guantanamo - medical ethics and human rights in a "legal black hole"*, N Engl J Med. 2006; 355(13):1377–1382 [PubMed]; M. Müller, *Zwangsernährung in der Haft [Forced feeding in detention]*, Neue Zürcher Zeitung [New Zurich newspaper], September 9, 2010, in J. Pont, H. Stöver, and H. Wolff, *Dual Loyalty in Prison Health Care*, American Journal of Public Health, Vol. 102, No. 3 (March 2012), 10.2105/AJPH.2011.300374, accessed March 25, 2016, http://www.ncbi.nlm.nih.gov/pmc/articles/PMC3487660/.

[4] *World Medical Association (WMA) Declaration of Tokyo - Guidelines for Physicians Concerning Torture and other Cruel, Inhuman or Degrading Treatment or Punishment in Relation to Detention and Imprisonment*, adopted by the 29th World Medical Assembly, Tokyo, Japan, October 1975 and editorially revised by the 170th WMA Council Session, Divonne-les-Bains, France, May 2005 and the 173rd WMA Council Session, Divonne-les-Bains, France, May 2006, rules no. 5 and 6, accessed March 25, 2016, http://www.wma.net/en/30publications/10policies/c18/index.html.

form such a judgment should be confirmed by at least one other independent physician. The consequences of the refusal of nourishment shall be explained by the physician to the prisoner.

The development of medical standards and ethics in case of force-feeding a prisoner during his/her hunger strike was realised through a special declaration of the WMA, dealing with hunger strikers.

According to the WMA Declaration of Malta on Hunger Strikers[5], an ethical dilemma arises when hunger strikers who have apparently issued clear instructions not to be resuscitated reach a stage of cognitive impairment. The principle of beneficence urges physicians to resuscitate them but respect for individual autonomy restrains physicians from intervening when a valid and informed refusal has been made. An added difficulty arises in custodial settings because it is not always clear whether the hunger striker's advance instructions were made voluntarily and with appropriate information about the consequences.

Physicians should respect individuals' autonomy. This can involve difficult assessments as hunger strikers' true wishes may not be as clear as they appear. Any decisions lack moral force if made involuntarily by use of threats, peer pressure or coercion. Hunger strikers should not be forcibly given treatment they refuse. Forced feeding contrary to an informed and voluntary refusal is unjustifiable. Artificial feeding with the hunger striker's explicit or implied consent is ethically acceptable (Declaration of Malta, principle no.2).

Physicians attending hunger strikers can experience a conflict between their loyalty to the employing authority (such as prison management) and their loyalty to patients. Physicians with dual loyalties are bound by the same ethical principles as other physicians, that is to say that their primary obligation is to the individual patient (Declaration of Malta, principle no. 4).

In this respect, it was stressed out that health care professionals employed as civil servants of the prison authority [as it is the case in Romania – *A/N, R.F.G.*] and subject to civil service rules also may encounter demands for dual loyalty and limitations of medical independence and confidentiality. This is particularly the case whenever nonmedical superiors in the administrative prison hierarchy abuse their responsibility of supervision by interfering in medical issues.[6]

On the contrary, private health care professionals, subject to no other command than their professional code, are less likely to defer to prison authorities who pressure them to compromise exclusive loyalty to their patients. Full-time prison health care professionals are more likely to succumb to institutional cultures that subordinate patient interest to agendas of the prison than are part-time professionals who also work outside of prison walls and maintain continuous contact with health care in the community. Dual loyalty is least likely to arise where health care services are organized independently of the prison authorities. Prison authorities then take responsibility only for medical tasks deemed necessary for safety and security or for forensic purposes.[7]

Of particular importance are the guidelines for the management of hunger strikers set out by the Declaration of Malta (no. 10, 12, 13):

If no discussion with the individual is possible and no advance instructions exist, physicians have to act in what they judge to be the person's best interests. This means considering the hunger strikers' previously expressed wishes, their personal and cultural values as well as their physical health. In the absence of any evidence of hunger strikers' former wishes, physicians should decide whether or not to provide feeding, without interference from third parties.

Artificial feeding can be ethically appropriate if competent hunger strikers agree to it. It can also be acceptable if incompetent individuals have left no unpressured advance instructions refusing it.

Forcible feeding is never ethically acceptable. Even if intended to benefit, feeding accompanied by threats, coercion, force or use of physical restraints is a form of inhuman and degrading treatment. Equally unacceptable is the forced feeding of some detainees in order to intimidate or coerce other hunger strikers to stop fasting.

As we can see, the WMA considers force-feeding ethically unacceptable. There is a confict of values between the duty of care to safeguard life and the right to physical integrity. Physicians should, however, prevent any act that could amount to torture or inhuman and degrading treatment. If a decision is nevertheless taken to force-feed a prisoner on hunger strike, such a decision should be based upon medical necessity and should be carried out under suitable conditions that refect the medical nature of the measure. The decision-making process should follow an established procedure, which contains sufficient safeguards, including independent medical decision-making. The methods used to execute force-feeding should not be unnecessarily painful and should be applied with skill and minimum force. Force-feeding should

[5] *WMA Declaration of Malta on Hunger Strikers*, adopted by the 43rd World Medical Assembly, St. Julians, Malta, November 1991 and editorially revised by the 44th World Medical Assembly, Marbella, Spain, September 1992 and revised by the 57th WMA General Assembly, Pilanesberg, South Africa, October 2006, accessed March 25, 2016, http://www.wma.net/en/30publications/10policies/h31/index.html.

[6] Pont, Stöver, and Wolff, *Dual Loyalty in Prison Health Care*.

[7] Pont, Stöver, and Wolff, *Dual Loyalty in Prison Health Care*.

infringe the physical integrity of the hunger striker as little as possible.[8]

But, as it was stressed out, the Malta Declaration does not resolve the dilemma. It provides only that the ultimate decision on whether to intervene or not should be left to the medical doctor.[9]

Once the prisoner's judgement is no longer rational or unimpaired, then he or she is no longer in a position to withhold consent, thus entering a condition wherein a concept of presumed consent can be held to operate. At least, such an approach is more easily reconciled with respect for the inherent dignity of the human person than is forcibly feeding a conscious and rational prisoner against his or her will.[10]

Rodley's above mentioned approach may be true if there is no prior consent of the prisoner, but the dilemma (whether medical practitioners should intervene) is at its most extreme where a hunger-striking prisoner loses consciousness and with it the ability to make a rational decision about whether to continue the hunger strike, but has left instructions that, even if this were to happen, he is not to be force-fed. There is an obvious tension in all these instances between the recognition of prisoner's right to choose, which is closely related to their right to physical integrity and human dignity, and the positive obligation on the state under Article 2 of the ECHR to protect human life.[11]

The respect for individuals' autonomy should be present in the case of hunger strikers. In this respect, it is mandatory that both the prison administration and the medical staff can communicate with the prisoner in order to know the reasons and the problems that need to be addressed in order to cease the hunger strike.

In any case, the force-feeding of a prisoner is not an ethical medical standard. To this end, the medical ethics only allow for artificial feeding in certain cases, with the compliance of certain conditions, but in the same time observing that the patient's autonomy is not infringed.

Finally, it should be stressed out that these minimum medical rules of ethics and guidelines are of the most importance, as the ECtHR examines and considers hunger strike from medical perspective, so the analyse of the cases is made in principle on the basis of the therapeutic necessity to artificially feed a prisoner.

2.2. European Convention of Human Rights and the case-law set out by the European Court of Human Rights

a.) Nobody should die in detention and Member States should ensure that every detainee is afforded the basic human dignity of dying outside of prison. Member States should ensure that all persons in detention receive the same level of medical care obtainable by other members of society.[12]

The shaping up of this future golden rule (*nobody should die in detention*) regarding the execution of prison penalties can be analysed in relation with the hunger strikes and the need to suspend the execution of the prison penalty on medical grounds.

Moreover, the equality of the quality of medical services recieved by prisoners (as other members of society) means, *inter alia*, that the prisoners should be subject to the same ethical and medical standards in case of hunger strike.

Although at international level the **United Nations Standard Minimum Rules for the Treatment of Prisoners**[13] are silent about the hunger strikes and force-feeding, at the European level, the **Recommendation no. R (98) 7 of the Committee of Ministers concerning the ethical and organisational aspects of health care in prison**[14] establishes a series of principles and recommendations which medical healthcare in prisons has to meet, including in relation with the hunger strike procedure (nos. 61-63 of the Recommendation):

The clinical assessment of a hunger striker should be carried out only with the express permission of the patient, unless he or she suffers from serious mental disorders which require the transfer to a psychiatric service.

Hunger strikers should be given an objective explanation of the harmful effects of their action upon their physical well-being, so that they

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[8] Lehtmets and Pont, *Prison health care and medical ethics. A manual for health-care workers and other prison staf with responsibility for prisoners' well-being*, 44-45.

[9] D. van Zyl Smit, S. Snacken, *Principles of European prison law and policy. Penology and human rights* (Oxford: Oxford University Press, 2011), 167.

[10] Rodley and Pollard, *The treatment of prisoners under international law*, 419.

[11] van Zyl Smit and Snacken, *Principles of European prison law and policy. Penology and human rights*, 166.

[12] A. Gross, *The fate of critically ill detainees in Europe. Report* (Committee on Legal Affairs and Human Rights, 13 November 2015), 1, accessed March 25, 2016, http://semantic-pace.net/tools/pdf.aspx?doc=aHR0cDovL2Fzc2VtYmx5LmNvZS5pbnQvbncveG1sL1hSZWYvWDJILURXLWV4dHIuYXNwP2ZpbGVpZD0yMjI0NCZsYW5nPUVO&xsl=aHR0cDovL3NlbWFudGljcGFjZS5uZXQvWHNsdC9QZGYvWFJlZi1XRC1BVC1YTUwyUERGLnhzbA==&xsltparams=ZmlsZWlkPTIyMjQ0

[13] *United Nations Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules)*, accessed March 25, 2016, http://www.penalreform.org/wp-content/uploads/1957/06/PRI-Marked-version-of-Nelson-Mandela-Rules-3rd-Cmmttee-Resolution.pdf.

[14] *Recommendation no. R (98) 7 of the Committee of Ministers to member states concerning the ethical and organisational aspects of health care in prison* (adopted by the Committee of Ministers on 8 April 1998, at the 627th meeting of the Ministers' Deputies), accessed March 25, 2016, http://www.legislationline.org/documents/action/popup/id/8069.

understand the dangers of prolonged hunger striking.

If, in the opinion of the doctor, the hunger striker's condition is becoming significantly worse, it is essential that the doctor report this fact to the appropriate authority and take action in accordance with national legislation (including professional standards).

As it can be noted, the Recommendation includes the issues of refusal of nourishment in the generic term of right to health of the detainees, whereas the focus is on the medical act.

b.) Article 3 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) enshrines one of the basic values of the democratic societies whose core purpose is to protect a person's dignity and physical integrity – prohibition, in absolute and unqualified terms, of torture or inhuman or degrading treatment or punishment[15], thus protecting, *inter alia*, the persons deprived of their liberty against the abuses of the prison administration.

Given the exposed position of the persons deprived of their liberty, member states need to give special attention upon fulfilling their obligation to taking all necessary measures in order to ensure the protection of those persons against torture or inhuman or degrading treatment or punishment. At this stage, mention should be made that a large proportion of the cases before the Commission and European Court of Human Rights (ECtHR) case-law have been introduced by prisoners, who are perhaps in a particularly vulnerable position, almost, if not all, aspects of their lives being subject to regulation by authorithy. The potential for interference and restriction in fundamental rights and freedoms is considerable.[16]

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.[17]

c.) ECtHR case-law on article 3 of the Convention. The force feeding of the detainee within the hunger strike procedure can lead, as it can be easily noted further below, to the violation of the provisions of art. 3 of the Convention for the Protection of Human Rights and Fundamental Freedoms.

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 is, in the nature of things, relative; it depends on all the circumstances of the case, such as the nature and context of the treatment, the manner and method of its execution, its duration, its physical or mental effects and, in some instances, the sex, age and state of health of the victim.[18]

Forced feeding of prisoners staging a hunger strike. In its previous case-law, the Commission stated that in its opinion forced feeding of a person does involve degrading elements which in certain circumstances may be regarded as prohibited by art. 3 of the Convention.[19]

In the ***Herczegfalvy v. Austria*** case, the Court considered that the position of inferiority and powerlessness which is typical of patients confined in psychiatric hospitals calls for increased vigilance in reviewing whether the Convention has been complied with. The established principles of medicine are admittedly in principle decisive in such cases (patients who are entirely incapable of deciding for themselves); as a general rule, a measure which is a therapeutic necessity cannot be regarded as inhuman or degrading. The Court must nevertheless satisfy itself that the medical necessity has been convincingly shown to exist.[20]

In other words, involuntary therapeutic treatment is unlikely to give rise to any Article 3 issue provided always that this is administered in accordance with contemporary medical standards.[21]

In this particular case it is above all the length of time during which the handcuffs and security bed were used which appears worrying. However, the evidence before the Court is not sufficient to disprove the Government's argument that, according to the psychiatric principles generally accepted at the time, medical necessity justified the treatment in issue. Moreover, certain of the applicant's allegations are not supported by the evidence.

[15] *Article 3 – Prohibition of torture*
No one shall be subjected to torture or to inhuman or degrading treatment or punishment.

[16] K. Reid, *A practitioner's guide to the European Convention on Human Rights*, 3rd edition (London: Thomson Sweet & Maxwell, 2008), 464.

[17] A. Reidy, *The prohibition of torture. A guide to the implementation of Article 3 of the European Convention on Human Rights* (Strasbourg: Human rights handbooks, No. 6, Directorate General of Human Rights, Council of Europe, 2002), 19, accessed March 25, 2016, http://www.echr.coe.int/LibraryDocs/DG2/HRHAND/DG2-EN-HRHAND-06%282003%29.pdf.

[18] ECtHR, *Kudla v. Poland*, no. 30210/96, §91, 26 October 2000. ECtHR judgement from, in the case of. All the ECtHR judgements mentioned in this study are available on the website of the ECtHR - http://hudoc.echr.coe.int and were accesed in March 19, 2016.

[19] European Commission of Human Rights, *X. v. Germany* (dec.), no. 10565/83, 9 May 1984.

[20] ECtHR, *Herczegfalvy v. Austria*, no. 10533/83, §82, 24 September 1992.

[21] J. Murdoch, *The treatment of prisoners. European standards* (Strasbourg: Council of Europe Publishing, 2006, reprinted 2008), 295.

Hence, no violation of Article 3 (art. 3) has been shown.[22]

In the ***Nevmerzhitsky v. Ukraine*** case[23], the applicant complained that he had been held in detention and in particular in the isolation cell despite the fact that he had been suffering from a number of chronic diseases. The applicant also maintained that he had been deprived of adequate medical treatment while remanded in custody. The applicant alleged that he had been force-fed while on hunger strike, without any medical necessity being established by the domestic authorities, which had caused him substantial mental and physical suffering. In particular, he alleged that he had been handcuffed to a heating appliance in the presence of guards and a guard dog (in his further complaints he did not mention the guard dog), and had been held down by the guards while a special medical tube was used to feed him.

On the force-feeding of the applicant: The Court reiterates that a measure which is of therapeutic necessity from the point of view of established principles of medicine cannot in principle be regarded as inhuman and degrading. The same can be said about force-feeding that is aimed at saving the life of a particular detainee who consciously refuses to take food. The Convention organs must nevertheless satisfy themselves that the medical necessity has been convincingly shown to exist (see *Herczegfalvy v. Austria*, § 83, cited above). Furthermore, the Court must ascertain that the procedural guarantees for the decision to force-feed are complied with. Moreover, the manner in which the applicant is subjected to force-feeding during the hunger strike shall not trespass the threshold of a minimum level of severity envisaged by the Court's case law under Article 3 of the Convention. The Court will examine these elements in turn.

At the outset, the Court notes that the applicant did not claim that he should have been left without any food or medicine regardless of the possible lethal consequences. However, he claimed that there had been no medical necessity to force-feed him, as there had been no medical examinations, relevant tests or other documents that sufficiently proved that necessity. He claimed that the decision to subject him to force-feeding had been based on the analysis of the acetone level in his urine. He further maintained that the force-feeding had been aimed at his humiliation and punishment, as its purpose had been to make him stop the hunger strike and, in the event of his refusal, to subject him to severe physical suffering.

As to the manner in which the applicant was fed, the Court assumes, in view of the submissions of the parties, that the authorities complied with the manner of force-feeding prescribed by decree. However, in themselves the restraints applied – handcuffs, a mouth-widener, a special rubber tube inserted into the food channel – in the event of resistance, with the use of force, could amount to torture within the meaning of Article 3 of the Convention, if there is no medical necessity.

In the instant case, the Court finds that the force-feeding of the applicant, without any medical justification having been shown by the Government, using the equipment foreseen in the decree, but resisted by the applicant, constituted treatment of such a severe character warranting the characterisation of torture. In the light of the above, the Court considers that there has been a violation of Article 3 of the Convention.

Medical assistance and treatment provided for the applicant: The applicant suspended his hunger strike on 14 July 1998, resuming in October 1998. However, from the records submitted by the Government it is clear that the applicant was not examined or attended by a doctor from 5 August 1998 to 10 January 2000. In the Court's view, this cannot be deemed to be adequate and reasonable medical attention, given the hunger strike and the diseases from which the applicant was suffering. Furthermore, the Government have provided no written records as to the force-feeding throughout the hunger strike, the kind of nutrition used or the medical assistance provided to him in this respect.

In these circumstances, the Court considers that there has been a violation of Article 3 of the Convention as regards the lack of adequate medical treatment and assistance provided to the applicant while he was detained, amounting to degrading treatment.

In ***Ciorap v. Moldova***[24], Strasbourg Court held that there is a violation of article 3 of the ECHR, as repeated force-feeding of the applicant performed in a manner which unnecessarily exposed him to great physical pain and humiliation, was considered torture. As it can be observed from the judgement, the Court held a violation of article 3 not only because of the force-feeding, but also because of an intervention of several factors, especially the unnecessary use of force, namely handcuffing and the fact that the forced-feeding was not supported by valid medical reasons.

[22] ECtHR, *Herczegfalvy v. Austria*, §83-84.

[23] ECtHR, *Nevmerzhitsky v. Ukraine*, no. 54825/00, §78, 93-99 and §102-106, 5 April 2005.

[24] ECtHR, *Ciorap v. Moldova*, no. 12066/02, §84-85 and §88-89, 19 June 2007. The Court was struck by the manner of the force-feeding, including the unchallenged facts of his mandatory handcuffing regardless of any resistance, the causing of severe pain in order to force him to open his mouth and the pulling of his tongue outside of his mouth with metal tongs.

In ***Pandjikidzé and Others v. Georgia***[25], relying on article 3 (prohibition of inhuman or degrading treatment) of the Convention, the first applicant complained in particular about the lack of reaction on the part of the competent authorities to his 115-day hunger strike (to show disagreement with the criminal proceedings against him), while he was held in pre-trial detention.

The Court observed that he had never been force-fed and had not complained to the Court that the authorities should have taken such action. Even though his state of health must have declined, it did not appear from the case file that his life had been exposed to an obvious danger as a result of the authorities' attitude, and therefore that force-feeding would have been justified by any "medical imperative", or that he had been deprived of medical treatment appropriate to his state of health, or that he had been medically unfit to remain in prison. The Court therefore declared the complaint **inadmissible** (manifestly ill-founded) pursuant to article 35 (admissibility criteria) of the Convention.

In ***Özgül v. Turkey***[26], the applicant went on hunger strike while he was in prison. A few months later he was admitted to a hospital ward reserved for prisoners, but he refused treatment. The Institute of Forensic Medicine examined him and diagnosed him with Wernicke-Korsakoff syndrome[27], recommending that his sentence be suspended for six months. His request for release having subsequently been denied. One month after he had been sentenced to life imprisonment, when his health deteriorated, the doctors decided to impose treatment on him. The applicant complained in particular about the authorities' medical intervention against his will.

As to the medical intervention complained of by the applicant, the Court observed that article 3 (prohibition of inhuman or degrading treatment) of the Convention imposed an obligation on the State to protect the physical well-being of persons deprived of their liberty, for example by providing them with the requisite medical assistance. The persons concerned nevertheless remained under the protection of article 3, whose requirements permitted of no derogation. In the present case, the Court noted that the applicant had been under permanent medical supervision in a hospital since late December 2001. Until 15 March 2002 the doctors had not imposed treatment, but on that date they noted a deterioration of his state of health and found medical intervention and force-feeding to be necessary. Thus, for as long as the applicant's medical condition had been satisfactory the doctors had respected his wishes and they had only intervened when a medical necessity had been established. They had then acted in the applicant's interest, with the aim of preventing irreversible damage. Moreover, it had not been established that the aim of the medical intervention was to humiliate or punish him. It could be seen from the file that there had never been any question of using means of restraint. The Court thus found the complaint **inadmissible** (manifestly ill-founded) under article 35 (admissibility criteria) of the Convention.

Re-imprisonment of convicted persons suffering from the Wernicke-Korsakoff syndrome. The Court has established that article 3 may go as far as requiring the conditional liberation of a prisoner who is seriously ill or disabled, notably where the detainee either can no longer receive adequate treatment while in detention, or his or her condition is so poor that it would be inhuman and degrading to keep him or her in detention. Exemplary cases in which a detainee's condition was no longer deemed compatible with detention, necessitating either temporary or permanent release, include *inter alia*, the conditional liberation due to the continued detention of a detainee suffering complications of a hunger strike.[28]

For example, in ***Tekin Yıldız v. Turkey***[29], the applicant was diagnosed with Wernicke-Korsakoff Syndrome in July 2001. His sentence was suspended for six months on the ground that he was medically unfit, and the measure was extended on the strength of a medical report which found that his symptoms had persisted. A warrant was issued for his arrest in October 2003 after he was suspected of having resumed his activities with the terrorist organisation. On 21 November 2003 he was arrested and sent back to prison. Despite an early ruling that he had no case to answer, he remained in prison for eight months and it was not until 27 July 2004 that he was finally released.

The Court held that there had been a **violation of article 3** (prohibition of inhuman or degrading treatment) of the Convention on account of the applicant's re-imprisonment from 21 November 2003 to 27 July 2004. It observed in particular that the fact that an applicant had inflicted harm upon himself by going on a prolonged hunger strike did not release a State from any of its obligations towards such persons under article 3. Considering, in the instant case, that the applicant's state of health had been consistently found to be incompatible with detention and that there was no evidence to cast doubt on those findings, it found that the domestic

[25] ECtHR, *Pandjikidzé and Others v. Georgia* (dec.), no. 30323/02, 20 June 2009. See European Court of Human Rights. Press Unit. *Factsheet – Hunger strikes in detention* (2015), 2, accessed March 25, 2016, http://www.echr.coe.int/Documents/FS_Hunger_strikes_detention_ENG.pdf.

[26] ECtHR, *Özgül v. Turkey* (dec.), no. 7715/02, 6 March 2007. See *Factsheet – Hunger strikes in detention,* 2.

[27] Encephalopathy consisting in the loss of certain cerebral functions, resulting from a deficiency of vitamin B1 (thiamine).

[28] Gross, *The fate of critically ill detainees in Europe*, 10.

[29] ECtHR, *Tekin Yıldız v. Turkey,* no. 22913/04, 10 November 2005. See *Factsheet – Hunger strikes in detention,* 6.

authorities who had decided to return the applicant to prison and detain him for approximately eight months, despite the lack of change in his condition, could not be considered to have acted in accordance with the requirements of Article 3. The Court further held that **there would be a violation of article 3** of the Convention if the applicant was re-imprisoned without there being a marked improvement in his medical fitness to withstand such a measure.

In ***Sinan Eren v. Turkey***[30], the applicant was diagnosed as suffering from Wernicke-Korsakoff syndrome in October 2002 and his sentence was suspended as a result. In January 2004 a medical report concluded that the suspension of his prison sentence was no longer justified on medical grounds and a warrant was issued for his arrest. The applicant absconded. Alleging that the stay of execution of his sentence had been lifted based on a medical report of no scientific value and which clearly contradicted the previous medical reports, the applicant submitted in particular that he was suffering from Wernicke-Korsakoff Syndrome and that his possible return to prison would constitute a violation of article 3 (prohibition of inhuman or degrading treatment) of the Convention.

The Court held that there had been **no violation of article 3** (prohibition of inhuman or degrading treatment) of the Convention. It observed in particular that, having examined him on 11 September 2004, the panel of experts appointed by the Court had unanimously concluded that the applicant was not suffering from any neurological or neuropsychological disorders that made him unfit to live in prison conditions. The Court could only share its own experts' opinion and it therefore considered that the applicant's return to prison would not in itself constitute a violation of article 3 of the Convention.

d.) ECtHR case-law on article 2 of the Convention. Exceptionally, the issue of refusal of nutrition and force feeding can pose a problem also in the light of article 2 of the Convention. When a detained person maintains a hunger strike this may inevitably lead to a conflict between an individual's right to physical integrity and the High Contracting Party's obligation under art. 2 of the Convention – a conflict which is not solved by the Convention itself.[31]

In ***Horoz v. Turkey***[32], the applicant's son died in 2001 while in prison after going on hunger strike to protest against the introduction of "F-type" prisons, designed to provide living spaces for two to three persons instead of dormitories. Before the Court, the applicant complained in particular that the judicial authorities' refusal to release her son, contrary to the opinion of the Institute of Forensic Medicine, had led to his death.

The ECtHR held that there had been no violation of article 2 (right to life) of the ECHR with regard to the death of the applicant's son, since it had been impossible to establish a causal link between the refusal to release him and his death. It observed that the death in this case had clearly been the result of the hunger strike. The applicant had not complained either about her son's conditions of detention or of an absence of appropriate treatment. The Court found that the authorities had amply satisfied their obligation to protect the applicant's son's physical integrity, specifically through the administration of appropriate medical treatment, and that they could not be criticised for having accepted his clear refusal to allow any intervention, even though his state of health had been life-threatening.

Also, when analysing the findings of the ECtHR in the *Nevmerzhitsky v. Ukraine* case, one can observe that the judgment does not settle the significant question of when, if at all, a medical doctor may recommend that a prisoner be fed without his consent. However, it can be argued, in the light of the Court's full and uncritical referral to the declarations of the WMA, that is now recognized at a European level that established principles of medicine require a doctor not to intervene in the case of a prisoner who wishes to continue with a hunger strike and who is capable of making an informed decision in that regard. At the very least, a state that follows a doctor's advice to respect such a decision should not find itself subject to a complaint on the ground of having failed in its duties under article 2 to protect life. The provision in respect of the prisoner who whishes not to be treated even after he has lapsed into unconsciousness as a result of a hunger strike, is less clear, but the same argument may succeed here.[33]

e.) From the **procedural point**, 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

[30] ECtHR, *Sinan Eren v. Turkey*, no. 8062/04, 10 November 2005. See *Factsheet – Hunger strikes in detention,* 6-7.
[31] European Commission of Human Rights, *X. v. Germany* (dec.).
[32] ECtHR, *Horoz v. Turkey*, no. 1639/03, 31 May 2009. See *Factsheet – Hunger strikes in detention,* 1.
[33] van Zyl Smit and Snacken, *Principles of European prison law and policy. Penology and human rights,* 170-171.

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. Thus, the investigation lacked independence where members of the same division or detachment as those implicated in the alleged ill-treatment were undertaking the investigation. The independence of the investigation implies not only the absence of a hierarchical or institutional connection, but also independence in practical terms.[34]

For example, in ***Leyla Alp and Others v. Turkey***[35], the Court held that there had been a **procedural violation of Article 2** (right to life) of the Convention in respect of one of the applicants, and a **procedural violation of Article 3** (prohibition of inhuman or degrading treatment) of the Convention in respect of five other applicants, finding that the investigation and proceedings conducted by the national authorities had failed to satisfy the requirements of promptness and reasonable expedition implicit in the context of the positive obligations at issue.

2.3. The standards of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment

According to article 1 from the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) shall, by means of visits, examine the treatment of persons deprived of their liberty with a view to strengthening, if necessary, the protection of such persons from torture and from inhuman or degrading treatment or punishment.

When analyzing the activity of the CPT, Leidekker argues that perhaps the most striking development since 2001 is the altered attitude of the CPT as regards examining medical interventions; until fairly recently, the CPT preferred not to assess the content of a medical intervention carried out on a person deprived of his/her liberty.[36]

For some reason this approach changed: in the last few years, the CPT assessed a medical intervention, as it considered the situation of a prisoner who had been repeatedly forcibly fed by the Spanish authorities[37] in the course of his hunger strikes.[38]

Still, so far, the CPT has taken a cautious approach vis-à-vis medical interventions, which is rather similar to the manner in which the European Court of Human Rights tends to address such matters. The Court's approach is based on the concept of 'therapeutic necessity'.[39]

As a general principle, the CPT does not believe that it is the Committee's role to pronounce on the question whether it is right to force-feed a detained person on hunger strike.[40]

However, the CPT emphasized certain standards which should be met in the event that a decision is taken to force-feed a prisoner.

The minimum standards set out by the CPT are provided in the *Report to the Spanish Government on the visit to Spain (2007)*[41]:

If a decision is taken to force-feed a prisoner on hunger strike, in the CPT's view, such a decision should be based upon medical necessity and should be carried out under suitable conditions that reflect the medical nature of the measure. Further, the decision-making process should follow an established procedure, which contains sufficient safeguards, including independent medical decision-making. Also, legal recourse should be available and all aspects of the implementation of the decision should be adequately monitored.

The methods used to execute force-feeding should not be unnecessarily painful and should be applied with skill and minimum force. More generally, force-feeding should infringe the physical integrity of the hunger striker as little as possible. Any resort to physical constraint should be strictly limited to that which is necessary to ensure the execution of the force-feeding. Such constraint should be handled as a medical matter.

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[34] ECtHR, *Mikhenyev v. Russia*, no. 77617/01, §107-108 and 110, 26 January 2006.

[35] ECtHR, *Leyla Alp and Others v. Turkey*, no. 29675/02, 10 December 2013. See *Factsheet – Hunger strikes in detention*, 5.

[36] *CPT, Report to the Turkish Government on the visits to Turkey*, carried out by the CPT from 10 to 16 December 2000 and 10 to 15 January 2001 and from 18 to 21 April and 21 to 24 May 2001, CPT Doc. CPT/Inf (2001) 31, §33. "*(…) the issue of the artificial feeding of a hunger striker against his/her wishes is a delicate matter about which different views are held. (…) The CPT understands that the World Medical Association is currently reviewing its policy on this subject. To date, the CPT has refrained from adopting a stance on this matter. However, it does believe firmly that the management of hunger strikers should be based on a doctor/patient relationship. Consequently, the Committee has considerable reservations as regards attempts to impinge upon that relationship by imposing on doctors managing hunger strikers a particular method of treatment".* See, M. Leidekker, *Evolution of the CPT's Standards Since 2001,* Essex Human Rights Review, Volume 6 (2009), 103, accessed March 25, 2016, http://projects.essex.ac.uk/ehrr/V6N1/Leidekker.pdf.

[37] *CPT, Report to the Spanish Government on the visit to Spain*, carried out by the CPT from 14 to 15 January 2007 (Strasbourg, 2009), accessed March 25, 2016, http://www.cpt.coe.int/documents/esp/2009-10-inf-eng.htm.

[38] Leidekker, *Evolution of the CPT's Standards Since 2001*, 103-104.

[39] Leidekker, *Evolution of the CPT's Standards Since 2001*, 104.

[40] News Flash - Council of Europe anti-torture Committee publishes report on Spain, accessed March 25, 2016, http://www.cpt.coe.int/documents/esp/2009-02-03-eng.htm.

[41] *CPT, Report to the Spanish Government on the visit to Spain*, no. 14.

Force-feeding a prisoner without meeting the standards set out above could very well amount to inhuman or degrading treatment.

According to the CPT standards, regarding the patient's consent, in the event of a hunger strike, public authorities or professional organisations in some countries will require the doctor to intervene to prevent death as soon as the patient's consciousness becomes seriously impaired. In other countries, the rule is to leave clinical decisions to the doctor in charge, after he has sought advice and weighed up all the relevant facts.[42]

For the CPT, when examining a medical intervention, article 3 of the ECHR remains the reference point; in other words, it is not under the CPT's mandate to decide on primacy among conflicting fundamental rights, such as the right to life versus the right to physical integrity, which is at the core of the ongoing discussion about forced feeding of hunger strikers.[43]

Concluding, it was stressed out that the landscape in which the CPT operates is altering rapidly. It took years of intensive lobbying before the CPT could be established; now, international monitoring of detention conditions appears to be fully accepted.[44]

2.4. The U.S. case

If at European level there is, as noted above, a minimum of standards and regulations in place concerning hunger strikers and force feeding of detainees, within the North-American legislation the prison administration has rather permissive margin of action, whereas the case-law under certain conditions validates the intentional deprivation or reduction of food rationing for detainees.

Against this background, a prisoner's allegations in his conditions-of-confinement claim that he was deprived of food, drink, and sleep for four days were insufficient to state a claim for physical injury.[45]

The prison's feeding rule required a prisoner to stand in the middle of his cell, with the lights on, when the meal was delivered and that he wear trousers or gym shorts. If the prisoner did not comply with the rule, the meal was not served. The prisoner wanted to eat in his underwear, so on a number of occasions over a two-and-a-half-year period, he refused to put on the pants or shorts and, as a result, was not served. Because he skipped so many meals, he lost 45 pounds. The prison also refused to serve the prisoner when he had a sock on his head because this could be used to hide a weapon. The prisoner's cell walls were smeared with blood and feces that he refused to clean. Under these circumstances, the prisoner's food deprivation was self-inflicted. The prisoner failed to show how many of his missed meals were missed for reasons that could not be related to his refusal to comply with a reasonable condition on the receipt of food. The prisoner experienced no real suffering, extreme discomfort or any lasting detrimental health consequences.[46]

On the other hand, denying food for a 50-hour period was held to go beyond what was necessary to achieve a legitimate correctional aim.[47]

Also, a trial court's order that prison officials place a defendant in solitary confinement and feed him only bread and water on the anniversary of his offense was impermissible.[48]

Special issues have been reported concerning **the situation of detainees at Guantánamo Bay**, as excessive use of force and force feeding of prisoners have been established to be documented and usual practices whereas such practices at the level of the Council of Europe, as noted above, have been considered inhuman and degrading treatment or even torture[49].

In this sense, there are recurrent reports of contexts in which excessive force was routinely used, including the context regarding the force-feeding during hunger strikes. According to reports by the defence counsels, some of the methods used to force-feed definitely amounted to torture[50].

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[42] *CPT standards*, "Substantive" sections of the CPT's General Reports (CPT/Inf/E(2002)1-Rev.2015), no. 46, accessed March 25, 2016, http://www.cpt.coe.int/en/docsstandards.htm.

[43] Leidekker, *Evolution of the CPT's Standards Since 2001*, 103-104.

[44] Leidekker, *Evolution of the CPT's Standards Since 2001*, 105.

[45] Mitchell v. Horn, 318 F.3d 523 (3d Cir. 2003) in J. W. Palmer, *Constitutional Rights of Prisoners*, 9th Edition (New Providence, New Jersey: Lexis Nexis Anderson, 2010), 429.

[46] Freeman v. Berge, 441 F.3d 543 (7th Cir. 2006) in Palmer, *Constitutional Rights of Prisoners*, 285-286.

[47] Dearman v. Woods, 429 F.2d 1288 (10th Cir. 1970) in Palmer, *Constitutional Rights of Prisoners*, 107.

[48] People v. Joseph, 434 N.E.2d 453 (I11. Ct. App. 1982) in Palmer, *Constitutional Rights of Prisoners*, 107.

[49] See, for example, ECtHR, *Nevmerzhitsky v. Ukraine*; ECtHR, *Ciorap v. Moldova*.

[50] *"They are being force-fed through the nose. The force-feeding happens in an abusive fashion as the tubes are rammed up their noses, then taken out again and rammed in again until they bleed. For a while tubes were used that were thicker than a finger because the smaller tubes did not provide the detainees with enough food. The tubes caused the detainees to gag and often they would vomit blood. The force-feeding happens twice daily with the tubes inserted and removed every time. Not all of the detainees on hunger strike are in hospital but a number of them are in their cells, where a nurse comes and inserts the tubes there."* Accounts given by Attorney Julia Tarver (28 October 2005) *in Situation of detainees at Guantánamo Bay*. Report of the Chairperson-Rapporteur of the Working Group on Arbitrary Detention, Leila Zerrougui; the Special Rapporteur on the independence of judges and lawyers, Leandro Despouy; the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Manfred Nowak; the Special Rapporteur on freedom of religion or belief, Asma Jahangir; and the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, Paul

[*Concluding the Special Rapporteur considered that*] such treatment amounts to torture, as it inflicts severe pain or suffering on the victims for the purpose of intimidation and/or punishment.[51]

In the *Situation of detainees at Guantánamo Bay* Report[52] the authors underlined that, as we showed above, both the *Declarations of Tokyo and Malta* prohibit doctors from participating in force-feeding a detainee, provided the detainee is capable of understanding the consequences of refusing food. This position is informed by the fundamental principle, which recurs throughout human rights law, of individual autonomy. (…) Further, some domestic courts have decided, based on an individual's right to refuse medical treatment, that a State may not force-feed a prisoner[53]. While some other domestic courts have taken a different position, it is not clear that they have all given due consideration to the relevant international standards[54].

At national level, according to the United States Government, Department of Defense policy allows health professionals to force-feed a detainee in Guantánamo Bay when the hunger strike threatens his life or health.[55]

From the perspective of the right to health, informed consent to medical treatment is essential[56], as is its "logical corollary" the right to refuse treatment[57]. A competent detainee, no less than any other individual, has the right to refuse treatment[58]. In summary, treating a competent detainee without his or her consent - including force-feeding - is a violation of the right to health, as well as international ethics for health professionals.[59]

Concluding, it was stressed out that the Government of the United States should ensure that the authorities in Guantánamo Bay do not force-feed any detainee who is capable of forming a rational judgement and is aware of the consequences of refusing food. The United States Government should invite independent health professionals to monitor hunger strikers, in a manner consistent with international ethical standards, throughout the hunger strike.[60]

2.5. National legislation regarding the hunger strike

The majority of national legislations in Europe, as well as relevant international medical ethical codes, today consider that a competent adult may choose to refuse medical treatment even if it could save his life. Consequently, the authorities involved in the management of a hunger strike by a prisoner may often be faced with two potentially conficting values: their duty of care to safeguard a life and the prisoner's right to physical integrity (including the right not to have a treatment imposed on him).[61]

a.) Having regard to the difficulties posed by a detainee's refusal to feed himself/herself, the legal regulations created a detailed procedure for hunger strikers which establishes some clear tasks for the prison staff, but also with the intervention of the judge in charge of the supervision of deprivation of liberty in order to guarantee the respect of the hunger striker's rights.

The hunger strike procedure is detailed in art. 54 from the Law no. 254/2013 on enforcement of penalties and of measures ordered by the judicial bodies during the criminal proceedings[62] and art. 119-122 from the Government Decision no. 157/2016 for the approval of the Regulation of application of the Law No. 254/2013[63]. Against this

Hunt (United Nations, Economic and Social Council, Commission on Human Rights, Sixty-second session, E/CN.4/2006/120, 27 February 2006), 36, accessed March 25, 2016, https://documents-dds-ny.un.org/doc/UNDOC/GEN/G06/112/76/PDF/G0611276.pdf?OpenElement.

[51] *Situation of detainees at Guantánamo Bay,* 17-18.

[52] *Situation of detainees at Guantánamo Bay*, no. 80, 23.

[53] See, e.g., *Secretary of State for the Home Department v. Robb* [1995] Fam 127 (United Kingdom); *Thor v. Superior Court*, 21 California Reporter 2d 357, Supreme Court of California (1993); *Singletary v. Costello*, 665 So.2d 1099, District Court of Appeal of Florida (1996) in *Situation of detainees at Guantánamo Bay,* 41.

[54] See, generally, Mara Silver, "Testing Cruzan: Prisoners and the Constitutional Question of Self-Starvation", 58 Stanford Law Review 631 (2005) (collecting US jurisprudence on force-feeding of detainees) in *Situation of detainees at Guantánamo Bay,* 42.

[55] Committee on Economic, Social and Cultural Rights, general comment no. 14 (2000), E/C.12/2000/4, §8, 34 in*Situation of detainees at Guantánamo Bay,* no. 81, 23.

[56] Committee on Economic, Social and Cultural Rights, general comment No. 14 (2000), §8, 34 in *Situation of detainees at Guantánamo Bay*, 42.

[57] See *Cruzan v. Director Missouri Department of Health*, 497 U.S. 261, 269-70 (1990) (recognizing the right to refuse treatment as the logical corollary to the doctrine of informed consent) in *Situation of detainees at Guantánamo Bay,* 42.

[58] See *Secretary of State for the Home Department v. Robb* [1995] Fam 127 (United Kingdom); see also Chair of the Board of Trustees of the American Medical Association (AMA), Duane M. Cady, M.D., *AMA to the Nation, AMA unconditionally condemns physician participation in torture*, (20 December 2005) accessed at http://www.ama-assn.org/ama/pub/category/15937.html (10 February 2006) (clarifying that "every patient deserves to be treated according to the same standard of care whether the patient is a civilian, a US soldier, or a detainee" and acknowledging that the AMA position on forced feeding of detainees is set forth in the Declaration of Tokyo in *Situation of detainees at Guantánamo Bay,* 42.

[59] *Situation of detainees at Guantánamo Bay*, no. 82, 24.

[60] *Situation of detainees at Guantánamo Bay,* no. 103, 26.

[61] Lehtmets and Pont, *Prison health care and medical ethics. A manual for health-care workers and other prison staf with responsibility for prisoners' well-being*, 41.

[62] Law no. 254/2013 on enforcement of penalties and of measures ordered by the judicial bodies during the criminal proceedings, published in the *Official Journal of Romania*, Part I, no. 514 of August 14, 2013.

[63] Government Decision no. 157/2016 for the approval of the Regulation of application of the Law No. 254/2013, published in the *Official Journal of Romania*, Part I, no. 271 of April 11, 2016.

background, person who refuses food is monitored by the prison administration.

According to the above mentioned provisions, in case a sentenced person intends to refuse food, he/she notifies the supervisory agent verbally or in writing and submits to such agent any possible applications concerning the grounds for food refusal.

The supervisory agent shall notify immediately the head of the detention section about the matter, who shall hear the sentenced person and shall take appropriate measures, if the matters invoked fall under its jurisdiction. In case the sentenced person remains determined to refuse food, the head of the section shall inform the director and the doctor of the penitentiary.

The prison director hears the detainee and records in the standardized form the issues indicated by the detainee, the reasons which led to that form of protest, the measures ordered, as well as the detainee's option to further refuse food or to accept it. If the detainee upholds the hunger strike, the director has to inform the judge in charge of the supervision of deprivation of liberty and send him in writing a standardized form with indication of the date and hour when he was informed, accompanied, as case may be, by the detainee's grounds for food refusal [Regulation of application of the Law No. 254/2013, art. 120 para.(1)-(2)]. From the time of notifying the judge in charge of the supervision of deprivation of liberty, *it shall be considered that the sentenced person is in a situation of food refusal*.

Starting from the moment when a person is considered to be in food refusal, the legal provisions establish in detail the role of the judge in charge of the supervision of deprivation of liberty and the tasks he has to fulfill.

If the aspects noted by the detainee refer to aspects pertaining to the jurisdiction of the judge in charge of the supervision of deprivation of liberty (establishing or change of the regime in which custodial sentences are enforced, exercise of the detainees' rights or complaint against the decision of the discipline commission), the judge in charge of the supervision of deprivation of liberty is obliged to hear the detainee and will decide on the aspects raised by the detainee[64].

Having regard to the radicality of this form of protest, as well as the possible negative effects on the state of health or even life of the detainee, we think that the hearing of the detainee on hunger strike has to be performed by the judge in charge of the supervision of deprivation of liberty immediately.

According with the legal provisions, if the announcement occured during the working hours of the Office of judge in charge of the supervision of deprivation of liberty, the convicted person is heard on the same day. If the announcement occured after the working hours the hearing will pe performed the next day [Supreme Council of Magistracy Decision no. 89/2014 for the approval of the Regulation for organizing the activity of the judge in charge of the supervision of deprivation of liberty, art. 37 para.(2)[65]].

If the problems raised by the convicted person refer to other issues (not for the judge's competence), the judge in charge of the supervision of deprivation of liberty can hear the convicted person.

In such a situation the judge in charge of the supervision of deprivation of liberty can present to the prison director proposals concerning the measures which he consideres to be necessary [Regulation for organizing the activity of the judge in charge of the supervision of deprivation of liberty, art. 37 para.(2)].

Furthermore, if the detainee declares that he renounces the food refusal, the judge informs the prison director and notes this in the dedicated form. If the detainee declares that he does not renounce the food refusal, as well as in case the detainee was not heard, the dedicated form, containing the proposals of the judge in charge of the supervision of deprivation of liberty, is presented to the prison director [Regulation of application of the Law No. 254/2013, art. 120 para. (4)-(5)].

If the person refuses to make any declarations this has to be recorded in a protocol. For identity of judgment this last solution is also applicable where the convicted person says he is illiterate, when the matters stated have to be recorded in a protocol.

Following the hearing, if the person upholds its decision to refuse food, the judge can present to the prison director proposals in the dedicated form.

In must be observed the law-maker's approach consisting in the regulation of the administrative participation of the judge in charge of the supervision of deprivation of liberty in the hunger strike procedure as an individual task. The alternative solution – limitation of the judge's intervention strictly to giving court minutes in case the hunger striker complained about the exercise of his legal rights – we think would have very much restricted the judge's role. However, it is obvious that the judge's intervention within the food refusal

[64] It must be stressed out that, in the case-law developed under the previous legal framework, one can observe that in some cases there was an abuse of the regulation on food refusal, as the inmates adopted this form of protest only to gain access sooner to the judge, without respecting the audience program. See, *Report of the Judicial Inspection within the Supreme Council of Magistracy on the respect of legal provisions by the delegated judges, in accorance with the provisions of Law no. 275/2006 on enforcement of penalties and of measures ordered by the judicial bodies during the criminal proceedings,* no. 1806/IJ/1179/DIJ/2013, 25, accessed March 25, 2016, www.csm1909.ro/csm/linkuri/20_09_2013__60704_ro.doc.

[65] Supreme Council of Magistracy Decision no. 89/2014 for the approval of the Regulation for organizing the activity of the judge in charge of the supervision of deprivation of liberty, published in the *Official Journal of Romania*, Part I, no. 77 of January 31, 2014.

procedure should not be limited to solving the complaints concerning the exercise of the rights of the hunger striker.

According with the applicable legal provisions, the intervention of the judge in charge of the supervision of deprivation of liberty within the food refusal procedure is aimed not only to giving a decision concerning the exercise of rights, but also the hearing and deciding in relation with the issues raised by the convicted person which refer to the establishment or change of the regime for the enforcement of custodial penalties or, as case may be, the complaint against the decision of the discipline commission. The judge can also hear the convicted person in case he has other requests which are not subject to his jurisdiction, acting as an element of mediation, balance and equidistance between the convicted person as a hunger striker and the prison administration. Against this background one should note the very important role which the judge in charge of the supervision of deprivation of liberty has to play, who has to identify and analyze the causes which made the convicted person go on hunger strike.

The prison administration shall be under the obligation to temporarily transfer the person that refuses food in a medical institution within the medical network of the Ministry of Health and to notify the family of the sentenced person or someone close to the sentenced person, in case the health or bodily integrity of the sentenced person is seriously affected by refusal to eat.

Renouncing food refusal can be made through written or verbal statement before the prison staff, announcing the judge in charge of the supervision of deprivation of liberty (by letter accompanied by the statement concerning the renounciation to food refusal) or before the judge in charge of the supervision of deprivation of liberty [Regulation of application of the Law No. 254/2013, art. 122 para.(1)].

A special problem arises when several convicted person **as a group or the totality of the inmates** refuse food. In this case a discussion has to take place with each convicted person and the action will become the more stringent issue to be solved so that the prison administration will channel all its efforts towards mitigation of the event which can easily degenerate in general revolt or serious disturbance of order. In such cases the prison administration has to immediately make use of energy and means of positive influence, satisfaction of legitimate requests of the prison population. The prison administration also has to prepare the intervention forces so as to be able to defend the institution in case of danger.[66]

In any case food refusal, despite the fact that it is not a structural issue regarding the prison regime, has to be carefully looked at and assessed for each case individually, given that it is possible that the convicted person's requests are legitimate. Exposion to such physical suffering, even if not for a long time, or even when the detainee could not resist physically and morally several days, has to trigger at the level of the prison administration a special investigation as to establish if the detainee's version is not the right one. It is a ground for honour and deontology to be able to repair, even after a longer time, a situation which seems to have no solution.[67]

b.) In what concerns the food refusal, the prison's obligation arises as soon as the convicted person declares that he refuses to eat. Starting here the prison staff have to immediately fulfill all tasks as provided in the applicable regulations. The obligation of the prison administration is to undergo the intermediate stages up to the hearing of the convicted person by the judge in charge of the supervision of deprivation of liberty within the shortest time possible. If the prison staff do not fulfill the legal tasks, the judge in charge of the supervision of deprivation of liberty can intervene only to the extent in which non-fulfillment of these tasks interpheres with the exercise of one of the detainee's rights.

In other words, despite the fact that the judge's role within the food refusal procedure is limited acording with art. 54 para.(7)-(11) from the Law no. 254/2013 on enforcement of penalties and of measures ordered by the judicial bodies during the criminal proceedings, only to the hearing and deciding on the issues raised by the hunger striker (if the issues raised by the convicted person refer to matters of his jurisdiction), the judge can intervene within this procedure, upon the detainee's request, if one right of the detainee is affected by the behaviour of the prison staff.

In such a situation the delegated judge [now - *judge in charge of the supervision of deprivation of liberty*] held[68] the violation of the right ot medical healthcare, treatment and care, despite the fact that the detainee M.C. submitted a written request concerning food refusal to the head of the departement, which the latter, however, did not register, did not transfer the detainee to a room without food and did not order a medical consultation to be performed. Consequently, the judge held that the violation of the legal procedure affected the right to medical consultation, taking into

[66] I. Chiș, *Drept execuțional penal [Execution of Criminal Penalties Law]* (Bucharest: Wolters Kluver, 2009), 359. As it was noted, such cases in which the detainees are refusing meals in a group can cause violations of the ECHR standards. See, for example, ECtHR, *Leyla Alp and Others v. Turkey.*

[67] Chiș, *Drept execuțional penal [Execution of Criminal Penalties Law]*, 360-361.

[68] The delegated judge, Codlea Prison, judgement no. 63/2012, unpublished.

consideration also the fact that the prison staff exercised their tasks concerning food refusal only 4 days after the food refusal was announced, that is when the detainee complained before the judge.

Looking at the actions performed by the prison staff, it cannot be checked if the detainee refused food or did consume food, as he had not been transfered to a room without food and he had not been consulted by a physician; the prison administration's arguments concerning the fact that the intention to refuse food was not carried out during the day cannot be accepted because, if the detainee had accepted food, this would have been registered in a special register, including the detainee's signature, which was not the case.

3. Conclusions

The management of hunger strikers in prison is a controversial issue. Both Recommendation No. R (1998) 7 on the ethical and organisational aspects of health care in prison and the WMA Declaration on Hunger Strikers leave to the physician the discretion to act in a situation where a hunger strike becomes life-threatening for the prisoner.[69]

Professionals caring for prisoners should strictly and exclusively adhere to their role as caregivers to their inmate patients, acting in complete and undivided loyalty to them, and should firmly refuse to take over any professional obligation that is outside the interest of their prisoner patients. Professionally, they should be supervised by an authority other than the prison authorities, for example, the public health service or their professional association. In addition, inspections should be performed by an agency or organization that is independent of the prison authority or ministry of justice.[70]

Of course, when analysing the ECtHR case-law, one can observe that forcible feeding can in some circumstances violate the prohibition of torture and other ill-treatment under international law, where it is administered so as to cause unnecessary suffering or where not medically necessary. Medical ethics require doctors to respect the will of the hunger striker as long as the latter's judgement is rational and unimpaired.[71]

The medicalization of dealing with hunger strikes, which can be easily observed in the international standards (WMA) or the ECtHR case-law means that the action, when dealing with prisoners on hunger-strike, should be adressed by medical professionals, observing the ethics and methodology of their profession.

So, it must be stressed out that the decisions regarding force-feeding a prisoner on hunger strike must be of a medical nature, as asessed by the professionals (medical staff), without the involvement of the prison administration (as is the case in the U.S. law).

There is no need to involve the prison administration, as force-feeding a person does not involve an administrative decision regarding the order or discipline in the prison, but rather consists in a medical issue, which must be dealt with by the medical staff. As *van Zyl Smit and Snacken* emphasized, such a [*therapeutic*] relationship is itself a more humane way of dealing with the issue than relying on instructions given directly to prison officials.[72]

No human being should perish in detention, but trends in Europe show that more people die behind bars now than have in past years.[73] The Council of Europe must ask of its member States that laws and policies be examined in order to make changes that will allow for every human being to die with dignity, not chained to a bed while in detention.[74]

This trending principle must be taken into consideration when dealing with severe cases on hunger strikes among the prison population. For example, it would be in accordance with the ECtHR case-law to temporary release a prisoner suffering from Wernicke-Korsakoff Syndrome, disease generated by the complications from a hunger strike.

Turning to the Romanian case, it is important to stress out the evolution of the Romanian legislation since the entering into force of Law no. 254/2013 on enforcement of penalties and of measures ordered by the judicial bodies during the criminal proceedings, continuing with the adoption of the Government Decision no. 157/2016 for the approval of the Regulation of application of the Law No. 254/2013, emphasising the special attention given by the Romanian legislator in drafting and adopting legislation within the framework of international and European recommendations.

On the management of the hunger strikers, it should be stressed out the clear procedure provided for in the Romanian legislation, with the involvment of the judge in charge of the supervision of

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[69] Lehtmets and Pont, *Prison health care and medical ethics. A manual for health-care workers and other prison staf with responsibility for prisoners' well-being*, 40.

[70] Pont, Stöver, and Wolff, *Dual Loyalty in Prison Health Care*.

[71] Rodley and Pollard, *The treatment of prisoners under international law*, 419.

[72] van Zyl Smit and Snacken, *Principles of European prison law and policy. Penology and human rights*, 171.

[73] The most recent report of the Council of Europe Annual Penal Statistics indicates that from 2010 to 2012, the mortality rate in prisons rose from 25 deaths per 10 000 inmates to 28 deaths per 10 000 inmates. See M.F. Aebi, N. Delgrande, *SPACE I – Council of Europe Annual Penal Statistics: Prison populations. Survey 2013* (Strasbourg: Council of Europe, 2015), accessed March 25, 2016, http://wp.unil.ch/space/files/2015/02/SPACE-I-2013-English.pdf.

[74] Gross, *The fate of critically ill detainees in Europe*, no. 132, 26.

deprivation of liberty, an independend body with competence on supervising and controlling that the legality of custodial sentences is ensured.

There are no special provisions on force-feeding a prisoner, the Romanian legislation acknowledging the medical nature of the measure, providing that a person with complications from a hunger strike must be admitted immediately into a hospital, the medical procedures and ethics being incident in such a situation.

Concluding, when dealing to a hunger strike and the need of force-feeding the person, it is important to observe only the medical standards and ethics, without the involvement of the prison staff, as force-feeding a person is generally acknowledged as a measure of medical nature.

References:

1. Legislation

A. National Legislation

- Law no. 254/2013 on enforcement of penalties and of measures ordered by the judicial bodies during the criminal proceedings;
- Supreme Council of Magistracy Decision no. 89/2014 for the approval of the Regulation for organizing the activity of the judge in charge of the supervision of deprivation of liberty;
- Government Decision no. 157/2016 for the approval of the Regulation of application of the Law No. 254/2013.

B. International Legislation and Documents Adopted by International Bodies

- Council of Europe - Convention for the Protection of Human Rights and Fundamental Freedoms;
- Council of Europe – Recommendation no. R (98) 7 of the Committee of Ministers to member states concerning the ethical and organisational aspects of health care in prison;
- United Nations Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules);
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CRIMINAL TERRORIST GROUP IN THE NEW CRIMINAL LEGISLATION OF ROMANIA

Mirela GORUNESCU[*]

Abstract

In the Romanian criminal law, there is a specialized regulation that defines criminal terrorist group, as variant of plurality of offenders. The present study presents this kind of criminal group by identifying the elements of differentiation compared to the organized crime group regulated by the Criminal Code).

Keywords: *terrorism, organized criminal group, plurality set up, criminal law.*

1. Introduction

The terrorist phenomenon has always been a threat perceived as such by the world's states and for this reason considerable efforts have been undertaken to prevent and fight against it. Thus, one of the first countries that have taken legislative measures in this regard is Belgium, which since the 19th century has adopted an action plan to fight the phenomenon by introducing, in its criminal law, the "attack clause" which allowed the extradition of the perpetrators of political murders1.

International organizations have also adopted several of legal instruments which have as their main objective the prevention and fight against terrorism. Naturally, one of the most active organizations is the United Nations which, through its regulatory arrangements, succeeded in creating a coherent framework to enable the signatory states to fight efficiently against acts of terrorism.

At the European level, on 27 January 1977, the European Convention for the suppression of terrorism was adopted in Strasbourg2, amended by the amendment protocol to the European Convention for the suppression of terrorism, adopted in Strasbourg on 15 May 20033. The preamble of this legal instrument shows that the member states of the European Council, signatories of the convention, „considering that the purpose of the European Council is to achieve a closer union between its members, conscious of the growing unease caused by the multiplication of the acts of terrorism, wanting to take efficient measures so that the perpetrators should not escape prosecution and punishment, being convinced that extradition is a particularly efficient means to reach this result", have decided to adopt the measures included in the convention.

The main approach taken by this legal instrument was to exclude terrorist offenses from the category of political offenses, which would have made extradition ineffective. The very first article of the Convention shows that: „For extradition between the contracting states, any offense mentioned below will not be deemed a political offense, as an offense related to a political offense or as an offense inspired by political purposes: a) the offenses contained in the scope of the Convention for the suppression of the illicit taking of aircraft, signed in Hague on 16 December 1970; b) offenses covered by the scope of the Convention for the suppression of unlawful actions directed against civil aviation safety, signed in Montreal on 23 September 1971; c) offenses contained in the scope of the Convention on the prevention and suppression of offenses against persons enjoying international protection, including diplomatic agents, adopted in New York on 14 December 1973; d) offenses contained in the scope of the International Convention against the taking of hostages, adopted in New York on 17 December 1979; e) offenses included in the scope of the Convention on the physical protection of nuclear material, adopted in Vienna on 3 March 1980; f) offenses covered by the scope of the Protocol for the suppression of unlawful actions of violence at airports used by civil aviation, concluded in Montreal, on 24 February 1988; g) offenses within the scope of the Protocol for the suppression of unlawful actions against the safety of maritime navigation, concluded in Rome on 10 March 1988; h) offenses within the scope of the Protocol for the suppression of illegal actions against the safety of fixed platforms located on the continent, concluded in Rome on 10 March 1988; i) offenses within the scope of the International Convention for the suppression of terrorist attacks with explosives, adopted in New York on 15 December 1997; j) offenses within the scope of the International Convention for the suppression of the financing of

[*] Asociated Professor, PhD, Faculty of Law, "Nicolae Titulescu" University of Bucharest (e-mail: **mire_gor@yahoo.com**).

[1] The legislative framework to prevent and fight terrorism, https://www.sri.ro/fisiere/studii/cadrullegislativ.pdf.

[2] Ratified by Romania by law no. 19/1977, published in the Official Gazette of Romania, Part I, no. 34 of 4 March 1977.

[3] Ratified by law no. 366/2004, published in the Official Gazette of Romania, Part I, no. 913 of 7 October 2004.

terrorism, adopted in New York on 9 December 1999."

Paragraph 2 of the same article also extends the scope of the European Convention on: a) attempt to commit any of these main offenses; b) complicity to one of these main offenses or attempt to commit one; c) organization activity to order others in committing or attempting to commit one of the offenses listed.

Through this regulatory technique, the Convention establishes the area of offenses which it considers terrorist phenomenon and it excludes these from the area of political offenses that have special regime with regard to international judicial cooperation in criminal matters.

The doctrine notes that terrorism today has acquired a global dimension with two aspects. The first concerns the possibility of the terrorists to move comfortably in any part of the world, making use of false identities and enjoying travel facilities similar to those of tourists or business people. This allows them to study in detail the objectives that they seek to attack, to make various monetary and banking operations, attract the proselytes to the side of the military cause of the terrorist group to which they belong, etc. The second aspect of the terrorism globalization takes into account the fact that terrorists have spread to a maximum the area of their own logistics activities, but also of the actions taken, causing a difficult monitoring of their organization and planning activities by the structures for the prevention of terrorism4.

In the national legislation, the prevention and fight against terrorism is achieved mainly by Law no. 535/20045, and other regulatory documents as Law no. 656/2002 on prevention and sanction of money laundering, and the establishment of measures to prevent and fight against financing terrorism6. However, given that, according to art. 2 letter b of the latter regulatory document, it is shown that „the financing of terrorism means an offense under art. 36 of Law no. 535/2004 on preventing and fight against terrorism", we believe that the regulatory document that mostly provides for the fight against terrorism in Romania is still Law. 535/2004.

2. Outline of the terrorism phenomenon in the national legislation

The very first article of Law no. 535/2004 includes a definition of terrorism, which is presented as: „the range of actions and/or threats that are public danger and affect the national security, having the following characteristics: a) are committed with premeditation by terrorist entities, motivated by extremist beliefs and attitudes, hostile to other entities against which they act violently and / or destructively; b) aim to achieve specific political objectives; c) concern human and / or material factors within public authorities and institutions, civilian population or any other segment belonging to them; d) cause states with a strong psychological impact on the population, meant to draw attention to the aims pursued." Given the wording of the definition, we appreciate that the four traits of the terrorist acts must be met cumulatively, not being enough that only one or some of them to be found on one occasion. The conclusion is also claimed by the way article 2 of Law no. 535/2004, is worded, according to which: „the actions committed by terrorist entities are sanctioned under the provisions of this law, *if they fulfill one of the following conditions* (s.n.M.G.): a) they are usually committed with violence and cause unrest, incertitude, fear, panic or terror among population; b) seriously infringe upon human specific and nonspecific factors, and material factors; c) pursue specific objectives, political, by determining state authorities or international organizations to order, renounce or influence decisions in favor of the terrorist entity."

3. About "terrorist entity and other varieties of plurality of offenders formed

Law no. 535/2004 provides about certain varieties of the plurality formed which may manifest in the regulatory area of the law. The plurality formed is that the criminal law incriminates the mere composition of a group of people, which aims at committing offenses. In this case, it shows that, contrary to the hypothesis of natural plurality, according to which the gravity of the offense is determined by what is being actually done (present activity) by the participants (incest, bigamy, etc.), in case of the plurality formed, the seriousness of the offense is generated by what the members of the group propose to do in the future (future activity)7. This form of plurality is created by the will of the legislator, because the purpose pursued by those who have associated poses a great social danger (for committing crimes). The doctrine also identifies the conditions of existence of the plurality formed to be fulfilled cumulatively: a) there should be a group of at least three persons; b) the group should have the same criminal purpose; c) the group should have a significant duration of existence over time; d) the

[4] M. Atanasiu, F. Repez, "Securitatea şi apărarea ţării în contextul ameninţărilor teroriste", http://cssas.unap.ro/ro/pdf_studii/securitatea_si_apararea_tarii_in_contextul_amenintarilor_teroriste.pdf, p. 18.

[5] Published in the Official Gazette of Romania, part I, no. 1161 of 8 December 2004.

[6] Republished in the Official Gazette of Romania, part I, no. 702 12 October 2012.

[7] M.I. Rusu, Drept penal. Partea generală, Ed. Hamangiu, Bucureşti, 2014, p. 270.

group should have some organization with leadership and hierarchical structure8.

Law No. 353/2004 defines " the terrorist entity" as: "the person, group, structured group or organization that: a) commits or takes part in terrorist acts; b) is preparing to commit terrorist acts; c) promotes or encourages terrorism; d) supports terrorism in any form". In turn, the the terrorist group is: "a structured group of more than two persons, established for a certain period of time and acting in concert to commit terrorist acts". A structured group in accordance with this regulatory document is a group that is not randomly formed to immediately commit an act of terrorism, does not require a constant number of members and does not require establishing, beforehand, of their role or a hierarchical structure". The terrorist organization is a "hierarchical structure, with its own ideology on organization and action, having representation both nationally and internationally, and that, in order to achieve specific goals, uses violent and/or destructive ways". We have to notice that these definitions do not do anything other than contribute to the lack of clarity of the incrimination standards which they complete.

The statement is supported, all the more so, art. 367 Criminal Code also includes a para. (6), which has the value of interpretative rule, in that it defines the concept of "organized criminal group" as: "structured group, consisting of three or more persons, formed for a specific period of time and to act in a coordinated manner in order to commit one or several offenses".

Paragraph (1) of article 367 Criminal Code, in the basic variant, the following is incriminated: "The initiation or set up of an organized crime group, joining or supporting, in any form, of such a group", which is punishable by imprisonment from one to five years and the prohibition on the exercise of certain rights. The deed becomes more serious: „when the offense within the purpose of the organized crime group is punished by law with imprisonment for life or punishment of imprisonment for over 10 years", for this variant, the penalty being imprisonment from 3 to 10 years and the prohibition on the exercise of certain rights.

Still, as in the previous Criminal Code, the provision according which "where the actions referred to in paragraph (1) and paragraph (2) were followed by committing a crime, the concurrence of offense shall apply" has been maintained in article 367 para. (3) Criminal Code.

The text of art. 35 of Law no. 535/2004 is added to all these texts, in accordance with which: "(1) The association or initiation of an association establishment for the purpose of committing acts of terrorism or joining or supporting, in any way, such an association shall be punishable by imprisonment from 5 to 12 years and the prohibition of certain rights, without being able to exceed the maximum penalty prescribed by law for the offense falling within the purpose of the association." The legal definition above-mentioned shows that the element that makes the difference between the regulation of art. 367 Criminal Code and art. 35 of Law no. 535/2004 considers that "acts of terrorism" are found in the program of the organized crime group. In accordance with art. 32 of the Special Law, the commission of one of the following acts shall be acts of terrorism which, by their nature or context of their commission, may lead to a serious damage of a country or international organization, when they are committed to intimidate the population or to coerce a public authority or an international organization to perform, not to perform or abstain from performing any act or for seriously destabilizing or destroying the fundamental political, constitutional, economic or social structures of a state or international organization, and shall be punished according to the law for the crime committed, whose special limits are increased by one third, and with the prohibition of certain rights: a) murder, manslaughter or injury; b) threat or deprivation of liberty; c) destruction; d) communication of false information which endangers the safety of flight or navigation of a ship or aircraft; e) the commission, by using a device, a weapon or substance, of an act of violence against a person in a civil airport, if the act endangered the safety and security of the airport, as well as the commission of any act of physical or psychological violence against a person on board a civilian aircraft in flight or in flight training or on its navigation personnel; f) destruction or serious deterioration by using a device, a weapon or a substance, of the installations of a civil airport or an aircraft in service or not in service, but which is at an airport or causing damages that make the aircraft unavailable for flight or which are likely to endanger its safety in flight and airport service interruption, if the act is likely to jeopardize or compromise the safety and security at that airport; g) destruction or damage to installations or air navigation services or disrupting their operation, if the act endangered the flight safety; h) placing on a civil aircraft, by any means, of a device or substance able to destroy that aircraft or to cause damages which make it unfit for flight or which is likely to endanger its safety in flight; i) taking an aircraft without right, by any means, and without the right to exercise control over it; j) seizure of a ship or a fixed platform or control over it, by violence or threat; k) committing violence against a person on board of a ship or a fixed platform, if that act is likely to endanger the safety of the ship or fixed platform; l) destruction of a fixed platform or a ship or causing

[8] V. Dobrinoiu, I. Pascu, M.A. Hotca, C. Păun, I. Chiș, M. Gorunescu, N. Neagu, M. Dobrinoiu, M. Sinescu, Noul Cod penal comentat, Partea specială, Editura Universul Juridic, București, 2014, p. 857.

damage to a fixed platform or the cargo of a ship, which jeopardize the safety of the platform or navigation vessel; m) placement on a ship or fixed platform, by any means, of a device or a substance able to destroy or cause damages to the platform, ship or cargo that compromise or are likely to endanger the safety of the platform or the navigation of the ship; n) destruction or seriously damaging the fixed platform or navigation facilities or services or causing serious disruptions in operation, if any such act is likely to endanger the safety of the fixed platform or navigation of a ship; a) failure to comply with the regulations on weapons and ammunition, the regime of nuclear and other radioactive materials, and failure to comply with the regime of explosives; p) attack that endangers national security, attack against a community and acts of diversion; q) fraud committed through computer systems and electronic payment means and offenses against the security and integrity of computer systems and data; r) takeover without right of the collective passenger transport means or cargo. Paragraph 3 of the same article completes the regulation in the sense that "the commission of certain actions, for one of the purposes provided for in para. (1) shall also be deemed acts of terrorism and shall be punished by imprisonment from 7 to 15 years: a) manufacture, acquisition, possession, transport, supply or transfer to other persons, directly or indirectly, of chemical or biological weapons, explosive devices of any kind, and research in the field or development of such weapons or devices; b) introduction or spread into the atmosphere, soil, subsoil or water of products, substances, materials of any kind, microorganisms or toxins likely to endanger human health or animal health or the environment or the intent to fire, floods or explosions that have the effect of endangering human life; c) interfering with or disrupting the supply of water, electricity or any other fundamental natural resource, which has the effect of endangering human lives." Although the listing is consistent, we chose to include it in the present study because the element that distinguishes the offense provided for in art. 367 Criminal Code and one in art. 35 of Law no. 535/2004 is exactly the specificity of the action in the context of association. Whenever the subject of association commits such an offense, the special text shall be incident, but only if the association fulfills its characteristics found in the law.

Given this complex regulations, we believe it is not difficult to outline the organized crime terrorist group. However, we do not see the usefulness of subdividing this type of group depending on the size and the level of organization found in real situations, especially given that these terms may not be found in any text of the present criminal law.

4. Conclusions

The terrorist group is an aggravated form of the offense of establishing a criminal organization, as the action is defined in art. 367 Criminal Code. The elements that make the delimitation of the two offenses are connected to the situation of each, but also to the purpose for which each was created with special attention to the nature of the crimes falling within the program of the criminal group. The level of abstract danger is included in the same range of punishment, but the level of real danger is related to the elements indicated by the texts in the special law and they may be found as related to the analyzed actions.

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SEVERAL CONSIDERATIONS OF COMPARED LAW ON SELF-DEFENSE (I)

Lamya-Diana HĂRĂTĂU[*]
Traian DIMA[**]

Abstracts

Criminal legislations of other States regulate self-defense in approximately similar manners, without major differences as compared to the conditions required by the Romanian law-maker to be fulfilled in order for the offence to become justifiable/exempt from liability. In this study, we chose to make a comparison in respect of self-defense from the perspective of 18 States[1] around the world and, in the end, we will summarize several conclusions on the extent to which the Romanian law-maker could draw inspiration from their legislations.

Keywords: *self-defense, compared law, justifiable grounds, grounds for exemption from liability.*

Introduction[1]

The concept of self-defense is closely related to the theory of criminal offence, given that its applicability entails the exemption of the criminal nature of the offence and, consequently, the exemption from criminal liability.

We believe that, from this perspective, the study of self-defense ought to be intensified. The fact that the case-law noticed, over time, that courts of law sometimes faced difficulties in giving effect to self-defense in certain cases, determined us to conduct a comparative analysis of the conditions which need to be fulfilled in this respect.

1. Bulgaria

The Bulgarian criminal code stipulates, in the wording of Article 12 of the Second Chapter, dedicated to Criminal Offences, Section II Generalities, that the offence of the person who defends himself in a justified manner against an assault against State interest, public interest or against himself or another person shall not be deemed dangerous from the social perspective, provided that the defense is proportionate to the assault.

Considering that, in Article 9 of the Bulgarian Criminal Code, criminal offence is defined as a socially dangerous action, committed in a guilty manner and provisioned for in the criminal law, it may be noticed, from the definition of self-defense, that the offence committed in this manner loses its degree of social jeopardy, meaning one of the three key features envisaged by the law-maker, which will lead to the absence of criminal nature and of criminal liability.

Furthermore, paragraph (2) of the same text reveals that the action breaking the limits of defense proportionate to the nature and jeopardy of the assault shall be construed as excess of self-defense.

The Bulgarian law-maker described in paragraph (3) of Article 12 of the Criminal Code the instances which, having regard to the nature and jeopardy of the defense, shall not be deemed to be excess of self-defense. Among these, the following have nevertheless been declared unconstitutional:

1. (declared unconstitutional) – the assault originates from one or several persons;

2. (declared unconstitutional) – the wrongdoer is armed;

3. (declared unconstitutional as regards the terms "country house or business-related building") – the assault took place by entrance using force or theft from a house, country house or business-related building;

4. (declared unconstitutional) the assault took place against an engine, water vessel or movable rolling stock;

5. (declared unconstitutional) the assault took place during the night;

Further to such provisions being declared unconstitutional, in reference to the actual circumstances in which the assault takes place, it may be noticed that, for instance, although the number of wrongdoers is 3 or more, it may however amount to an excess of self-defense limits on the part of the assaulted person.

On the other hand, the same paragraph provides that, if, however, the assault may not be averted otherwise, then exceeding the limits of proportionate defense shall not be deemed to be excess of defense, because the assaulted person could only have responded as he did.

[*] PhD Teaching Assistant, Faculty of Law-Nicolae Titulescu University, criminal law department, attorney at law (e-mail: **lamya@haratau.ro**).

[**] PhD Professor, Faculty of Law, "Nicolae Titulescu" University of Bucharest, criminal law department.

[1] Full texts of the provisions of international criminal codes forming the object of this study were consulted at http://www.legislationline.org/documents/section/criminal-codes.

Paragraph (4) of the same article states that the person exceeding the limits of proportionate defense shall not be punished if he was in a state of freight or confusion at the time of his response, given the nature of the assault.

2. Republic of Moldova

In the Criminal Code of the Republic of Moldova, self-defense is stipulated in Article 36 of Chapter III – Circumstances that exempt the criminal nature of the offence.

Thus, the act provisioned for in the criminal law, committed in self-defense, shall not amount to a criminal offence.

The conjunction between this first provision and the provisions of Articles 14 and 15, defining the criminal offence as a prejudicial act (action or inaction) set forth in criminal law, committed with culpability and subject to criminal punishment, and that an action or inaction that although formally has signs of an act set forth in this code, but due to lack of importance, does not meet the prejudicial degree of a criminal offence, shall not be considered a criminal offence, it follows that the act committed in self-defense eliminates the key features of the criminal offence, as they are set out and, consequently, criminal liability.

Paragraph (2) of Article 36 specifies that a person who commits an act in order to repel a direct, immediate, material, and real attack against himself, against another person, or against public interest and which seriously endangers the person or the rights of the assaulted person or public interest shall be in a state of self-defense.

Furthermore, a person who commits an act set forth in paragraph (2) in order to prevent another one from violently entering into a residential or other area, thus endangering a person's life or health or by threatening such violence, shall be in a state of self-defense.

Hence, it may be noticed from this definition that self-defense meets in a similar, but not identical manner, the same conditions as provisioned for in the Romanian Criminal Code. One of the differences consists of the fact that the Criminal Code of the Republic of Moldova does not refer to the act of the person who, in a state of self-defense, exceeds the limits of proportionality as a result of distress or freight caused by the assault.

3. Poland

In the Polish Criminal Code, self-defense is regulated under Article 25 and forms part of Chapter III called Exemption of criminal liability.

According to the first paragraph of the above-mentioned article, the act of the person averting a direct and unlawful assault against any value protected by law shall not be a criminal offence.

Please note that, unlike the Romanian Criminal Code, which lists the values against which the assault is directed, the Polish Criminal Code refers to any values, its scope being much wider.

Further on, it is stated that, if the limits of proportionate self-defense are exceeded as compared to the severity of the danger, the court may mitigate the sentence or give it up altogether.

Notice shall be made that unjustified excess of self-defense is regulated, which, in the opinion of the Polish Criminal Code, does not exempt criminal liability, however, acts as legal mitigating circumstance (same as the regulation in the Romanian Criminal Code), the law-maker letting the court of law to decide either to decrease the sentence, or to give it up entirely, taking into account the particular circumstances under which the criminal offence was perpetrated.

Nevertheless, at the same time, paragraph (3) of the same article sets forth that the court will not enforce any sentence if the limits of self-defense were exceeded because of freight or strong emotion caused by the attack. This regulation seems to be grounds for non-liability (non-liability excess), as provisioned for in Article 26 of the Romanian Criminal Code.

What is different is that the law introduces the possibility not to enforce any sentence if the limits of self-defense are exceeded, a provision that is absent from our law but which, in our opinion, is not equivalent in the Polish Criminal Code, either, to an exemption from criminal liability, because the fact that no sentence is imposed is the consequence of the offence losing its criminal character. However, the act committed in this manner will still be construed as criminal offence.

4. Slovenia

In the Slovenian Criminal Code, self-defense is regulated under Article 22 forming part of Chapter 3 called General provisions on criminal offences, Section 1 – Crime and criminal.

Thus, in accordance with paragraph (1) of the article referred to above, "an act committed in self-defense shall not constitute a criminal offence", thus losing its criminal nature, and is not stipulated as justifiable grounds, as it is in the Romanian Criminal Code.

The second paragraph defines self-defense as the act committed with a view to averting an immediate and unlawful assault on himself or on any other person. It is observed that this regulation is similar to the one existing in the Romanian law.

Furthermore, the situation of excess of self-defense is also regulated, stating that, if the offence necessary for defense was committed by exceeding the limits of self-defense, the sentence may be decreased; if exceeding the limits of self-defense was the result of a state of distress or freight caused by the assault, the sentence may be removed. Therefore, in case of unjustified excess of self-defense, it seems as a mitigating circumstance, while

the justified excess seems to be grounds for removing the sentence entirely.

It is observed that, in the case where the limits of proportionate defense are exceeded, criminal liability will mandatorily be diminished, whereas, in the case where the lack of proportionality is the result of a state of distress or freight caused by the attack, then criminal liability *may* be removed.

It should be emphasized that, unlike in the Romanian Criminal Code, where criminal liability shall not be incurred in the latter case, in Slovenia, its removal is optional. Moreover, presumed self-defense is not regulated at all.

5. Georgia

Self-defense is stipulated in the Georgian Criminal Code in Chapter VIII dedicated to Non-incriminating circumstances.

Thus, in accordance with Article 28, the person harming the perpetrator of an assault in order to protect himself or his legal interests shall be deemed in necessary self-defense.

Paragraph (2) of the same article sets forth that self-defense shall also exist regardless of the person's possibility to prevent the attack or ask another person for help.

Paragraph (3) states that the injury of the wrongdoer shall occur with a view to retrieving property of which the assaulted person was deprived illegally, within the limits of the law, if this occurred immediately after the assault.

In the last paragraph, the Georgian law-maker refers to the failure to fulfill the conditions for self-defense having regard to the nature and danger of the assault, for which this grounds will not be given relevance to.

6. Italy

In the Italian Criminal Code, self-defense is regulated under Article 52, included in Title III called On criminal offences, Chapter I – On perpetrated offence and attempts.

Thus, as deriving from the said article, the person having committed a criminal offence in self-defense shall not be punished, when he was forced to defend his own or a third party's right against immediate and unlawful danger, provided that the defense is proportionate to the danger.

Furthermore, in the cases referred to in Article 614 of the Italian Criminal Code, incriminating home invasion, self-defense is presumed if the assault relates to one of the places indicated in defining that criminal offence, and the assaulted person may use a weapon held legally or another appropriate means to protect his or a third party's safety or his own or a third party's property, even when the wrongdoer withdraws or there is threat of danger. The same provision also applies in the case where the assault takes place in any other location where business or profession-related activity is conducted.

From these provisions, it may be noticed that an absolute presumption of self-defense is being created[2], where proportionality is requested only as regards the fulfillment of conditions for the weapon being used by the assaulted person in his response, to be owned legally, and when the person's property is targeted, the assault shall also be directed at the person himself.

Please note that, in most of it, the Italian regulation is, in principle, similar to the one in the Romanian criminal law, but there are also significant differences. In this respect, self-defense, in the opinion of the Italian law-maker, is not justifiable grounds, as the act provisioned for by the criminal law is not a criminal offence, because the person protecting himself acts without guilt, since he is forced, states the law-maker, to defend a right pertaining to himself or to a third party.

As for self-defense, in the hypothesis where the aggressor commits the criminal offence of home invasion, the Italian law is more permissive for the person protecting himself, and the latter, in his defense, may use a fire weapon without deeming that the proportionality principle was infringed, also presumed in the case where the aggressor withdrew from the person's home, and the latter still used the weapon. In consideration of such regulation, the case described herein for the purpose of this study would pose no other questions. We may not help but wonder, however, how this regulation could be in line with the provisions of the European Convention on Human Rights.

7. Latvia

Self-defense is detailed, in the Latvian Criminal Code, in the provisions of sections 28 – 30 forming part of Chapter III called "Circumstances which exclude criminal liability".

According to section 28, the circumstances which exclude criminal liability are necessary self-defense, detention causing personal harm, extreme necessity, justifiable professional risk, and the execution of a criminal command or criminal order, even if acts committed in such circumstances correspond to the constituent elements of a criminal offence.

In accordance with section 29, necessary self-defense shall be an act committed in defense of State or public interest, or of the rights of himself or of a third person, and also in defense against assault or threat of assault. Criminal liability applies if the limits of defense proportionate to the nature and severity of the assault have been exceeded.

[2] Article 52 of the Italian Criminal Code was amended by Law No 59 of 13 February 2006, when the right to self-defense was regulated in case of a home assault.

It may be noticed that the Latvian law-maker ranks first, in respect of self-defense, the protection of State or public interests and only then the person and his rights, while in Romanian law prevalence is given to the person and his rights and only afterwards to general interest.

According to paragraph (2) of the same section, defense is disproportionate to the nature and danger of the assault, when it was not necessary in order to prevent or avert such assault.

A new element is brought by the provision in paragraph (3), stipulating that causing harm to the assailant through negligence, while averting the assault, shall not be criminally punishable. Also, if the assaulted person had the possibility to avoid the assault or ask for help, he will also be in self-defense, in responding.

Another innovation of the Latvian law-maker consists of the regulation in section 30 called Apparent self-defense (putative, comment added).

According to this text of law, a person shall be in apparent self-defense when he mistakenly thinks that an assault such as described in Section 29 is taking place. In cases when the particular circumstances in which the offence was committed have provided a basis for assuming that an actual assault was in progress, the person who responds by mistake, without knowing that his assumption was incorrect, shall fall under the scope of necessary self-defense, and therefore shall not be held under criminal liability.

Furthermore, a person who exceeds the limits of proportionate self-defense which would be permissible in the circumstances described above, shall be held in accordance with the provisions of excess of necessary self-defense. At the same time, if the assailant was harmed during the act of defense, in the condition of an apparent assault, the provisions governing criminal offence committed by negligence shall apply.

As regards this regulation, we hereby express our agreement and will submit a proposal for an intended law (*lege ferenda*) so that putative self-defense, already discussed in Romanian doctrine, be expressly provided in the Romanian Criminal Code, as well. And, by way of example, we refer to the situation where the "apparent" assault comes from a person handling a rubber snake or any other instrument in a threatening manner, but which has all the attributes to be believed by the victim to be real. In this case, we opine that the victim's fending amounts to self-defense even if the assault was only apparent.

8. Estonia

In the Estonian Criminal Code, self-defense is provided for in item 28 of Chapter II called Criminal Offence, Section I dedicated to grounds exempting the criminal character of the offence.

In accordance with the above-mentioned article, paragraph (1), an act is not unlawful if the person combats a direct or immediate unlawful assault against his legal rights or those of another person, by violating the legal rights of the assailant, and without exceeding the limits of proportionate self-defense.

Further on, the excess of self-defense is regulated, whereby a person is deemed to have exceeded the limits of proportionate self-defense if he acts with deliberate or direct intention in self-defense, by means which are obviously incongruous with the danger arising from the assault, thus intentionally causing severe harm to the assailant. Since the Estonian law-maker provides no specific indication in respect of such excess of self-defense, it is to be construed that the person fending the assault in such a manner will no longer benefit from the mitigating consequences of self-defense, in light of the wording of paragraph (1) item 28.

Article 57 item 8 stipulates excess of self-defense as a mitigating circumstance.

Unlike other legislations, in the Estonian Criminal Code, the possibility of the assaulted person to prevent the assault or ask for help does not exclude the right to self-defense.

It is also worth mentioning that the Estonian regulation of self-defense is similar to Romanian law, with several differences.

9. Finland

Self-defense is stipulated in the Finnish Criminal Code in Section 4, forming part of Chapter 4 called Grounds for exemption from liability.

According to this text of law, the act that was necessary for a person to protect himself against a direct or threatening assault shall be deemed self-defense, save for the case where it obviously exceeds the limits of proportionate defense, considering the nature and severity of the assault, the person of the victim and of the assailant, and also other circumstances.

Where the defense exceeds the limits of proportionality (excessive self-defense), the perpetrator shall be exempt from criminal liability if the circumstances in which he defended himself determined him to respond as such, given the danger and sudden nature of the assault.

From this provision, it may be inferred that excess of self-defense may escape criminal liability only if the disproportion is correlated with the dangerousness and sudden nature of the assault.

The Finnish Criminal Code contains no special regulations in respect of presumed self-defense.

Unlike the Romanian law, certain new elements may be noticed in the Finnish legislation governing self-defense. Thus, in analyzing a case of self-defense, consideration shall be given both to the conditions in which the assault and the defense took place, the person protecting himself, but also the

person of the assailant and other circumstances, as well. These legal clarifications seem correct, in our opinion, in analyzing different situations of self-defense because the persons involved (the assailant and the person protecting himself) may have significant particularities, such as physical strength, intellectual abilities, profession, training, etc., which could help in forming a fair conclusion as to the existence or inexistence of self-defense.

10. Sweden

In the second part of the Swedish Criminal Code, dedicated to the theory of criminal offence, in Chapter 24 called On general grounds for exemption from criminal liability, there are provisions governing self-defense.

Thus, in accordance with Section 1, an act committed by a person in self-defense constitutes a criminal offence only if, having regard to the nature of the aggression, the importance of its object and the circumstances in general, it is clearly unjustifiable.

A first definite similarity between the Swedish and the Romanian law is the fact that the Swedish law-maker also considers self-defense as justifiable grounds for exemption from criminal liability if the act was committed in self-defense.

Furthermore, as provided by the Swedish law-maker, the right to act in self-defense only exists if it is directed against:

1. a threatening assault on a person or property;

2. a person who violently or by the threat of violence obstructs the repossession of property when caught in the

act;

3. a person who has unlawfully forced or is attempting to force entry into a room, house, yard or vessel;

4. a person who refuses to leave a dwelling when ordered to do so.

It is observed that, unlike the Finnish Criminal Code, for instance, the Swedish law-maker specifically regulated the circumstance where the assault is directed at the home of a person, the refusal to leave it, or even repossessing property. Furthermore, self-defense in the Swedish opinion is also different from Romanian regulations.

11. Norway

Self-defense is also stipulated in the Norwegian Criminal Code in its First Part, containing general provisions; more specifically, in Chapter 3 called Conditions governing criminal liability.

The wording of Section 48 of the said Code reveals that no one may be punished for an offence committed in self-defense.

The person acting with a view to preventing or fending against an unlawful assault shall be deemed to act in self-defense, provided that the act did not exceed what appeared to be necessary for that purpose.

However, the Norwegian law-maker, just as the Romanian one, provides that the act of the person who exceeds the limits of proportionate self-defense shall not be punishable if such excess is due solely to emotional upset or consternation caused by the assault. However, there are no regulations on presumed self-defense.

12. Switzerland

Title II of the Swiss Criminal Code regulates self-defense.

Hence, in accordance with Article 15 of the said Code, if a person is unlawfully assaulted or threatened with imminent assault, the assaulted person and any other person are entitled to ward off the assault by means that are reasonable in the circumstances.

Article 16 paragraph (1) refers to excess of self-defense, according to which, if, in defending himself, a person exceeds the limits of proportionate self-defense, as defined in the preceding paragraph, the court shall reduce the sentence. Therefore, justified excess acts as mitigating circumstances.

According to paragraph (2), it is laid down that if the offence is committed by a person in excess of the limits of proportionate self-defense as a result of excusable excitement or panic, it shall not be deemed as a criminal offence and therefore shall be exempted from punishment. This means that lawful excess is assimilated to necessary self-defense, while in the Romanian law it is non-punishable excess.

13. Germany

Self-defense is regulated in the German Criminal Code in Title IV called Self-defense, Necessity and Duress.

In accordance with section 32 of the above-mentioned title, a person who commits an offence in self-defense does not act unlawfully.

Self-defense is defined as any defensive action that is necessary to avert an imminent unlawful assault on himself or another.

According to section 33, whose sub-title is Excess of self-defense, a person who exceeds the limits of proportionate self-defense, as compared to the assault, out of confusion, fear or terror shall not be held criminally liable.

It is to be noticed that, in the German Criminal Code, criminal liability is also exempted if the obvious incongruity between the assault and the response is due to the state of confusion or fear which could have seized the assaulted person, as a result of the aggression.

14. France

Chapter II of the French Criminal Code, called Grounds for absence or attenuation of liability, regulates self-defense.

According to Article 122-5 of the said Code, a person is not criminally liable if, confronted with an unjustified assault upon himself or upon another, he performs at that moment an action compelled by the necessity of self-defense or the defense of another person, except where the means of defense thus used are not proportionate to the seriousness of the assault.

Moreover, a person is not criminally liable if, to interrupt the perpetration of a criminal offence against property, he performs an act of defense other than wilful murder, where the defensive act is strictly necessary to remove the jeopardy and the means used are proportionate to the gravity thereof.

In accordance with Article 122-6 of the same Code, self-defense shall be presumed when the offence is committed in the following instances:

- to repulse at night an entry to an inhabited place committed by breaking in, violence or deception;
- to defend himself against the perpetrators of theft or pillage carried out with violence.

Extensive similarity is noticed between the French regulations and those in the Romanian Criminal Code. Mention is to be made that the French law-maker does not treat self-defense as a justifiable grounds, either, criminal liability being exempted in consideration of the lack of guilt.

15. Belgium

Self-defense is laid down in the Belgian Criminal Code in the Title dedicated to Criminal offences and misdemeanors, in the Section Justifiable grounds.

In accordance with Article 416 of the same Code, "the act of a person defending himself against an actual assault directed at himself or at another shall not be construed as murder, bodily harm or battery".

In the relevant literature, self-defense is the reflection of a principle of law according to which any person facing a jeopardy shall be entitled to defend himself, his reaction shall however be moderate, not exceeding the limits of the assault[3].

The doctrine emphasized that the assault needs to be imminent, unlawful and directly threatening the physical integrity of the person, his health, freedom or dignity.[4] Furthermore, the assault shall be effective and sufficiently severe[5], and not originate from an authority, since it would not be unlawful in that case[6].

Article 417 refers to presumed self-defense. According to that article, a person shall act in self-defense when he averts the entry into a house, outbuilding, by breaking in, violence or climbing, during nighttime. This presumption is, however, deemed by the law-maker to have a relative character, while, as set forth in paragraph 3 of the same article, a person shall be in a state of absolute self-defense when he protects himself against an offence of theft or burglary committed with violence against himself or against another person.

The Romanian law-maker may have drawn inspiration in regulating self-defense from the Belgian legislation, given the striking resemblance of the two regulations. It is observed that, in the opinion of the Belgian law-maker, too, defense is a justifiable grounds exempting the criminal liability of the offence.

16. Spain

Self-defense is regulated in the Spanish Criminal Code in Book I, called General provisions on criminal offences and misdemeanors, the persons responsible, the penalties, safety measures and other consequences of criminal offences, Title I – On criminal offences and misdemeanors, Chapter II – On the grounds of exemption from criminal liability.

In accordance with Article 20 item 4 of the above-mentioned Code, the person committing an act in defending his rights or the rights of another shall be in self-defense, as long as the following conditions are fulfilled:

- the aggression is unlawful.

In the case of defense of property, the aggression shall be of such a nature as to jeopardize the integrity or amount to an imminent loss. If the assault targets the dwelling or its rooms, trespassing shall be deemed unlawful aggression.

- the use of proportionate means to avert or prevent the assault.
- lack of sufficient provocation on the part of the defending person.

Article 20 item 6 of the Code stipulates that the person who committed the criminal offence in a state of panic shall not be held criminally liable.

The stipulation of the conditions listed herein above is an indication that self-defense is not expressly regulated in the case where the limits of disproportionate defense, as compared to the assault, are exceeded.

The regulation in the Spanish Criminal Code is also similar to the Romanian Criminal Code, except

[3] J.J. HAUS, Principes généraux du droit pénal belge, t. I, 3e éd., Gand Publishing House, Librairie générale de Ad. Hoste, 1879, Brussels, Swinnen, 1977, p. 469, n° 616.

[4] Court of Cassation, decision of 28 February 1989; p. 662; (for more details, http://www.actualitesdroitbelge.be/).

[5] Revue de droit penale criminelle, Liege, 1992, p. 1013.

[6] P. Lambert, Legitime defense, Postal Memorialis – Lexicue du droit penal et des lois speciales, Kluwer Waterloo Publishing House, 2008, p. L.20/5.

that in the Spanish law-maker's view self-defense does not amount to justifiable grounds, but is deemed as a reason exempting criminal liability.

17. Portugal

Article 32 of the Portuguese Criminal Code sets forth self-defense, forming part of Chapter III called Grounds exempting criminal nature and guilt.

Thus, an act constitutes self-defense when committed as the necessary means to repel a present and unlawful aggression on legally protected interests of the agent or of a third person.

Additionally, the Portuguese law-maker further regulated, in Article 33, the situation of excess of self-defense.

According to that provision, exceeding the limits of self-defense shall not exempt from criminal liability, but may mitigate it.

As also stipulated by the Romanian law-maker, if, however, the excess of proportionality limits as compared to the severity of the assault is due to a state of fear or distress, then criminal liability shall be exempted.

18. The Republic of Haïti

Self-defense is regulated in the Criminal Code of Haïti within the category of grounds exempting criminal liability, in Articles 273 and 274.

In order for self-defense to be held, it is necessary for the assault to be directed at a person or his property, and the assault needs to be current, actual, imminent, unlawful, and the response shall be proportionate to the assault.

In accordance with these legal regulations, a person shall act in self-defense when responding to the perpetrators of thefts or burglaries, for which violence was used. Such a regulation is not to be found in the Romanian law and, in our opinion, should also be adopted by the Romanian law-maker.

In case of excess of self-defense, when the limits of proportionate defense are exceeded, the law-maker of the Haïtian Criminal Code did not provide the consequence of criminal liability being exempted.

Conclusions

In the countries whose legislations were referred to herein above, we did not found the two-tier classification (justifiable grounds and grounds exempting criminal the liability, in relation to self-defense) whereby the criminal offence or criminal nature of the act is removed, except for Belgium, where self-defense is ranked among justifiable grounds.

In specifying the circumstances of the assault, the laws of neither of the countries analyzed above specify that the assault needs to be material, which, in our opinion, leaves room for interpretation.

In the legislation of other countries, in case of self-defense, among the values jeopardized in the assault is also the person's property, which in Romanian law is not provided, the defended values pertaining to the attributes of the natural person.

In certain countries (Malta and the Grand Duchy of Luxembourg), self-defense is regulated in light of the criminal offences against life, health and bodily integrity.

Not all countries reviewed in our study regulate presumed self-defense or self-defense occurring during nighttime, while other countries have much more extensive regulations, as compared to the Romanian Code, in respect of "presumed self-defense".

Not all countries have a full regulation for "justified excess" and "pardonable excess" in the field of self-defense, as well as the consequences of exceeding self-defense in such cases.

In certain countries, there were very significant regulations in the field of self-defense, as well as the consequences of exceeding the limits thereof.

The concept of self-defense is regulated in all countries subject to our review, being a universal one, with various particularities specific to each country.

As compared to other countries, we believe that the regulation of self-defense in the Romanian Criminal Code is better, but still perfectible, in consideration of certain situations and ECHR requirements.

Selective reference:

- http://www.legislationline.org/documents/section/criminal-codes
- J.J. HAUS, *Principes généraux du droit pénal belge*, t. I, 3e éd., Gand Publishing House, Librairie générale de Ad. Hoste, 1879, Brussels, Swinnen, 1977, p. 469, n° 616;
- Court of Cassation, decision of 28 February 1989; p. 662; (for more details, http://www.actualites droitbelge.be/);
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THE JUDICIAL INDIVIDUALIZATION OF THE PUNISHMENT. ALTERNATIVES TO DETENTION IN THE UNITED KINGDOOM CRIMINAL LAW

Andrei-Viorel IUGAN[*]

Abstract

The simple fact that a person commits a crime doesn't mean necessary that that person must be imprisoned. It's for the court to decide which is the proper sanction that must be imposed to that person.

The state must create a very organized system of alternatives to detention, and as a result of those alternatives detention should be the ultimate measure for the judge to pronounce.

The legislation must regulate a wide variety of means of individualization, alternative to detention, and the courts must choose the one that assures the social reintegration of the delinquent and the restore of the public order.

In this study we are going to present how are the alternatives to detention regulated in the UK's crimal law system and what are the results of this system.

Keywords: *the postponing of the execution of the punishment, suspension under supervision of the sentence, discharghe, probation.*

1. Introduction

The beginnings of the probation concept and use of in the UK are linked to the name of Frederic Rayner, a printer from the south-east of England, who donated money to the Anglican Chirch for it to intervene in order to find suitable solutions for the social reintegration of missfits, offenders and criminals. More missionaries were appointed to work next to the Courts, with the aim of saving the sinners's souls from the sin of drink by providing support in finding a job and housing. Appointment of the first missionaries in 1876 represented the beginnings of the Probation Service. The success of these missionaries was so great that, with the adoption by the Government of the Probation Act of 1907 (Probation of Offenders Act), their powers were extended to all offenders not only those addicted to alcohol. The main role of probation in this first phase was to provide social assistance, not being an actual form of punishment. The probation order, as set out in the 1907 law (Probation Act), was not a rulling of a Court, but a chance offered to the offender for him to change his/her behavior without being punished by the Court, which is basically a substitute for a punishment.[1]

It should be noted that currently England's probation services 's main activities consist in the effective supervision of offenders in order to reduce the occurence of relapse and for protecting the public, and also providing information to the judicial bodies in order to make a judicial individualization proportionate to the seriousness of the offense and to the offender's person. In this regard, the probation service can prepare pre-sentence reports on demand. Such a report should contain an analysis of the offence/crime comitted, relevant information about the offender, the risk of relapse and recommendations for the sanction to be imposed on it. If the conclusions of the report recommend a custodial sentence, the drafting of a contingency plan is necessary, plan containing measures to be applied in prisons in order to reduce the risk of relapse. A copy of the report shall be communicated to the defendant and another copy to the public prosecutor.

2. Content

2.1. A short presentation of the UK' legal system

Offenses in the UK fall into two categories: minor/light ones called also summary offenses and medium and serious offenses referred to as indictable offenses. The minor offenses in turn are divided into two types: 'motoring offences' (eg speeding regulations) and 'non motoring offences', and generally include offenses that caused a loss of up to £ 5,000, the hitting offense, etc. Such offenses are tried only by the courts of magistrates.

The second category of offenses also includes two kinds of offenses: "triable-either-way offences" which include offenses that caused a loss of £ 5,000 or more, theft, driving under influence, and "indictable only offences" including serious crimes such as murder, deprivation of liberty/ unlawfull confinement, robbery etc. "Triable-either-way offences" can be prosecuted either in the courts of magistrats as well as by the Royal Court. If the magistrates considers that a greater punishment than

[*] PhD Candidate, "Nicolae Titulescu" University of Bucharest (e-mail: **andyiugan@yahoo.com**).

[1] A.M. Van Kalmthout, Reintegrarea socialã si supravegherea infractorilor în opt tãri europene, Craiova, Ed. Sitech, 2004, p. 35.

they are competent to apply is required, they send the file to the Royal Court. In England and Wales the Court of Magistrates may impose a penalty of up to 12 months in prison.

If the offense is of a reduced seriousness, a warning (caution) can be applied. This applies whenever there is sufficient evidence to justify a potential conviction, but is thought that to refer the case to the Courts would not be of public interest. The offender must admit his/her guilt and agree to receive the warning (caution). The warning (caution) may be simple, the person being cautioned of his unacceptable canduct and on the consequences of committing a new offense or conditioned. In the latter case the offender is obliged to follow certain social rehabilitation programs or repair the damage caused.

The warning (caution) can be applied by the police except for serious offenses of a medium or serious gravity, when the decision belongs to the Crown's prosecutor.

If it is considered that the case should be referred to the courts for trial, depending on the gravity of the offense, it shall be directed either to the Court of Magistrates or to the Royal Court.

The Court of Magistrates's work is based on the principles of the justice of the peace - magistrates are members of the public. They have no legal training and are not paid for their work as a Magistrate. They are dependent on the advice and expertise of an official with legal training named "justice's clerk".

There are also a number of paid magistrates which have the legal training. These are employed in some Courts of Magistrates and hold an obvious influence on the culture and practice of those courts.[2] The court may order either the conviction to imprisonment for life, imprisonment for a specific period, suspended sentence (suspended sentence order), probation (community sentences), a fine, may drop the charges or may order the defendant to pay a compensation.

The suspended sentence was introduced in 2003 and it applies to the cases where the court rules on imprisonment for a period of 12 months or less. The court may suspend the execution of that sentence for a compound term between six months and two years, period during which the convicted person must perform certain obligations. These are identical to those foreseen for probation. If the convicted person does not comply with these obligations, the suspension will be revoked and the court shall order effective enforcement of the punishment.

2.2 Alternatives to detention

Regarding probation (community sentences), the defendant must meet several requirements, including:

- To perform unpaid community work for a period between 40 and 300 hours;
- To attend professional training courses;
- To attend certain social reintegration programs. Such programs exist for example for car thieves, for those who drive drunk / under the influence, for those convicted as a result of domestic violence atcs, for those who are guilty of racism, etc.
- Not to perform/conduct certain activities;
- To be electronically monitored (curfew).There is the possibility that the convicted person is not allowed to leave his/her residence after a certain hour;
- Not to change his/her residence without the probation officer's consent;
- To undergo psychiatric medical treatment (only with the consent of the defendant);
- To undergo treatment in order to get rid of drug addiction (only with the consent of the defendant);
- To undergo treatment in order to get rid of alcohol dependence (only with the consent of the defendant);
- To meet with the probation officer assigned with its supervision according to a program/schedule drawn up by the latter. Basically the convicted person must report to the probation service headquarters at least 12 times in the first 3 months and at least 6 times in the next 3 months.

Regarding the provision of assistance to drug users, it should be noted that in 1998 the Drug Treatment and Testing Order was adopted. This program implies in a first phase that the supervised person shall meet once a week the community psychiatric assistent. The supervised convicted person shall meet twice a week a probation officer (unlike an ordinary person who under probation must perform only two such visits per month). Also, the person following this program must report once a month to the magistrate who convicted him, in order for his/her progress to be evaluated. People included in this program submit periodically urine samples in order to check whether they have been using drugs. Following an assessment carried out by the British authorities on the initial results of this program, it has been found that the weekly amount spent by a drug addict before integration in the program was about 400 pounds. The subjects of this program were committing a total of about 107 offenses per month before being included in the program, afterwards the number of crimes decreased to 10. It has also been found that many of the persons concerned have stopped using drugs. [3]

[2] *Idem*, p. 43.
[3] *Idem*, p. 55.

Waiving charges (discharge) is ordered if the court considers that it is not necessary to impose a sentence. Waiving charges can be unconditional or conditional. In the first case the defendant is not subject to any future restrictions regarding his future conduct, while in the second case it is possible that the defendant can still be held accountable for his actions if a new offense is committed in a specific time frame set by the court (this time frame can't be higher than 3 years).

The granting of a compensation occurs for offenses/crimes such as murder, hitting, stealing, etc., and can be applied as a unique punishment or alongside other types of punishment such as the ones mentioned above. In the Courts of Magistrates the defendant may be compelled to pay a compensation amounting to a maximum of £ 5,000 per offense. If the defendant is judged by a Royal Court, there is no such limit. In determining the amount of the compensation to be paid, the Court must take into consideration also the financial resources of the defendant. [4]

2.3. Results of the UK's crimal system

Between July 2013 and July 2014 in England and Wales were registered about 3.5 billion offenses, of which only 2,059 billion have come before the Courts of Magistrates. Around 1,394 billion defendants were tried by the Courts of Magistrates, 1,083 billion being found guilty, out of which 788.287 were fined and 42.987 were sentenced to imprisonment, compared to the 102.911 on which probation was ordered, the 25.331 on which the suspended sentence was applied and to the 104.844 to which other sanctions were applied.

Within the Royal Courts 85.943 persons were convicted, out of which 77.156 based on an admission of guilt agreement and 8787 without such an agreement. Of those who entered into such an agreement, 1603 persons were fined, 41.639 were sentenced to imprisonment, 20.765 received suspended sentences and 9915 persons were placed under probation. As it concerns those who have not concluded such an agreement, 182 were fined, 6297 were sentenced to imprisonment, 1344 received suspended sentences and 642 were placed under probation.

In total, within the above mentioned period 90.923 persons were sentenced to imprisonment (the average length of the sentence was 15.6 months), 160.908 persons were placed under probation and for 47.000 persons the suspended sentence was ordered.[5]

The statistics also show that the number of recorded offenses in the UK is steadily declining, now being the lowest since 1970 (when these type of statistics started being recorded).

The most common form of punishment applied by the British courts is the fine (over two thirds of those convicted were sanctioned with a fine). This is because most of the offenses were minor ones (summary offences), which are falling withing the Courts of Magistrates's jurisdiction. In 85% of summary offences cases, fines were imposed.

The number of persons sentenced to imprisonment also decreased by 12% in the past two years, in the reference period mentioned above only 8% of defendants being incarcerated. Notwithstanding the prison population increased by about 1-2%, together with the average length of the sentences ordered, from 15 months to 15.6 months.

Amid legislative reforms, an increase in the number of persons who have received a suspended sentence was registered, correlated with a reduction in the number of sentences through which probation (community sentence) was ordered.

In terms of more serious offenses like the offenses of a average and high gravity, the most common form of punishment ordered is imprisonment. The percentage of sentences ordering imprisonment is of 27%, the highest in the last decade. 21% of the convicted persons (for the same type of offense) were placed under probation (community sentence), compared to the 19% which were fined and the 12% which received a suspended sentence. Over a quarter of those who committed this type of offenses were tried by the Royal Courts, 57% of whom were sentenced to imprisonment. This proves a specialization regarding such serious offenses and a firm reaction of the judges in this kind of cases. [6]

It also noted that the number of first offenders is steadily decreasing since 2007, correlated with an increase in the number of recidivist offenders. Between June 2013 and June 2014, 104.100 convicted persons had been previously convicted or warned at least 15 times. About 38.9% of those convicted in the same period had a "rich" criminal record, as opposed to a procentage of 26.9% from ten years ago.

Of those who had 15 or more previous convictions or warnings, 38% were incarcerated for average or high gravity offenses, while only 11% of first offenders were sentenced to prison for the same type of offenses. In the case of first offenders the most common sanction was the warning (57%).[7]

[4] *A Guide to criminal Justice Statistics*, last updated 19th November 2015, disponibil la adresa https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/217725/criminal-justice-statistics-guide-0811.pdf.

[5] *Criminal Justice Statistics Quarterly Update to June 2014. England and Wales*, p.20, disponibil pe https://www.gov.uk.

[6] *Idem*, p.11-15.

[7] *Idem*, p.17-19.

With regards the relapse rate, based on different types of sanctions, the results of a study conducted between 2000-2010 must be noted. The study reveals that of those who benefited from a warning (the sample was of 135.722 persons) 15.7% have committed criminal offenses within the next year, in the next two years 23.3% of them committed criminal offenses, the percentage increased to 28.5% after three years, to 32.1% after four years, to 34, 7% after five years, to 35.9% after six years, to 36, 8% after seven years, to 37.4% after eight years, just to find that after nine years 38% of these persons had committed criminal offenses. The average number of offenses committed for each of these individuals was of 2.43 after one year, 3.02 after two years, 3.52 after three years and 5.50 offenses after 9 years.

With regards those against which noncustodial sanctions were ordered, under the supervision of the probation services (the sample was of 73.075 persons) after one year 32.3% of these persons relapsed, 44.7% committed new offenses after two years, 51.9% after three years, 56.6% after four years, 59.8% after five years, 62.5% after six years, 64.7% after seven years, 64.7% after eight years and 67.8% after nine years relapsed. The same statistics show that the average number of offenses committed by persons who relapsed was of 3.53 after the first year, 4.97 after two years, 6,20 after three years, 9,85 after eight years and 10.36 after the ninth year.

By comparison, of those who had been sentenced to inprisonment (54.108 persons), after the first year 45.8% of them committed at least a new offence, that percentage increased to 59.4% after two years, to 66.1% after three years, to 70% after four years, to 72.5% after five years, to 74.5% after six years, to 76.1% after seven years, to 77.4% after eight years and to 78.4% after nine years. The average number of criminal offenses committed by persons who relapsed was of 4.45 after one year, of 6.63 after two years, of 8.60 after three years, of 10.28 after four years and of 15.54 after nine years. [8]

3. Conclusions

Every criminal system is efficient, regarding the alternatives to detention, only if the persons placed under supervision don't commit new offences end if they are not imprisoned.

The economy that the state makes with not imprisoning a person, but place him under supervision, will have a opposite effect if that person commits new crimes.

This reality must be taken in consideration and must lead to a real reform regarding the alternatives to detention in the Romanian criminal law.

We presented the UK's criminal model so we can understand what we have to do in our criminal system.

Like in the UK, one of the most important problem is the underfunding of the probation system.

The lack of financial and human resources have negative effects i our country.

Without a perfect organised probation system there can't be a surveillance of the conicted persons.

However the probation system crisis is only a side of the economic and social crisis that our country is confronted in the last twenty years. Without a strong economy and without a well organized social system it's impossible to create workplace and assure the social reintegration of the convicted persons.

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[8] *2012 Compendium of re-offending statistics and analysis*,p. 41 disponibil pe https://www.gov.uk.

THE PREVENTIVE ARREST OF A PERSON IN PREVENTIVE DETENTION STATUS

Bogdan MICU[*]

Abstract

The paper addresses a practical issue of great relevance, namely that of opportunity and utility of preventive arrest of a person who is already in detention in another case. The issue is also extended and other preventative measures and is related to the fulfillment of the requirement of "threat to public order" imposed to be met in this matter.

Keywords: *preventive arrest, house arrest, danger to public order, preventive measures.*

1. Introduction

In judicial proceedings in the field of criminal law, it is often found the need to have and enforce preventive measures aimed mainly to ensure the proper conduct of the criminal trial. Under no circumstances, however, such measures, which have a negative impact on the rights and freedoms of the persons referred to may be taken if the general and special conditions required by the law are not met.

As indicated by art. 202 para. (4) Criminal Procedure Code, the preventive measures are: arrest, judicial review, judicial review on bail, house arrest and preventive arrest. The choice of either of these measures with regard to a concrete situation will be taken based on the fulfillment of the legal conditions, but also in agreement with the principle of proportionality also provided for in art. 202 para. (3): "any preventive measure shall be proportionate to the seriousness of the accusation of the person to whom it is taken and it is needed for the achievement of the aim pursued through its disposition."

In recent jurisprudence, we could notice the trend of taking the measure of preventive arrest, the most severe of the preventive measures, with regard to persons who were already in the custody of the State, either they were in the situation of serving a sentence, or they were the subject of another preventive arrest warrant. With regard to this practice, we appreciate that it is inconsistent with the conditions under which it may order the preventive arrest. To argue this opinion, we will proceed, first of all, to analyze the conditions that must be met for the preventive measure of arrest to be ordered.

2. The conditions under which the preventive arrest of a person may be ordered

Thus, firstly, to take the preventive measure of arrest in the custody of the State, it needs to be found that the measure is necessary to ensure the general goal of preventive measures, as shown in art. 202 paragraph (1) Criminal Procedure Code. According to the quoted text, any preventive measure may be ordered: "if there is evidence or reasonable indications which show reasonable suspicion that a person has committed a criminal offense" and if it is necessary "in order to ensure the proper conduct of the criminal trial, of preventing the circumvention of the suspect or defendant from prosecution or trial or to prevent the committing of another crime."

Given the provisions included in article 202 para. (1) to (3) Criminal Procedure Code, we have to find that for taking the preventive measure of arrest all general conditions of preventive measures should be fulfilled:

a) to have solid evidence or indications showing a reasonable suspicion that a person has committed an offense [art. 202 para. (1) Thesis 1 Criminal Procedure Code]. The condition was assessed in the specialized doctrine as superfluous because preventive measures necessarily imply the existence of a procedural framework which cannot exist without evidence or solid clues that show that a certain offense was committed[1].

However, we also notice in the specialty doctrine that the wording "there are strong clues" which shows a reasonable suspicion that a person has committed an offense is similar to that contained in article 5 paragraph 1 letter c) thesis 1 of the European Convention for the defense of human rights and fundamental liberties "there are credible reasons" to believe that a person has committed an offense[2]. In the case law of the European Court of human rights

[*] Asociated Professor, PhD, Faculty of Law, "Nicolae Titulescu" University of Bucharest (e-mail: **bogdanmicu@mnpartners.ro**).

[1] I. Neagu, M. Damaschin, "Tratat de procedură penală, Partea generală", Universul Juridic Publishing House, Bucharest, 2014, p. 587.

[2] A. Ţuculeanu, C. Sima, "Condiţiile reţinerii şi ale arestării preventive în reglementarea noului Cod de procedură penal", in "Revista Dreptul" no. 3/2015, p. 61 and the followings.

it is stated that "credible reasons" means the existence of reliable data or information, to convince an objective observer that it is possible that the investigated person committed the offense, the reasoning inferred in the circumstances of each cause[3].

b) the measure involving deprivation of liberty to be necessary in order to ensure the proper conduct of the criminal trial, circumvention of the suspect, or defendant from criminal prosecution or trial or prevention of committing another crime [art. 202 para. (1) thesis 2 Criminal Procedure Code]. Obviously, by these provisions the legislator has set the determinant goal of taking a preventive measure, which is to ensure the proper conduct of the criminal trial[4], the legal nature of the preventive measures being that of the "means of activating the criminal prosecution, the criminal process generally"[5].

About the assumption "to prevent the circumvention of the person committing the offense from prosecution or trial", the doctrine shows that it might be missing because the proper conduct of the criminal trial implies the presence of the suspect or defendant in prosecution or trial activities[6]. At the same time, views have been expressed, according to which the basis relating to the prevention of committing another offense, being a too general formulation, may not be accepted as a distinct basis for deprivation of liberty of a person, but rather a circumstance that can serve, adapted to the conditions of article 223 para. (1), letter d), final thesis of the Criminal Procedure Code, to the arrest of the defendant[7].

c) The preventive measure shall be proportional to the seriousness of the charges of the person against whom it is taken and it is needed for the achievement of the aim pursued through its disposition. [art. 202 para. (3) Criminal Procedure Code] The doctrine notes that among the prevention measures and the system of criminal sanctions, there should be a certain resonance because the status of freedom during criminal trial must correspond to a certain extent to the one existing after the application of criminal sanction, even showing that the criminal repression begins during the prosecution or trial of the case[8].

However, the requirement of proportionality of the measure in relation to the seriousness of the accusation is reflected in articles 53 para. (2) thesis II of the Constitution of Romania, under which the restriction of the right to freedom may only be ordered if the restriction is proportional to the situation that caused it, is non-discriminatory and shall not affect the existence of that right. The deprivation of liberty of a person is optional, being a serious measure, it is justified only if, in the circumstances of the case as a whole, other measures, less severe, are insufficient to achieve the goal shown in art. 202 para. (1) Criminal Procedure Code[9].

Moreover, art. 202 para. (4) Criminal Procedure Code lists in a certain order the preventive measures. The sequence used by the legislator also indicates the severity of the measure within the framework of preventive measures, the order of preference being given to measures which provide a lower level of interference on the rights and freedom of the person.

d) there is a cause that prevents the beginning of the criminal action or the exercise of criminal action [art. 202 para. (2) Criminal Procedure Code]. The condition is characterized as being unnecessary in the context the existence of any of the causes of the art. 16 Criminal Procedure Code[10] stops the whole course of the criminal procedure under which such a measure of prevention could be ordered [11].

e) the suspect or defendant should be heard in the presence of the lawyer chosen or appointed ex officio, insofar as he / she does not evade prosecution and does not exercise his /her right to silence.

These general conditions listed above must be met for the disposition of any preventive measure, regardless of its seriousness. Specific conditions of each of the measures to be ordered are added to all these.

Regarding the preventive arrest of the defendant, the special conditions are indicated by art. 223 Criminal Procedure Code: a) to have solid

[3] C.E.D.O, "Cauza Fox, Cambell, Hartley contra Marii Britanii", Decision of 30 August 1990, www.echr.coe.int; C.E.D.O., Cauza Varga contra României, Decision of 11 March 2008 www.echr.coe.int.

[4] I. Neagu, M. Damaschin, op. cit., p. 588.

[5] Constitutional Court, Decision no. 81 of 27 January 2011, published in the Official Gazette of Romania, Part I, no. 133 of 22 February 2011.

[6] G. Radu, "Măsurile preventive în dreptul procesual penal Român", Hamangiu Publishing House, Bucharest 2007, p.6.

[7] A. Ţuculeanu, c. Sima, URop.cit., p. 61 and following.

[8] I. Neagu, M. Damaschin, op. cit., p. 588.

[9] A. Ţuculeanu, c. Sima, URop.cit., p. 61 and following.

[10] According to article 16 Criminal Procedure Code, the criminal proceedings may not be started, and when it was started it can no longer be exercised if: a) the deed does not exist; b) the deed is not specified by the criminal law or has not been committed with the laid down by law; c) there is no evidence that a person has committed the offense; d) there is a justifying cause (self-defense, state of necessity, exercise of a right or the fulfillment of an obligation, the consent of the injured person) or non-liability (physical coercion, moral coercion, non-attributable excess, minority of the perpetrator, irresponsibility, unintentional poisoning with alcohol or other psychoactive substances, error, unforeseeable situation; e) prior complaint is missing, authorization or referral to the competent body, or some other condition prescribed by law, necessary to start the criminal action; f) amnesty, prescription or death of the suspect or defendant; g) prior complaint was withdrawn, reconciliation, or a mediation agreement was signed; h) there is a cause of impunity; i) there is an authority of judgment; j) there has been a transfer of proceedings to another state, according to the law.

[11] I. Neagu, M. Damaschin, op. cit., p. 589.

evidence or clues which show reasonable suspicion that a person has committed an offense; b) preventive arrest measure is necessary in order to ensure the proper conduct of the criminal trial, to prevent the circumvention of the defendant from prosecution or trial, avoid committing a crime; c) to record alternative performance of any of the situations referred to in article 223 Criminal Procedure Code.[12]

The specialty doctrine shows that in the Criminal Procedure Code there are two main categories in which the preventive arrest may be ordered, each having its own conditions[13]. The two categories are: assumptions of preventive arrest separate from the threat condition for public order [provided for in article 223 para. (1) letters a) - d) Criminal Procedure Code], namely, assumptions of preventive arrest ordered in consideration of danger to public order posed by the defendant [provided for in article 223 para. (2) Criminal Procedure Code].

I. Assumptions of preventive arrest separate from the threat condition for public order [provided for in article 223 para. (1) letters a) - d) Criminal Procedure Code] involving the meeting the following requirements:

a) there should be evidence indicating reasonable suspicion regarding the commission of an offense by the defendant. The requirement stresses that for taking the measure of preventive arrest, as the most severe of the preventive measures, it is not enough to have strong indications that an offense has been committed, as evidence is needed[14].

d) to be one of the situations listed in article 223 para. (1) letters a) - d) of the Criminal Procedure Code:

- the defendant fled or hid in order to evade the prosecution or trial, or has made any preparations for such actions;
- the defendant attempts to influence another participant in the offense, a witness or expert or to destroy, alter, conceal or steal material evidence or determine another person have such behavior;
- the defendant pressures the injured person or tries to reach a fraudulent agreement with him / her;
- there is reasonable suspicion that, after the beginning of the criminal action against him, the defendant has committed intentionally a new crime or is about to commit a new crime.

As related to these issues, it is not enough to invoke them in an abstract manner, but factual evidence should be presented[15]. For example, in the case of Griskin against Russia, the arrest was based on the existence of a threat of destruction or forgery of evidence. However, the authorities have made reference to this threat without indicating concrete reasons to justify that the defendant could abuse the freedom to commit acts of destruction or forgery of evidence, and for this reason, the breach of conventional provisions has been found[16].

II. The hypotheses of preventive arrest ordered in consideration of danger to public order which the defendant poses [provided for in article 223 para. (2) Criminal Procedure Code]

In the case of certain serious offenses, paragraph (2) of art. 223 of the Criminal Procedure Code provides for the possibility of taking the measure of preventive arrest of the defendant and in the other case, in compliance with the following conditions:

a) there should be evidence indicating a reasonable suspicion that the defendant has committed a crime that falls within the categories listed in article 223 para. (2) Criminal Procedure Code. As we the specialty doctrine provides, the offenses referred to in paragraph (2) of article 223 of the Criminal Procedure Code are also found in paragraph (1) of article 223 Criminal Procedure Code, being included in the generic formulation used by the legislator in paragraph (1) of article 223 Criminal Procedure Code: "the defendant has committed an offense," without further details. The difference between the two texts - paragraphs (1) and (2) of article 223 Criminal Procedure Code consists in establishing different situations (grounds) that legitimate the preventive arrest of the defendant [17].

Thus, basis of depriving the defendant of his liberty, as follows from paragraph (2) of article 223 Criminal Procedure Code refers to the following offenses: an intentional crime against life, a crime which has caused personal injury or death to a person, an offense against national security laid down in the Criminal Code and other laws, offenses of drug trafficking [18], weapons smuggling, human trafficking, terrorism, money laundering, counterfeiting of money or other values, blackmail, rape, illegal restraint, tax evasion, abuse, legal abuse, corruption, an offense committed by means of electronic communication, or any other offense for which the law provides for punishment by imprisonment of 5 years or more.

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[12] Idem, p. 628.

[13] M. Udroiu, Procedură penală, Partea generală, Editura C.H. Beck, Bucureşti, 2014, p. 402.

[14] I. Neagu, M. Damaschin, op. cit., p. 629.

[15] C.E.D.O. Case Tase against Romania, Decision of 10 June 2008, www.echr.coe.int; Case Calmanovici against Romania, Decision of 1 July 2008, www.echr.coe.int

[16] C.E.D.O. Case Griskin against Russia, Decision of 24 July 2012, www.echr.coe.int

[17] A. Ţuculeanu, c. Sima, URop.cit., p. 61 and following.

[18] The Constitutional Court admitted the exception of unconstitutionality regarding the phrase "drug trafficking" mentioned in the provisions of art. 223 para. (2) Criminal Procedure Code by Decision 553/2015.

b) there is no cause that prevents the beginning or the exercise of criminal action of those provided for in article 16 Criminal Procedure Code;

c) the criminal action should have been started for the crime for which there is a reasonable suspicion that it has been committed;

d) the measure is necessary to ensure the proper conduct of the criminal proceedings, to prevent the circumvention of the defendant from prosecution or trial or to prevent him commit a new crime (the proper conduct of criminal proceedings);

e) the measure is proportional to the seriousness of the accusation against the defendant and it is required for the achievement of the aim pursued in ordering it;

f) defendant was heard by the judge in the presence of the lawyer chosen or appointed ex officio;

g) defendant's deprivation of liberty would be necessary for the removal of a threat to public order.

This requirement is particularly of interest for this study, which is why we will analyze it in a thorough manner.

Thus, the doctrine notes that by this requirement, the legislator has established a legal alternating criterion which it reports for the incidence of situations that legitimate the deprivation of liberty, as appropriate, in the circumstances referred to in article 223 para. (1) letters a)-d) Criminal Procedure Code or, in their absence, the complex character referred to in article 223 para. (2) Criminal Procedure Code [19].

For the purpose of the threat for public order, the judge of rights and freedoms, the preliminary chamber judge, or the court will have to take into account the following criteria: the seriousness of the offense, the manner and circumstances of committing the offense, the entourage and environment from which the defendant comes, criminal history and any other circumstances relating to the defendant, hypotheses of preventive arrest measures ordered in consideration of danger to public order posed by the defendant [provided for in article 223 para. (2) Criminal Procedure Code].

However, we cannot fail to notice that there is no legal definition for the term "public order". In the Explanatory Dictionary [DEX], the term "public order" means political, economic and social order in a state which is ensured through a set of rules and special measures and translates by the normal functioning of the state apparatus, maintaining the peace of the citizens and compliance with their rights[20].

In the specialty doctrine, it is shown that the public order disturbance, to a certain extent, is related to the things felt by public opinion and not only by the objective data justifying this placement in detention as an exceptional measure. In doing so, the judge need not necessarily be insensitive to the public opinion, but he must provide a balance between the conflicting interests of the victim and the offender, for the purpose of respecting the rights of each party and the public interest [21].

Against this background, according to a separate opinion, the public order is understood as a component of the rule of law and it concerns the proper conduct of life in society, ensuring public safety and security of citizens[22]. In the same way, it has been shown that the assessment of threat to public order should be considered evidence on record showing the exterior elements made or to be made, and that would demonstrate the existence of a present danger for a collectivity of people so that the arrest is necessary to eradicate the hazard in question[23].

As regards the existence of a threat to public order, and in the case law of C.E.D.O., several emphases were made. For example, the Court found the breach of the provisions of art. 5 of the Convention because the authorities did not show any actual circumstance (negative) on the defendant, and the existence of a threat to public order arises only from the seriousness of the offense, the cause not being complex[24].

The domestic case law showed in a concrete situation that leaving at liberty the defendant investigated for illegal restraint and blackmail, poses danger for public order, considering the circumstances of committing the offense and the defendant. For this, the Court pointed out that the defendant exercised violence on the victim, confined him illegally, by transporting him to a basin dam and threatening him to throw him in the lake if he did not pay his debt. The danger to public order also results from the defendant's quality, under-officer with I.S.U. Instead of acting, according to his professional status, to save his fellows, he acted to the contrary, causing suffering to the victim of the crime. In the absence of a resolute response, such actions would encourage crime climate and would lessen citizens' confidence in the authorities[25].

[19] A. Ţuculeanu, C. Sima,Rop.cit., p. 61 and following.
[20] Explanatory dictionary of the Romanian language, Bucharest, 1996, p. 726.
[21] M. Udroiu, op.cit., . 416.
[22] A. Ţuculeanu, c. Sima, URop.cit., p. 61 and following.
[23] Gh. Mateuţ, Tratat de procedură penală. Partea generală, vol. II, C.H. Beck Publishing House, Bucharest 2012, p. 369-370.
[24] C.E.D.O. Romanova against Russia, Decision of 20 October 2005, www.echr.coe.int
[25] I.C.C.J., Criminal Section, Conclusion no. 3802/10 November 2009, Case Law Bulletin, p. 845.

3. The necessity to find the existence of the current danger to public order

We may find that in terms of the danger requirement for public order, there are principle changes compared with the previous Code of Criminal Procedure, which we do not find in the legal practice reflected properly.

Thus, in art. 223 para. (2) of the Criminal Procedure Code in effect, the term used by the legislator is: "it is found that the deprivation of liberty would be necessary for the removal of a threat to public order." Differently, art. 148 paragraph (1) letter f) of the Criminal Procedure Code 1968 shows that preventive arrest could be ordered if the general conditions of preventive measures were fulfilled: f) the defendant committed a crime for which the law provides for life imprisonment or jail for more than 4 years and there is evidence that his discharge is a real danger for the public order".

Under the previous Criminal Procedure Code, the assessment of danger was made by reference to the further behavior of the person, related to which the question of preventive arrest arose. Based on the appreciation elements made available to the Court it is shown that leaving the defendant free would cause danger to public order. This way, the phrase "danger to public order" designated a state that would endanger in the future the normal conduct of the social cohabitation rules, if the defendant was free, aiming at all social values protected by the criminal law. With regard to the fulfillment of this requirement, two elements had to be taken into consideration: the practical danger of the action and the perpetrator.

Differently, the new Criminal Procedure Code uses the expression: "it is found that the deprivation of liberty would be necessary for the removal of a threat to public order." In this way, on the occasion of analyzing the need of taking the measure of preventive arrest, it is no longer taken into consideration the social behavior of the defendant. Under the new provisions, it must be noted that at that time, the defendant's freedom is a danger for public order, danger in full swing, and that the only way to stop this danger is deprivation of freedom.

4. About the impossibility of ordering the preventive arrest in consideration of danger to public order posed by the defendant for persons already arrested

In these circumstances, it appears as surprising the common practice of preventive arrest of a person who is already in the custody of the State, either under a different preventive arrest warrant, or even under a writ of execution of a punishment applied in another case. We believe that such a practice does not represent anything other than a manifestation of inertia in implementing legal provisions better known from the previous Criminal Procedure Code, whereas the new provisions cannot cover such practice.

Our affirmation considers that it is excluded to find as fulfilled the requirement: "his deprivation of freedom is necessary for the elimination of a threat to public order with regard to a person who is already in the custody of the authorities. In no case, one cannot assert about a person held in a detention center and preventive arrest or even in a prison that his freedom since that time presents real danger for public order, for the simple reason that the condition of freedom does not exist at the time of the evaluation. In these circumstances, the new measure of preventive arrest cannot be regarded as necessary for the removal of a state of danger, which is why it appears as unlawful because it does not comply with the requirements for taking such measures.

We are unable to accept any possible motivation which would refer to the need for the new arresting warrant that would ensure the prevention of possible future circumvention of the person in detention but that could be released either because the preventive measure would reach the maximum period, would be revoked, replaced or the person would be released under parole or released as the punishment period would be fulfilled. Even in such cases, we may not talk about a real danger for public order, but about a future and possible danger. In these circumstances, the danger could be ascertained only after the release of the person placed in detention, making it impossible to be proved prior to the release.

An arrest warrant issued if the person to which it refers is already in the custody of the State is meaningless and and lacking real efficiency, because it may not be enforced. Moreover, it shall comply with the general scheme and be extended or checked within the terms specified by law, since it has a limited period in time. We believe that it is a useless legal effort to order a preventive measure which does not have the effectiveness imposed by art. 202 Criminal Procedure Code and it is even more useless to verify a measure that was never enforced.

It would be even more difficult to accept the assumption that following a request of preventive arrest by the Prosecutor's Office, the Court would appreciate that this is not proportional with the seriousness of the situation analyzed and orders house arrest. In this case, the person for whom the measure was taken is already in the custody of the State, and at the same time, he would not be allowed to leave the house.

5. Conclusions

We appreciate that the preventive arrest may not be legally ordered in consideration of danger to

public order posed by the defendant in respect of a person who is already arrested preventively or who is imprisoned to serve time, whereas such a measure is unlawful. The element of unlawfulness relates to the failure to comply with the special condition indicated in art. 223 para. (2): Criminal Procedure Code. "it is found that the deprivation of liberty would be necessary for the removal of a threat to public order."

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THE CRIMINAL OFFENCE OF MONEY LAUNDERING – A SERIES OF THEORETICAL AND PRACTICAL CONSIDERATIONS

Constantin NEDELCU[*]

Abstract

The paper at hand addresses the extremely complex and sensitive matter relating to one of the most controversial offences in the criminal laws of Romania – in particular, the criminal offence of money laundering. This paper bears both theoretical and practical interest, in that it points out specific instances of court case-law which were given different constructions by various judiciary authorities.

Keywords: *money laundering, concealment, aiding and abetting, concurrence of offences, concurrent regulations.*

1. The criminal offence of money laundering as reflected in international legal instruments

The criminal offence of money laundering is reflected in international legal instruments, and this as a result of the particularly high degree of social jeopardy that is attached to the criminal offence in question.

Thus, the recitals of the 1990 Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime of the European Council[1], state that this legal instrument was adopted in the context of all signatory states being convinced of the need to pursue a common criminal policy aimed at the protection of society, considering that the fight against serious crime, which has become an increasingly international problem, calls for the use of modern and effective methods on an international scale, believing that one of these methods consists in depriving criminals of the proceeds from crime, and the shared conclusion that for the attainment of this aim a well-functioning system of international co-operation must be established.

In accordance with Article 6 of the above-mentioned Convention, called: "Laundering offences", such criminal offences shall consist of the following, when committed intentionally: a) the conversion or transfer of property, knowing that such property is proceeds, for the purpose of concealing or disguising the illicit origin of the property or of assisting any person who is involved in the commission of the predicate offence to evade the legal consequences of his actions; b) the concealment or disguise of the true nature, source, location, disposition, movement, rights with respect to, or ownership of, property, knowing that such property is proceeds; and, subject to its constitutional principles and the basic concepts of its legal system: c) the acquisition, possession or use of property, knowing, at the time of receipt, that such property was proceeds; d) participation in, association or conspiracy to commit, attempts to commit and aiding, abetting, facilitating and counselling the commission of any of the offences established in accordance with this article.

Paragraph 2 of the same article also includes several clarifications as to the manner in which the provisions incriminating laundering offences are to be implemented or applied in the domestic law of the signatory states. They will appraise whether: a) the predicate offence was subject to the criminal jurisdiction of the state Party; b) the offences do not apply to the persons who committed the predicate offence; c) knowledge, intent or purpose required as an element of an offence set forth in that paragraph may be inferred from objective, factual circumstances.

In addition, paragraph 3 of the same article further states that each Party may adopt such measures as it considers necessary to establish also as offences under its domestic law all or some of the acts referred to in paragraph 1 of this article, in any or all of the following cases where the offender: a) ought to have assumed that the property was proceeds; b) acted for the purpose of making profit; c) acted for the purpose of promoting the carrying on of further criminal activity.

Under the aegis of the European Union, other legal instruments were also enacted aimed at penalizing offences of money laundering, in testimony to the fact that this phenomenon is deemed to be extremely severe, all Member States expressing the need to fight against it. The onset was that, if certain coordination measures are not adopted at the level of the Community, then money launderers or terrorism financers could attempt to take advantage, in facilitating their criminal activities, of the free movement of capital and of the freedom to provide

[*] Lecturer PhD, "Nicolae Titulescu" University (e-mail: **constantin.nedelcu@univnt.ro**).

[1] Ratified by means of Law No 263/2002 published in Official Gazette of Romania, Part I, No 353 of 28 May 2002.

financial services relating to the integrated financial area[2].

With a view to addressing these concerns in the field of money laundering, Council Directive 91/308/EEC was adopted on 10 June 1991 on prevention of the use of the financial system for the purpose of money laundering. This legal instrument requires Member States to prohibit money laundering and force the financial sector, including credit institutions and a wide range of other financial institutions, to identify their clients, to keep appropriate records, to set forth internal procedures concerning personnel training and money laundering and report any money laundering suspicions to the competent authorities.

Another legal instrument adopted under the coordination of the European Union is the Council Framework Decision of 26 June 2001 on money laundering, the identification, tracing, freezing, seizing and confiscation of instrumentalities and the proceeds of crime (2001/500/JHA)[3] which, in its recitals, refers to the European Council in Tampere of 1999, pointing out that money laundering is at the very heart of organized crime and should be rooted out wherever it occurs. In this respect, it is further stated that "The European Council is determined to ensure that concrete steps are taken to trace, freeze, seize and confiscate the proceeds of crime". In this context, Article 2 of Framework Decision No 2001/500/JHA stipulates as follows: "Each Member State shall take the necessary steps consistent with its system of penalties to ensure that the offences referred to in Article 6(1) (a) and (b) of the 1990 Convention, as they result from the Article 1(b) of this framework Decision, are punishable by deprivation of liberty for a maximum of not less than 4 years." By means of this legal instrument, an obligation undertaken at the level of the European Council was assimilated in the Community law of that date.

Setting out from the objective reality that money laundering often takes place in an international context, the European Union acknowledged that any measures adopted exclusively at national or even Community level, without having regard to international coordination and cooperation, would only achieve limited results. For this reason, the measures adopted by the Commission in this field should be in line with endeavors undertaken by other international authorities. In particular Community actions ought to continue to take into account the recommendations of the Financial Action Task Group (herein after referred to as FATF), which is the main international body fighting against money laundering and terrorism financing[4].

These considerations led to the enactment of Directive 2005/60/EC of the European Parliament and of the Council of 26 October 2005 on the prevention of the use of the financial system for the purpose of money laundering and terrorist financing.

In the very first article of the directive, it is laid down that Member States shall ensure that money laundering and terrorist financing are prohibited.

At the same time, the following conduct, when committed intentionally, shall be regarded as money laundering: "a) the conversion or transfer of property, knowing that such property is derived from criminal activity or from an act of participation in such activity, for the purpose of concealing or disguising the illicit origin of the property or of assisting any person who is involved in the commission of such activity to evade the legal consequences of his action; b) the concealment or disguise of the true nature, source, location, disposition, movement, rights with respect to, or ownership of property, knowing that such property is derived from criminal activity or from an act of participation in such activity; c) the acquisition, possession or use of property, knowing, at the time of receipt, that such property was derived from criminal activity or from an act of participation in such activity; d) participation in, association to commit, attempts to commit and aiding, abetting, facilitating and counselling the commission of any of the actions mentioned in the foregoing points."

The same text indicates that money laundering shall be regarded as such even where the activities which generated the property to be laundered were carried out in the territory of another Member State or in that of a third country, while knowledge, intent or purpose required as an element of the activities of money laundering may be inferred from objective factual circumstances.

In close connection with the phenomenon of money laundering, the Directive further defines the concept of "serious crime" which shall mean, at least: "acts as defined in Articles 1 to 4 of Framework Decision 2002/475/JHA on combating terrorism; any of the offences defined in Article 3(1)(a) of the 1988 United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances; the activities of criminal organizations as defined in Article 1 of Council Joint Action 98/733/JHA of 21 December 1998 on making it a criminal offence to participate in a criminal organization in the Member States of the European Union; fraud, at least serious, as defined in Article 1(1) and Article 2 of the Convention on the Protection of the European Communities' Financial Interests; corruption; all offences which are punishable by deprivation of liberty or a detention

[2] http://eur-lex.europa.eu/legal-content/RO/TXT/HTML/?uri=CELEX:32005L0060&from=EN#ntr5-L_2005309RO.01001501-E0005
[3] http://eur-lex.europa.eu/legal-content/RO/TXT/HTML/?uri=CELEX:32001F0500&qid=1458738324354&from=en
[4] http://eur-lex.europa.eu/legal-content/RO/TXT/HTML/?uri=CELEX:32005L0060&from=EN#ntr5-L_2005309RO.01001501-E0005

order for a maximum of more than one year or, as regards those States which have a minimum threshold for offences in their legal system, all offences punishable by deprivation of liberty or a detention order for a minimum of more than six months".

2. Considerations on the evolution in Romanian law

Under the influence of such regulations, in the Romanian legal system, Law No 21/1999 was enacted for the prevention and penalizing of money laundering[5]. In Article 23(1) of the said law, the criminal offence of money laundering was defined as follows: "**a)** the exchange or transfer of valuables, knowing that they derive from the commission of criminal offences: trafficking in narcotic drugs; failure to comply with the arrangements for weapons and ammunitions, in an aggravating form; failure to comply with the arrangements for nuclear materials or other radioactive materials; failure to comply with the arrangement for explosives; counterfeiting currency or other valuables; procurement; smuggling; blackmail; illegal deprivation of liberty; swindle in the banking, financial or insurance systems; fraudulent bankruptcy; theft and concealment of motor vehicles; failure to comply with the protection arrangements for certain goods; trafficking in animals protected in their country of origin; illicit trade in human organs and tissue; criminal offences committed by means of computers; criminal offences committed by means of credit cards; criminal offences committed by persons forming part of criminal groups; failure to observe the regulations governing the import of wastes and residues; failure to observe the regulations governing gambling; for the purpose of concealing or disguising the illicit source thereof, and also for the purpose of concealing or abetting persons involved in such activities or presumed to evade the legal consequences of their actions; **b)** concealment or disguise of the true nature, source, disposition, movement or ownership of property, knowing that such property is proceeds of one of the criminal offences referred to in letter a); **c)** the acquisition, possession or use of property, knowing that such property is proceeds of one of the criminal offences referred to in letter a)".

Therefore, it may be noticed that the Romanian law-maker opted for the alternative of expressly indicating the criminal offences which may be regarded as predicate offences in relation to money laundering, as this offence is obviously connected with the phenomenon of organized crime and of serious crime.

Upon repealing Law No 21/1999 and its replacement with Law No 656/2002, the Romanian law-maker's option changed, the current Article 29 in the new regulation no longer lists the criminal offences which may be regarded as predicate offences in light of the offence of money laundering. As compared to the previous form of this criminal offence, the new text broadly maintains the wording, the relevant doctrine stating that when the object of "laundering" consists of illicit money, in fact, the author of the money laundering offence performs the following activities[6]:

I. first of all, he gets (receives) the cash originating from the commission of criminal offences (*reception of money*).

II. second of all, the money launderer devises a money laundering *scheme* (*laundering itself*), which, in most cases, is structured in *three stages*:

- the first stage – *placement* – this is the stage when the money deriving from illicit activities is placed in circulation, is actually placed with institutions falling in the category of those referred to in Article 8 of Law No 656/2002, more specifically: banks, investment funds, insurance companies, etc. Therefore, in this first stage, illicit proceeds are *scattered*, which means that the overall amount is divided into portions smaller than EUR 15,000 (in RON equivalent) and then actually *placed*;
- the second stage – *sedimentation or stratification* – involves the separation of illegal proceeds from their source. This is achieved through the creation of totally or partially fictional financial or commercial transactions, by setting up "shell" companies. The money launderer draws up fictional import-export documents, in reliance upon which money is transferred *from the initial placement institution (bank)* as payment for fictional export services or operations, to another bank;
- the third stage – *integration* – involves the legitimization of proceeds derived from the commission of criminal offences, by re-entering them in the legal financial, banking or commercial circuit.

The wording of Article 23(29) of Law No 656/2002 also underwent other amendments, as compared to its form upon the effective date of the law. The text was supplemented with three other paragraphs, which set forth that: if the offence was committed by a legal entity, in addition to the penalty of fine, the Court shall impose, as the case may be, one or more complementary sentences, as stipulated in Article 136 (3) a)-c) of the Criminal Code.

[5] Published in Official Gazette of Romania, Part I, No 18 of 21 January 1999. Currently repealed by Law No 6556/2002.

[6] Al. Boroi, M. Gorunescu, I.A. Barbu, *Dreptul penal al afacerilor* [Criminal Business Law], C.H. Beck Publishing House, Bucharest, 2011, p. 367.

From the perspective of the subjective side, paragraph (4) in Article 29 of Law No 656/2002 expressly lays down that: "knowing the source of property or the pursued purpose may be inferred from objective factual circumstances".

Paragraph (5) of the legal text extends the scope of the above-mentioned provisions, being irrelevant whether the criminal offence from which the property derived was committed in the territory of Romania or abroad.

3) Practical difficulty in enforcing the incriminating regulation set forth in Article 29 of Law No 656/2002 on the prevention and fight against money laundering and terrorism financing

As already indicated herein above, upon repealing Law No 21/1999 and replacing it with Law No 656/2002, the Romanian law-maker's option changed. Thus, Article 23 of this new legislative enactment[7] defined the criminal offence of money laundering, with no reference to the type of criminal offence which may become predicate offence in relation to it. Not even the technique of reference to the concept of serious offence was used, which was defined at that time by the relevant laws in force. Under such circumstances, separation between the criminal offence of money laundering and the criminal offence of concealment and abetting, already existing in the Criminal Code, became even more burdensome. The doctrine attempted to explain the difference between money laundering and the two classical criminal offences within the meaning that the regulation governing money laundering should only apply to the cases where concealment and abetting relate to the phenomenon of money laundering, and also in the instances where "concealment" refers to a real estate asset. In all other cases, the texts referring to concealment or abetting, as applicable, shall apply[8].

Another opinion is that, in fact, no distinction is possible between the three criminal offences, the intervention of the law-maker being required, within the meaning of indicating once again the offences which may be regarded as the predicate offence in relation to the criminal offence of money laundering[9]. Another vivid controversy existing in the legal practice and appropriately reflected in court practice refers to the active agent of the criminal offence of money laundering. As regards this constituent element, it was stated that the active agent of the criminal offence of money laundering may be the author of the predicate offence, but also a person specialized in money laundering, not related in any manner whatsoever to the predicate offence. In legal practice[10], it was specified that the author of the criminal offence of bribe taking exchanging the money received for "*his activity*" into foreign currency and depositing it to the bank in the name of his mother will also be held liable for the criminal offence of money laundering, a solution which both the undersigned, and the relevant literature[11], adhere to. In another view, it is deemed that the active agent of the criminal offence of money laundering is always different from the active agent of the criminal offence from which the property originates[12].

In a yet more radical opinion, it is stated that the principle *ne bis in idem* would be infringed, should the author of the predicate offence be penalized for money laundering, as he is penalized twice for committing the same offence because, in certain factual hypotheses, he automatically commits the criminal offence of money laundering, too. For instance – in the hypothesis described in letter c), the author of the criminal offence of theft takes possession over the property immediately after consummation of the predicate offence, thus automatically and simultaneously committing the criminal offence of money laundering.

In line with this last opinion, we also believe that the criminal offence of money laundering may not be committed by the author of the predicate offence, in any circumstances whatsoever. We also deem that the phrase "knowing that such property is proceeds" included in the incriminating rule set forth in Article 29 of Law No 656/2002 should account as an exclusion, from the category of potential active agents in the criminal offence of money laundering, of the person having committed the predicate offence, because the phrase would seem futile otherwise in respect of the latter.

3. Conclusions

The criminal offence of money laundering is an offence which was traditionally connected to the phenomenon of organized crime, the criminal offences from which money or property to be laundered originated being expressly and restrictively stipulated by the regulation defining this criminal offence. In line with the new legislative realities, the criminal offence left the area of

[7] Which became Article 29 after re-publication in Official Gazette of Romania, Part I, No 702 of 12 October 2012.

[8] P. Munteanu, *Câteva elemente de distincţie între spălarea de bani, tăinuire şi favorizare* [A series of distinctions between money laundering, concealment and abetting], published in *Caiete de Drept penal* [Criminal Law Notebooks] No 1/2008, p. 50.

[9] M. A. Hotca, M. Gorunescu, N. Neagu, M. Dobrinoiu, R.F. Geamănu, *Infracţiuni prevăzute în legi speciale* [Criminal offences set forth in special laws], C.H. Beck Publishing House, Bucharest, 2013, p. 124.

[10] The High Court of Cassation and Justice, Criminal Division, Criminal Decision No 1386/2004, *Dreptul* [Law Magazine] No 2/2005, p. 247.

[11] Please see Editor's note G. Antoniu to article *Subiectul activ al infracţiunii de spălare a banilor* [Active agent of the criminal offence of money laundering], author: C. Bogian, R.D.P. [Criminal Law Magazine] No 1/2007, p. 74.

[12] D. Ciuncan, A. Niculiţă, *Subiectul activ al infracţiunii de spălare a banilor* [Active agent of the criminal offence of money laundering], R.D.P. [Criminal Law Magazine] No 2/2006, p. 105 *et seqq*.

plurality, constituting and being constantly mistaken for other criminal offences regulated under the Romanian criminal law, such as concealment or aiding and abetting. Although the doctrine repeatedly requests legislative interventions to help clarify these matters, but also others in connection with the capacity of active agent, all amendments brought so far have not led to such clarification, and the case-law also faces difficulties of interpretation and enforcement when it comes to the incriminating regulations in the field of money laundering.

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THEORETICAL AND PRACTICAL CONSIDERATIONS RELATING TO THE OFFENSE OF DRIVING A VEHICLE UNDER THE INFLUENCE OF ALCOHOL OR OTHER SUBSTANCES. COMPARATIVE LAW ISSUES

Alin Sorin NICOLESCU[*]

Abstract

Along with the enforcement of the New Criminal Code, the offense provided by art. 87 from the Emergency Ordinance no. 195/2002 was abolished and introduced in the New Criminal Code in art. 336 under the name "Driving a vehicle under the influence of alcohol or other substances". The introduction of this offense in the Criminal Code was made as a result of some modifications regarding the offense objective content and sanctioning character. The most important modifications consist in the incrimination conditions in respect to the moment alcohol must be identified in the blood so that the material element of the objective side of the offense is met. This modification further led to a series of problems, mainly regarding the moment the offense is consumed, moment that in the legislator's opinion is the moment the biological samples are taken. This opinion does not consist with the fact that this offense is a danger offense and it is consumed at the moment it occurred. According to the Romanian Constitutional Court decision no. 734/2014, after the moment the offender is stopped in traffic, he no longer represents a danger to the values protected by the criminal law and it would be absurd to punish him for an action that no longer represents a danger to society, considering the moment the biological samples are taken. Moreover, this legal issue lead to acquittal solutions regarding the offense provided and sanctioned by art. 336 from the Criminal Code.

Keywords: *offense, biological samples, driving, vehicle, alcohol.*

1. Introduction

"A society cannot exist, as a whole, without a series of fundamental values defended by legal rules. One aspect of a developing social life has been represented since ancient times by the social values protected by the legislation that the completely social life depends on. "After the emergence of the state, the function of defending of the essential social values that the society is based and develops is realized by means of criminal law."[1]

By applying sanctions for committing some dangerous actions or considered by the society as being dangerous, it is found the importance of criminal law in everyday life and its indispensability, in general, of the offenses in the road that the society frequently deals with lately, and the number of the convicted people in this respect is in continuous growth.

It is very important that the regulatory acts should adapt themselves to the society and, especially, to the level of values the society is built and formed, thus, the law is in a constant change, trying to fold close to the perfection on the needs of the community. Of course, the balance between the social realities and the normative field that establishes the relations between individuals is not always perfectly accomplished, thus, the interpretation of the rules in the spirit they were created for, suggests the fair application of these ones and, without doubt, the law finds applicability in the national culture and morality. It is admitted the fact that the society is continuously changing and it is therefore imperative that the rules should become acquainted with the occurred social changes.

With the occurrence of the new Criminal Code Penal[2], the Romanian law system has undergone a reform as regards the criminal legislation. This reform was welcomed in most cases by the great authors and theorists, however, as any new issue; it was the subject of some criticism, which, in some cases, surpassed the beneficial side of the new legislation.

As a novelty, a number of offenses of the special legislation were introduced in the new Criminal Law. Thus, offenses, such as those in the field of Government Emergency Ordinance no. 195/ 2002 regarding the circulation on the public roads, were abolished and introduced in the Criminal Code under the influence of some regulatory changes, which later led to a number of legal issues that required even the intervention of the High Court of Cassation and Justice or of the Romanian Constitutional Court in order to solve some legal problems or to establish the unconstitutionality of the acts.

Art. 87 of the Government Emergency Ordinance no. 195/ 2002 was abolished by art. 121 section 1 of Law no. 187/ 2012 for the

[*] Judge, University Assistant at "Nicolae Titulescu" University from Bucharest.

[1] Constantin Mitrache, Cristian Mitrache,*Roman Criminal Law.General Part*, Ed. Universul Juridic, Bucharest, 2014, p.21.

[2] Law no. 286/2009 regarding the (new) Criminal Law, published in Official Gazette. No. 510 of 24th July 2009.

implementation of the Law no. 286/ 2009 regarding the Criminal Code.

The present study focuses on the analysis of the stipulations of the incriminating text of the art. 336 of the new Criminal Code, corresponding in G.E.O. no. 195/ 2002, art. 87. The offense is regulated in a simple variation, an assimilated variation and an aggravated variation.

2. The Analysis of the Offence

2.1. Legal Content

In a simple form, the Criminal Code defines as a criminal offence, the action of a person of driving a vehicle on public roads for which the law requires the possession of a driving license at the time of collecting the biological samples has an alcoholic impregnation of over 0, 80 g/l of pure alcohol in blood[3]. It is noticed that the new regulation takes over many of the constitutive elements of the offence, as it was previously regulated in the Emergency Ordinance no. 195/ 2002, but with some differences:

Driving on public roads does not concern only a vehicle or tram, but the material element of the offence reveals the condition of driving any kind of vehicle[4] for which the law provides the obligation of possessing a driving license.

It is noticed the fact that in this situation, the legislator extended the incrimination procedure on any type of vehicle, the only condition is that the legislation provides the obligation of possessing the driving license of the driver of the vehicle in question.

It is also noticed the fact that the minimum allowed limit referring to the alcoholic impregnation in the blood is the same, i.e. 0.80 g/l of pure alcohol in the blood, but with the specification that this one is necessary to exist at the time of biological sampling.

In the assimilated form, art. 336 finds guilty the deed of the person who drives a vehicle on public roads that the law provides the obligation of possessing a driving license under the influence of some psychoactive substances. The normative text takes the same structure of the old regulation with the following differences[5]:

The action of driving must relate to a vehicle for which the law provides the obligation of owning a driving license, as in the case of the simple form.

As regards the active subject, this one must be under the influence of psychoactive substances, as opposed to the old regulation where the condition of the active subject was that this one was under the influence of some substances or narcotic products or drugs with similar effects to these ones.

The aggravated form is provided in paragraph (3) and is represented by the deed of the person who drives a vehicle on public roads for which the law provides the obligation of possessing a driving license at the time of biological sampling and has an alcoholic impregnation exceeding 0, 80 g/l of pure alcohol in blood or the person is under the influence of some psychoactive substances, if this person carries out public transport of people, transport of substances or dangerous substances or is in the process of practical training of people in order to obtain the driving license or during the practical tests of the exam in order to obtain the driving license. It is noticed the fact that there are no changes of the constitutive elements of the offence in relation to the previous regulation.

2.2. Pre-existing conditions

The legal object is constituted by those social relations that ensure the safety on public roads.

The offence prescribed by art. 336 lacks of material object, being a crime of danger the driving of a vehicle on public roads according to the conditions prescribed in the text of incrimination being means through the offence is committed and not its object.

In the case of the simple and aggravated form the active subject is unqualified, being any person who satisfies the required conditions by the law for criminal responsibility. In interpreting the aggravated form, it is necessary that the active subject should perform a certain activity, such as: making public transport of passengers, transport of substances or dangerous products or he/ she is in the process of practical training of some people to obtain the driving license or is during the practical examination to obtain the driving license, thus, the active subject must be qualified in this situation

The passive subject is the state, "over which it passes these consequences of all violations of the rule of law, implicitly the consequences that violate the traffic rules on public roads."[6]

2.3. The Constitutive Content

In terms of the objective side, the material element of the simple and aggravated offence prescribed by art. 336 in para. (1) and (2) is carried out by the action of driving, under para. (1) by a person who has an alcoholic impregnation over 0, 80 g/l of pure alcohol in blood at the moment of biological sampling, and in the case para. (2) by a

[3] Art. 336 of Criminal Code.

[4] The mechanical system which moves on the road, with or without means of self-propulsion, currently used for the transport of people and/or goods or to perfrom services or worksi. Art. 6, pt 35 of GEO no. 195/2002.

[5] Tudorel Toader, Maria-Ioana Michinici, Anda Crisu-Ciocinta, Mihai Dunea, Ruxandra Raducanu, Sebastian Radulet, *New Criminal Code, Comments on articles*, Ed. Hamangiu, 2014, p 528.

[6] Alexandru Boroi, *Criminal Law. Special Part.*, Ed. Universul Juridic, Bucharest, 2014, p. 503.

person who is under the influence of some psychoactive substances.

It is mentioned that the collection of the biological samples is done in the authorized health care units or in forensic medicine institutions and carried out only in the presence of representative of the traffic police officers. The determination of the concentration of alcohol or the presence of substances or narcotic products or drugs with similar effects to these in the organism is done in authorized forensic medicine institutions in accordance with the methodological norms established by the Ministry of Public Health. Also, the traffic police officers establish the presence of the alcohol in the exhaled or preliminary test the presence of substances or narcotic products or drugs with similar effects in the organism with the aid of some certified technical means, for example: ethyl test.[7]

As regards the aggravated variation prescribed in para. (3), the material element is performed under the influence of the same actions of driving, but in specific terms and conditions:

In the first way of committing the offence, the vehicle must meet the conditions to be used as a means of transport in order to public transport of passengers;

The second way provides the transportation with a vehicle by the person in the situations prescribed in para (1) and (2) of the substances or dangerous products;

The third situation requires that the person under the incidence of the above mentioned paragraphs to be in the practical training of some people in order to obtain the driving license;

The fourth way requires that the person referred to in art. 336 may be located during the practical exam in order to obtain the driving license.

The offence is one of danger; so consequently, the immediate consequence will count in endangering the safety on public roads.

"In order to fulfil the objective side of the offences referring to the safe circulation on the public roads, there must be a causal link between the action or inaction that constitutes the material element and the specific result. The causal link comes from the very materiality of the offence and should not be proved."[8]

In terms of the subjective side, the offence provided and punished by the art. 336 can be committed in the form of a direct or indirect attempt.

The reason or the aim of the commitment of the crime has no relevance for the existence of the offence, but they are to be considered in the individualizing of the possible punishment that will apply to the defendant.

The offense is likely to be committed as an interrupted attempt. It might commit an attempt to the offence provided in art. 336 of the Criminal Code, the offender who was in an advanced state of drunkenness (blood alcohol level over 0.80 g/l) climbed at the wheel of a car, started the engine, geared lever I of speed to move forward, but a friend or even a police officer actually stops this person. The preparatory acts, even though possible, as the attempt, are not punished.

As regards the more favourable law to the conditions of the incrimination, having an extension of the rule of incrimination, the Criminal Code has more stringent regulations. In terms of the system of penalties, the Criminal Code has a favourable character because it provides an alternative to the simple variant and assimilated variant both imprisonment and fine penalty.

The commitment of the offence is punishable by imprisonment of between one to five years or fine in both simple and assimilated variation. As far it concerns the aggravated variant ion, the commitment of the offence is punishable by imprisonment between 2 and 7 years.

3. Decision no. 3/ 2014 of the High Court of Cassation and Justice

As shown above, the incorporation of the art. 87 of GEO no. 195/ 2002 in the content of the art. 336 of the Criminal Code was made subject to some amendments, aspects that have caused a number of differences, a non-unitary practice and even the investment of the superior courts for the purpose of solving some laws or establishing the unconstitutionality of provisions referring to the objective side of the offence, the moment of the offence and in particular on what evidence, derived from the work of sampling and analysis of the biological samples, we can discuss about the incidence and the criminal nature of the deed. So:

The High Court of Cassation and Justice published its decision in the Official Gazette no. 392 on 28th May 2014. The jury for solving some points of law in criminal matters no 3/ 2014 had as objective to pronounce a prior decision to solve a principle of the law regarding the interpretation and enforcement of the stipulations of art. 336 para. (1) of the Criminal Code for the purpose of establishing the result of the alcohol with criminal relevance in the hypothesis of a double biological samples.

The notification of the Criminal Section of the High Court of Cassation and Justice was determined by the so- called mismatch of the provisions of the art. 336 para. (1) of Criminal Code with the existing methodological norms regarding the sampling, the storage and the transportation of the biological samples to judicial probation through establishing

[7] G.E.O. 195/2002, art. 88.

[8] Alexandru Boroi,*Criminal Law.Special Part*, Ed. Universul Juridic, Bucharest, 2014, p. 504.

the alcohol or the presence of narcotic substances or drugs with similar effects, in the case of the people involved in events or circumstances related to road traffic, approved by the law of Ministry of health no 1512/ 2013, especially those in art. 10 para. (1).

The Court of Appeal from Alba- Iulia, the Criminal Section and for cases involving children decided to notify the High Court of Cassation and Justice regarding the pronouncement of a prior decision to solve the principle of the law regarding the enforcement and interpretation of art. 336 para. (1) of the Criminal Code, for the purpose of establishing the blood alcohol result with criminal relevance in the hypothesis of a double biological sample.

Since the legislator did not take over the entire incriminating text of art. 87 of G.E.O no. 195/ 2002, in the practice of the courts was raised the problem of the moment of the alcohol level with criminal relevance for the reintegration of the objective side of the offence. It is reminded that the old regulation implied an alcoholic impregnation that exceeded 0, 80 g/l of pure alcohol in blood at the time of driving the vehicle, thus, enabling to establish this deed through retroactive calculation[9] that was possible due to the methodological rules regarding the sampling, the storage and the transport of the biological samples in order to judicial probation through the establishment of the alcohol or the presence in the organism of substances or narcotic products or drugs with similar effects to these ones in the case of the involved people in in the events or circumstances referring to the road traffic[10].

3.1. The opinion of the instances in Romania

Most Courts of Appeal in Romania have submitted opinions regarding the law issue undergone to solve, at the request of the High Court to solve the law issue undergone to the analysis, and for this purpose, the interpretation has been one common, as follows : in the case of a double biological taken samples, the one with criminal relevance and that completes the objective side of the offence is the first sampling as this is the time closest to the time of detection in the traffic of the driver under the influence of the alcohol or other substances**[11]**.

At the level of the Courts in from the District 1, 4 and 5 Bucharest, it has formed the opinion that: "determining the criminal activity depending on the result of the first sampling corresponds most to the social protected values . Thus, if the result of the first sampling is higher than of the second, then the alcoholic impregnation from the time of the commitment was higher than the existing at the time of the two samples, fact that proves the degree of superior social danger".

The Court in District 2 expressed the point of view in terms of criminal relevance of the evidence with the highest value.

On the basis of the principle in dubio pro reo, the Law Court of District 6 expressed the opinion according to which the level of the blood alcohol with criminal relevance should be given by the lowest value because not the first taken sample is lower, since the blood alcohol content takes the form of a curved with an increasing and decreasing period. If the sampling of the two blood proofs is done during the increasing period, the first sample has a lower value and will be more favourable to the defendant. If the sampling of the two samples is carried out during the decreasing period, the second sample will be lower and more favourable to the defendant.

3.2. The opinion of "Mina Minovici" Forensic medicine Institute

There is also an official point of view of the National Forensic Medicine Institute "Mina Minovici" that replied that the criminal relevance of the ethylic intoxication is given by the value of the alcohol from the first blood taken, arguing that:

"Collecting two blood samples was part of the methodology to determine the ethylic intoxication and was useful for establishing the phase of the intoxication (absorption or elimination) and the rate of the individual elimination in case of the request the expertise of the retroactive assessment of alcohol. For the purposes of the new Criminal Code, the extraction of a single blood sample in a moment as close as possible to the road event is necessary.

This provision should have replaced the old provision of collecting two blood samples provided in the Order of the Health Minister no 1.512/ 2013, but pending the modification of the order of health minister, the National Institute of Forensic Medicine "Mina Minovici" stated that the value of the alcohol from the first blood sample gives the probative value for the existence of the alcoholic intoxication.

The alcohol consumed by a person enters a dynamic process in the body called metabolism. The concentration of the alcohol in various parts of the body will be different from one moment to another, until the completely elimination from the body. Complex mechanisms governed by dozens of individual, general and particular factors interfere in the metabolism of the alcohol. Thus, each person reacts in his or her own way, both in terms of method or metabolism, as well as, especially, as regards the clinical manifestations rendered by behaviour.

[9] Art. 10. (1) To determine the blood alcohol content, two bloos samples will be taken at an interval of one hour each other, each sample being represented by an amount of 10 ml blood.

[10] Approved by the Order of the Health Minister no. 1.512/2013.

[11] Decision of High Court of Cassation and Justice no. 3/2014.

Although the pathophysiological mechanisms are very well known, it has not been found so far any acceptable model based on which it could be faithfully reconstructed the path of the alcohol in the dynamics of the process of absorption and elimination from the body. In this respect, it has been developed multiple models of the evolution of the blood concentration in the body, the closest to the reality being the one imagined by Widmark.

It has been shown that the only scientific way to establish the level of the alcoholic intoxication is through the blood analysis of the taken sample, and the probative value of the expertise regarding the retroactive estimation of the alcohol has been greatly exaggerated, the retroactive interpretation of the alcohol is not a usual expertise in the European countries and is rarely allowed.

Since it is impossible to quantify all the factors that contribute to the metabolism, it applies models of calculation of graphical expression that are simplified, estimated or resulted from the statistical averages. In the submitted opinion, this represents a first argument for the relative character of a retroactive interpretation of alcohol.

The speculative nature of this kind of expertise provides the main argument. To reproduce the metabolism of a certain amount of drink, this one must be objectively known, as well as all the circumstances of the respective alcohol consumption. The defendant provides all the information in all these cases. It is necessary to know that at a certain level of blood alcohol, established undoubtedly through the laboratory analysis, it can be reached through an infinite number of variations of consumption. By default, there will be an infinite number of possible concentrations in a previous moment. Therefore, through this type of expertise, it is concluded that if the person had swallowed the alcoholic beverages declared, he/she would have had certain blood alcohol content in the accused moment. The recalculated blood alcohol content does not reflect the real value, but only one theoretically possible, resulted only from the declared consumption.

The veracity of the declaration of consumption cannot be scientifically verified, as there are not certain criteria in this regard. The data from the declaration of consumptions are subjective and can be more or less real, regardless the good faith of the offender, especially due to the fact that they are mentioned after a long period of time (months or even years), and in most cases the declarations are incomplete, unreal, improbable or sometimes really absurd.

Citing the experience of decades, the National Institute of Forensic Medicine "Mina Minovici" specifies that, in almost all the cases in which the results were below the limit of offence through recalculation, the declarations of consumptions reports were not real, but there were no scientific arguments to specify this thing. However, these cases are not isolated, representing between 1/ 2 to 1/ 3 of the total of these expertise in recent years."[12]

In order to sustain those mentioned, the National Institute of Forensic Medicine "Mina Minovici" presented a statistics of this type of expertise to understand the extent of the phenomenon: "There were performed 3722 of expertise for the calculation and retroactive interpretation of the blood alcohol content in 2013, and it has to be noticed the progressive decrease in the number of the requests to perform this type of expertise in the last 4 years. Of the 3.722 of expertise, in 68 % of cases, it has been calculated the blood alcohol content could have been higher than 0,8 g/l at the moment of driving."[13]

Thus, we notice that the National Institute of Forensic Medicine "Mina Minovici" presents a series of arguments that are out of the scope of the criminal law in the way that it presents the situation of the blood alcohol content from the biological and metabolic point of view, perspectives which are in a close connection with the completion of the objective side of the offence that is the subject of the analysis , sustaining and reinforcing the opinion according to which the relevant value of the blood alcohol content is given by the first biological sample taken by the medical staff.

3.3. The Opinion of the Department of legislation, studies, documentaries and legal information within the High Court of Cassation and Justice

In order to form the unitary point of view on the matter of law, it has been requested the opinion of the Department of legislation, studies, documentaries and legal information within the High Court of Cassation and Justice that also presented the situation according to which the moment of the first sample of the biological samples is relevant for the retention of the offence of "driving a vehicle under the influence of alcohol or other substances."

The department of the legislation, studies, documentaries and legal information within the High Court of Cassation and Justice argued that: "Introducing the condition that the person should have an alcoholic impregnation of over 0,80 g/l of pure alcohol in blood at the time of collecting the biological samples", the legislator of the new Criminal Code aimed at excluding the possibility of a later recalculation of the alcohol impregnation in blood as the memorandum of reasons reveals, and not the exclusion of the connection between the action of driving on public roads of a vehicle and the

[12] Decision of High Court of Cassation and Justice no. 3/2014.
[13] Idem.

moment when the existence of the alcohol impregnation in blood of over 0, 80 g/ l is found. In order to eliminate the inconveniences created by the recalculation of the alcohol impregnation in blood, the legislator opted for the moment of sampling the biological samples, as a close moment when it can determine the alcohol impregnation with a high degree of accuracy and which are relevant, at the same time, for the action of driving on public roads of a vehicle and for the safety on public roads.

Therefore, the time of collecting the biological samples constitutes a single moment located in the immediate vicinity of a driving action of a vehicle on public roads that is relevant for the safe circulation on public roads and allows the determination of the alcohol impregnation in blood with a high degree of accuracy.

This is what results from the provisions of art. 190 para (8) of the new Criminal Code procedure that uses the phrase "in the shortest time" referring to the collection of biological samples in the case of the offense provided in art. 336 para. (1).

Thus, the regulation contained in art. 336 para. (1) of the Criminal Code, excluding the further recalculation of the alcohol impregnation in blood and setting a unique moment of collecting the biological samples, immediately, subsequent to the driving action on public roads, estimates that the moment of the second sampling cannot be considered as a moment with relevance to the safe circulation on public roads. "[14]

3.4. The relevant judicial practice

The decision no. 3/ 2014 of the High Court of Cassation and Justice has taken into account a number of aspects relating to the judicial practice of courts in criminal matters, such as: the criminal Sentence no. 565/ 5th . 03. 2014 of Court from Miercurea- Ciuc; the criminal Sentence no. 674 of 27th. 02. 2014 of the Court from Arad and the criminal decision no. 230/ A of 20th .03. 2014 of the Court of Appeal from Cluj.

Thus, by the penal sentence no. 565/ 5th .03. 2014 of the Court from Miercurea- Ciuc that noticed the fact that there were two samples of biological samples, in this case, from the defendant sent to court for the commitment of the offence prescribed by art. 87 para. (1) of the Goverment Emergency Ordinance no. 195/ 2002 (according to the report of toxicological alcohol analysis no. 118/ 47/ A-12 issued by the County Service of Forensic Medicine in Harghita on 20th.03.2013 , the defendant presented a blood alcohol content of 0,85% at 20:45, and at 21:45 presented a blood alcohol content of 0,65 %) , it has been established that the result of blood alcohol content of criminal law, in the event of a double sampling, is the second sampling, disposing on the basis of art. 396 para (5) in relation to art 16 para (1) (b) of the Code of Criminal procedure, the defendant's acquittat of for commiting the offence under art. 336 para (1) of the Criminal Code.

The solution of the court took into account the fact that art. 336 para (1) of the Criminal Code has not been drawn up in terms that are sufficiently clear conclude, beyond any doubt, that the deed of the defendant may be punished from the point of view of criminal law, being doubtful the obligation of the concrete framing in which the defendant acted in the text of art. 336 para (1) of Criminal Code, especially since the European Court of Human Rights decided that, in the criminal matters, the analogy to the detriment of the defendant is prohibited, so the terminology used in the drafting of art. 336 para (1) is ambiguous, inaccurate and is likely to deprive the predictability this rule of incrimination.

Noting that the Health Minister Order no. 1.512/ 2013 takes further effects, reported to the constitutional principle of retroactivity of the more favourable criminal law, the court considered that the provisions of the new Criminal Code which accuse the deed of the defendant of driving a vehicle under the influence of the alcohol must be interpreted as being, by reference to the second sample, a more favourable criminal law from the mandatory retroactive effect of which the defendant cannot be excluded. [15]

As regards the motivation of the court and the interpretation of law institutions that are closely related to the commitment of the offence prescribed and punished by art. 336 of Criminal Code, we specify that the court has misinterpreted and misapplied the stipulations of art. 336 of Criminal Code, it has misapplied the legal stipulations referring to the more favourable criminal law in the sense of the Order of the health minister no. 1512/ 2013 and art. 10 of its content referring to the collection of the two biological samples. The Court in Miercurea-Ciuc wrongly detained the situation of the judgment of the second biological sample, as having criminal relevance, in the criminal sentence no. 565/ 5th .03.2014.

The Court in Arad offered a solution of acquittal by the criminal Sentence no. 674/ 27th.02.2014 based on art. 16 para. (1)(b) of Code of Criminal Procedure in the case of a driver found in the traffic without possessing a driving license and tested with the ethyl test device and found the presence of alcoholic impregnation of 0, 80 mg alcoholic vapours/ l in the exhaled air. The defendant has been transported in order to collect biological sample and according to the toxicological analysis, he had a blood alcohol content of 0, 75 g/l of pure alcohol in blood at 04: 36, and he had a blood alcohol content of 1,05 g/l of pure alcohol in blood at 05:36.

[14] Idem.

[15] Decision of High Court of Cassation and Justice no. 3/2014.

The Court has motivated in the sense that that the incriminating criminal norm- art. 87 para (1) of G.E.O. no. 195/ 2002- introduces the deed of a person driving on public roads a vehicle and having an alcoholic impregnation of over 0,80 g/l of pure alcohol in blood in scope of criminal unlawful act. From the definition of the legal text, it is strongly underlined the fact that the minimal threshold of blood alcohol content must exceed the value of 0,80 g/l of pure alcohol in blood, the deed does not represent an offence if this value does not exceed. The accomplishment of this blood alcohol content value must be synchronous with the action of driving a vehicle on public roads in the absence of any temporal determinations introduced in the incriminating norm. Therefore, the achievement of the blood alcohol value that attracts the incidence of the criminal law at a subsequent moment of the cessation of the driving action on public roads does not have any relevance as long as it cannot be deduced from this the existence of some similar values to the alcohol blood at the time of driving. For this reason, the methodological rules of collecting biological samples in force at the date of the commitment of the deed stipulated the necessity of accomplishment of this operation within a maximum period of 30 minutes and set up the need of collecting two biological samples. The offender could refuse this operation under the penalty of the impossibility to require the retroactive recalculation of the value of alcohol.

The simple ingestion into the body of a quantity of alcohol, as long as this has not been absorbed and has not been reflected in a blood alcohol level, higher than the value of 0, 80 g/l of pure alcohol , lacks of criminal meaning, given the principle of the strict legality principle of the criminal liability.

By applying these assertions, the overall value in the present case, it is noticed that the defendant presented a value of 0, 75 g/l of pure alcohol in blood at about one hour when stopped in traffic. The second sample resulted at 05:36 has led to a value of 1, 05 g/l of pure alcohol in blood, resulting in the necessity of this incremental chart at the blood alcohol level that the defendant was in the phase of absorption at the first biological sample, as attested by the report of the forensic expertise regarding the retroactive interpretation of the blood alcohol content carried out in question. "[16]

Compared to those exposed in the criminal Sentence no. 674 of 27th .02.2014 by the Court in Arad, it is mentioned that it treats very well the concern of the retroactive calculation and its importance in the case of the restoration of the objective side of the offence. It clearly shows the moment of performing the offence and the moment of the level of alcohol in blood with criminal relevance for the purposes of establishing of the present offence. We also mention the situation shown above represents an exceptional case in the field of performing the incriminated offence in GEO no. 195/ 2002 art. 87 para. (1), namely: the situation when the driver who faces metabolically with an alcohol impregnation below the criminal limit at the time of driving, but he/she reaches the level of 0, 80 g/ l of pure alcohol in blood at the moment of sampling the biological samples due to the ascending curve of alcohol caused by the rate of its assimilation.

Through the penal decision no. 230/ A of 20th .03.2014, the Court of Appeal in Cluj- the criminal and juvenile Department rejected the defendant's P.C. application for the trial of the cause in the simplified procedure of the recognition of the accusation and based on art. 396 para. (5) related to art. 16 para. (1)(b) of the Code of criminal procedure with the enforcement of art. 5 of Criminal law, has ordered the acquittal of the defendant from the accusation of committing the offence of driving under the influence of alcohol or other substances prescribed by art. 336 para (1) of Criminal Law (by changing the legal classification of the offence prescribed in art. 87 para (1) of Government Emergency Ordinance no. 195/ 2002) with the enforcement of art. 4 of Criminal Code.

In order to pronounce the sentence, the court found that on 5th. 05. 2012 around 21:30, the defendant drove on public roads, being involved in a road crash, and resulted with slight injury of the called G.B. The defendant had an alcohol impregnation of 0, 70 g/l of pure alcohol in blood at 00: 20, respectively 0, 55 g/l of pure alcohol in blood at 01: 20 as shown in the toxicological analysis from 9th .05. 2012.

A forensic report was also drawn up and established the fact that at the date of 5th .05. 2012, the defendant had a blood alcohol of 1, 15 g/ l at 21:30, report which, in the opinion of the Court of Appeal was considered that it had no longer relevance due to the changes in law to the incriminating text (the defendant being convicted by the penal Sentence no. 107/ 22nd .01.2014 of the Cluj- Napoca Court to 4 months of prison for performing the offence prescribed by art. 87 para. (1) of the Government Emergency Ordinance no. 195/ 2002 with the enforcement of art. 320 para 7 of the Code of criminal procedure, with the conditioned suspension of the penalty execution).

It was considered that according to the art. 336 para (1) of criminal Code, it is an offence to drive on public roads a vehicle by a person who has an alcoholic impregnation of over 0, 80 g/ l at the time of collecting the biological samples.

[16]Idem.

In this case, the defendant did not have a blood alcohol content of over 0,80 g/ l at that moment, fact that has led to the conclusion that the act committed is no longer prescribed by the criminal law, being discriminated in this respect so that the provisions of art. 4 of Criminal Code[17] are applicable.

The opinion of Prosecutor's Office attached to High Court of Cassation and Justice has been sent through the address 910/C/1276/III-5/2014 on 14th April 2014 within which it also noted the changes of the incriminating conditions as regards the moment at which it is necessary the existence of the alcohol impregnation of the driver to meet the material element of the objective side of the offence against art. 87 of GEO no. 195/ 2002.

Over this issue, the Prosecutor argues on the conditions of incriminating prescribed in art. 336 para (1) of Criminal Law, as having a double meaning:

It fixes the moment of collecting the biological samples as a unique moment of determining the alcoholic impregnation in blood which is relevant to the retention of the offence prescribed in art. 336 para (1) of Criminal Code;

It involves a single biological samples. Over this issue, the Prosecutor's Office mentions that there is no legal correlation in the view that the methodological norms regarding the collecting, storage and transport of the biological samples in order to judicial probation through the establishment of the blood alcohol content or the presence of substances or narcotic substances or drugs with similar effects in the body in the case of the people involved in events or surroundings regarding the traffic, approved by the Order of the Health Minister no 1512/ 2013, which in art. 10 para (1) provide that " to establish the blood alcohol two blood samples will be collected at an interval of an hour from each other , each sample being represented by a quantity of 10 ml blood" and according to art. 12 para (1), " in the case that two blood samples were collected, at an interval of one hour from each other, the retroactive estimation cannot be carried out. [18]

This retroactive estimation is necessary and useful in fixing the constitutive elements of the offence in the form in which it exists in the previous rules, not finding its application in the form of the incrimination in art. 336 para (1) of Criminal Code.

The Prosecutor's Office also presents the situation of collecting the biological samples that constitute a unique moment situated close to the action of driving on public roads a vehicle which has relevance to the protection of social relations regarding the safety on the public roads and which allows the determination of the blood alcohol impregnation with a high degree of precision making reference to art. 190 para (8) of the Code of criminal procedure that fixes "in the shortest time" as moment of collecting.

Concluding, the Prosecutor's Office appreciate that the probative value of the second sample, detected at an interval of one hour from the time of the first sample, cannot be considered as having criminal relevance.

By analysing all the aspects of the problem which were subjects to the debates, the High Court of Cassation and Justice decides that " in the hypothesis of a double collection of biological samples, the result of the blood alcohol is the one given by the first sample" on 12th May 2014.

4. The decision of the Constitutional Court of Romania no 732/ 2014

After this date, the Constitutional Court has decided on the solution of the complaint about the infringement of the constitution of the disposals of art. 336 para (1) and (3) of the Criminal Code. The Court of Justice objected ex officio this complaint in the file no 984/255/P/2012 of the Court of Appeal in Oradea- the criminal Division and for causes involving minor on the occasion of the solution of the made appeal in a criminal case where the defendant was sent to court for performing the offence prescribed by art. 87 para (1) of the Government Emergency Ordinance no. 195/ 2002 regarding the driving on public roads.

In the motivation of the complaint about the infringement of the constitution, the Court of Appeal in Oradea sustains that the disposals of art. 336 para (1) and (3) infringe the constitutional stipulations of art. 1 para. (5) regarding the obligation of respecting the Constitution, its supremacy and its laws, of the art. 21 para (3) relating to the right of a fair trial, and of art. 73 par. (3) (h) relating to the regulation of the offences, penalties and the regime of these fulfilments by organic law, as well as of the art. 20 regarding the international treaties as regards the human rights on the domestic laws in relation to the stipulations of art. 6 paragraph 1 regarding the legitimacy of the incrimination from the Convention for the protection of the human rights and of fundamental freedoms. Thus, it considers that the legislator, by incrimination of the action of driving a vehicle under the influence of alcohol or other substances as it is regulated this offence by art. 336 of Criminal Code, deviated from the general principle of the legitimacy of the incrimination of art. 7 paragraph 1 of the Convention for the protection of the human rights and fundamental freedoms, according to which "no one can be convicted of any act or omission which does not constitute an offence according to the national and

[17] Decision of the High Court of Cassation and Justice no. 3/2014.
[18] Idem.

international law at the commitment moment", namely by art. 1 of Criminal Code which in par. (2) prescribes that "No person may be penalized for a deed which was not prescribed by the criminal law at the time it was committed". [19]

The Court of Appeal in Oradea also mentions that the legislator attempted the dissociation between the commitment of offence, which coincides with the detection of the driver in traffic, and the consuming offence, which, in the new legislative vision, would be the collection of the biological samples on the conditions under which this offence is one of danger and therefore is consumed when it occurred. In other words, when stopped in the traffic, the offender no longer presents a danger for the social values protected by the criminal law and it would be absurd to be punished for an act which no longer represents a public danger, reported to the time of collecting the biological sample. Moreover, the new regulation, no longer allows to collect two biological samples in order to establish the level of alcohol at the time of catching in the traffic of the author of the act, abolishes a scientific sample, which is conclusive and useful to the case, the one which consists in the retroactive calculation of the blood alcohol.

In reasoning of its decision, the Constitutional Court of Romania mentions that the art. 336 par. (1) of Criminal Code did not take the same text as art. 87 par. (1) of Criminal Code of Government Emergency Ordinance no. 195/2002 , but it amended the incriminating conditions as regards the moment when it is necessary the existence of the blood alcohol impregnation in order to be able to find the meeting of the material element of the objective side of the crime, as it results from the exposure of reasons of the new Criminal Code, by amending the content of the offence of driving a vehicle under the influence of alcohol or other substances, the legislator sought to exclude the possibility of a retroactive estimation of the alcohol level in order to avoid the inconveniences created by this estimation. The legislative solution prescribed by art. 87 para. (1) of the Government Emergency Ordinance no. 195/2002 imposes a retroactive calculation of the blood alcohol level which lies in determining the existent blood alcohol level at the moment of driving and it requires the collection of two blood samples to establish the ethylic intoxication phase (absorption or elimination) and the rate of individual elimination in case of the request of the expertise of retroactive estimation of the blood alcohol.

"The alcohol impregnation of over 0, 80 g/l of pure alcohol in blood present at the time of collection of biological samples places, thus, the consumption of the offence at the later time of its commitment, in the conditions in which the essence of the offences of danger is the fact that they are consumed at the time of their occurrence. Once with the stopping in traffic, it ceases the state of danger for the social values protected by the provisions of art. 336 of Criminal Code, thus, related to the moment of collecting the biological samples, the calling of the criminal liability to account is not justified. The determination the degree of the alcohol impregnation and, implicitly, the framing in the field of the criminal unlawful depending on the time of the collection of the biological samples, may not always be immediately after the commitment of the deed, represents an external and randomly criterion of the behaviour of the offender in order to criminal responsibility contrary to the constitutional and conventional norms mentioned above." [20]

By a majority of votes, on 16th.December. 2014, the Court found that the phrase "at the time of collecting the biological samples" of the content of the provisions of art. 336 para. (1) of Criminal Code is unconstitutional because it prejudices the constitutional provisions of art. 1 para. (5) related to the principle of respecting the laws and of art. 20 regarding the assertion of the international treaties as regards the human rights on domestic laws reported to the provisions of art. 7 paragraph 1 regarding the legitimacy of the incrimination from the Convention for the protection of human rights and fundamental freedoms. The mentioned phrase lacks of predictability the incriminating norm under the circumstances in which the principle of respecting the laws and of the legitimacy of the incrimination require the legislative to enact through texts which are sufficiently clear and precise to be applied, including, through the insurance of the possibility of the concerned people to comply with the legal requirements. [21]

The declaration of the normative phrase "at the time of collecting the biological samples" as being unconstitutional, makes that by returning to the criminal relevance of the moment of driving and that of the sampling as a constitutive element of the objective side, the necessity of the retroactive calculation of the alcohol level should be again necessary. In other words, the Court recalls in the view of the regulation the previous incriminating reasoning through the retroactive calculation of the blood alcohol. The Decision of the Constitutional Court also makes the effects of the Decision of the High Court of Cassation and Justice no. 3/2014 to stop.

[19]The Decision of the Constitutional Court of Romania no. 732/2014.
[20] Idem.
[21] Idem.

5. Methodological norms regarding the sampling, storage and transport of the biological samples of 12th December 2013

The successive legislative changes led to the phenomenon of incoherence and, in some cases, to the misapplication of the law due to the problems referring to the enactment and implementation techniques of the needs of the society in the normative document.

As regards the application of the methodological norms referring to the sampling, storage and transport of the biological samples to judicial probation through the determination of the blood alcohol or the presence in the body of substances or narcotic products or drugs with similar effects to these ones in case of the people involved in events or circumstances related to road traffic, it feels the need to makes some remarks:

Firstly, once with the entry into force of the New Criminal Code, they acted upon the procedure of collecting the biological samples, the methodological norms referring to the sampling, storage and transport of the biological samples to judicial probation through the determination of the blood alcohol or the presence in the body of substances or narcotic products or drugs with similar effects to these ones in case of the people involved in events or circumstances related to road traffic approved by the Order of the Health Minister no. 1512/2013, published in the Official Gazette of Romania, Part I, no. 812 of 20th December 2013, it feels the need to make some remarks. These norms stipulated that the biological samples which can be sampled from the involved people in events or in circumstances related to road traffic to determine the blood alcohol or the presence in the body of drugs, can be represented by blood samples (in the case of the determination of the blood alcohol) and samples of blood and urine (in the case of the determination the presence of drugs in the body)[22]. The collection of the biological samples in order to establish the blood alcohol or the presence of the drugs in the body will be made in the shortest possible time since the occurrence of the traffic event or the circumstance which required their sampling.[23]

The issue over which it was successively intervened following the Decision no 3/ 2014 the Decision no. 3/ 2014 of the High Court of Cassation and Justice and of Decision 732/ 2014 of the Constitutional Court lied in the number of the biological samples taken by the medical staff to prove the commitment of the offence. Thus, the Order initially obliged to determine the blood alcohol the collection of two blood samples at an interval of one hour from each other, each sample being represented by a 10 ml blood quantity.

After the decision of the High Court of Cassation of Justice, published in the Official Gazette on 28th .05.2014, the methodological norms referring to the sampling, storage and transport of the biological samples to judicial probation through the determination of the blood alcohol or the presence in the body of substances or narcotic products or drugs with similar effects to these ones in case of the people involved in events or circumstances related to road traffic were amended by the Order 1192/2014 on 23rd.10. 2014, establishing that to determine the blood alcohol it is sampled a single blood sample of 10 ml.

In the first instance, the legislative material related to the interpretation of art. 336 of Criminal Code and the collecting of biological samples in the field of forming the probative material in order to act the criminal responsibility of the people who commit the respective offence, found its legislative coherence and enforcement because it was no longer necessary to sample two blood samples to set the occurrence and probation of the offence, since the only evidence with criminal relevance was the sampled evidence, the retroactive calculation did not find its enforcement due to the Decision of the High Court of Cassation and Justice.

Subsequently, the Decision 732/ 2014 of the Constitutional Court of Romania, published in the Official Gazette on 27th.01.2015 that declared the unconstitutionality of the phrase "at the time of collecting the biological samples" meant the returning to the retroactive calculation in order to establish the occurrence of the offence. The problem in practise appeared due to the Order 1192/ 2014 of 23rd.10. 2014 which was still into force and supposed the collection of a single biological sample, the methodological norms referring to the sampling, storage and transport of the biological samples to judicial probation through the determination of the blood alcohol or the presence in the body of substances or narcotic products or drugs with similar effects to these ones in case of the people involved in events or circumstances related to road traffic were again amended by the Order 277/ 2015 of 18th. 03. 2015 that obliged this time the collection of two blood samples at an interval of one hour of each other in order to determine the blood alcohol, and each sample being represented by 10 ml to retroactively calculate and determine the blood alcohol at the time of driving

Thus, we notice that the period between 27th.01.2015 (the time of the publication of the Decision of the Constitutional Court) and 18th.03.2015 (the time of the Order 277/2015) still performed the previous amendments brought over the methodological norms referring to the sampling, storage and transport of the biological samples to

[22] Art. 7.
[23] Art. 9.

judicial probation through the determination of the blood alcohol or the presence in the body of substances or narcotic products or drugs with similar effects to these ones in case of the people involved in events or circumstances related to road traffic , thus, the collection of biological samples involved the collection of a single blood sample, even though, it was necessary the retroactive calculation that involved two biological samples, aspect that was impossible to achieve to establish the occurrence of the offence.

The only plausible solutions in accordance with the regulation, pronounced by the prosecutor's office and instances, in the case when the driver was found in traffic between 27th .01.2015 and 18th.03.2015 to whom it was collected only a single biological evidence that was at the limit of 0, 80 g/l of pure alcohol, and without existing the result of the alcohol test because he/ she refused this evidence, are the classification of criminal prosecution, respectively the acquittal in the phase of judgement, being incidents art. 16 para. (1)(b), the thesis I of the Code of Criminal Procedure. Of course, there is also a special situation made by the driver who, at the time of the collection of the single biological sample has sufficiently high blood alcohol that, beyond any reasonable doubt results that at the time of driving he/she had an alcohol impregnation I blood which placed in the field of criminal unlawful. To understand better the situation, we will take the example of the driver found in the traffic on 28th .02.2015 at 20:00, to whom it is collected a single biological sample at 21:00 that lying in 10 ml of blood from which it results an alcohol impregnation of 2,2 g/l of pure alcohol. In this case, the solution of conviction of the instance will be legal, as the forensic expertise notes that, under no circumstances, at 20:00 the driver could not have an alcohol impregnation lower of 0,8 g/l.

6. Solution of acquittal of the offender, related to the decision of the Constitutional Court of Romania no. 732/2014

By the criminal verdict no 12 of 4th.06. 2015 pronounced by the Military Court from Iasi, it was prescribed to abstain from the enforcement of the penalty against the defendant F.V., sent to court for the commitment of the offence of "Driving under the influence of the alcohol of other substances" provided by art. 336 para. (1) of the Criminal Code with the enforcement of art. 5 of the Criminal Code. The stipulations prescribed by art. 81 C of the Criminal Code has also been applied to the defendant, drawing the defendant attention to the stipulations of art. 82 para. (3) of Criminal Code

The first instance retained that the defendant F.V. was sent to court for the above mentioned offence through the indictment of the Military Prosecutor's Office attached to the Military Court from Iasi from 6th.08.2014, given in the file no. 74/P/2014, the deed lying in that the defendant was topped in traffic and tested with the ethyl test, resulting a value of 0,57 mg/l of pure alcohol in the exhaled air.

Two biological samples have been collected to obtain the blood alcohol, resulting the value of 1,25 gr% (of pure alcohol in blood) at 00:40 and 1,10 gr.% (of pure alcohol in blood) at 01:40 . The defendant provided two types of alcoholic drinks (different), and two values of blood alcohol were established through the report of expertise at the time of the discovery, respectively 1,35 gr% and 0,50-0,40 gr% depending on the type.

An appeal was declared against the criminal verdict by the Military Prosecutor's Office subordinated to Military Court from Iasi. The reasons of the appeal were strongly related to the effects of the Decision of the Constitutional Court no. 732 of 16th.12.2014, published in the Official Gazette no. 69 of 27th.01.2015 according to which the phrase "at the time of the collection of the biological samples" from the stipulations of art. 336 para. (1) C of the Criminal Code are unconstitutional.

The instance of appeal had in view the fact that at the date of 27th.01.2015, when the decision 732/2014 of the Constitutional Court was published in the Official Gazette, the phrase "at the time of collecting the biological samples" from the content of the stipulations of art. 336 para. (1) C of the Criminal Code was suspended by law in the first stage (45 days) and the judicial effects ceased because the Parliament did not agree with these unconstitutional provisions with the stipulations of the Constitution.

After 27th.01.2015, the date of the publication in the Official Gazette of Decision of the Constitutional Court no. 732/2014 through which it was noticed the unconstitutionality of the phrase "at the time of collecting the biological samples" from the content of art. 336 para. (1) of the Criminal Code and the lack of the legislative intervention according to art. 147 para (1) of the Constitution, the stipulations of art. 336 para. (1) of the Criminal Code do not provide the condition of incrimination as regards the moment when the existence of the alcohol impregnation in blood is necessary to be able to notice the meeting of the material element of the objective side of the offence.

In the absence of this essential condition of the body of law (art. 336 para. (1) of Criminal Code), not only the recipients of the criminal law do not have a clear representation of the constitutive elements of the objective and subjective nature of the offence in such a way to provide the consequences that result from the failure to comply with the standard and to adapt the

behaviour according to it, but the deed prescribed by art. 336 para (1) of Criminal Code- leaves the field of the criminal illicit because the text becomes inapplicable in the lack of the same condition-essential requirements.

The considerations of the decision of the Constitutional Court cannot add to the law because the Constitutional Court is not a positive legislative, and neither the courts have the competence of enactment, the substitution of the of the competent authority in the field (the Decision of the Constitutional Court no. 838/2009), the Parliament having the exclusive competence to regulate the offences, penalties and their execution by organic law.

In conclusion, by the deed prescribed by art. 87 para (1) of G.E.O. no. 195/2002 or the art. 336 para (1) of the Criminal Code when from the commitment of the offence until the final judgement of the case, after the date of the publication of the Decision of the Constitutional Court no. 732 from 16thDecember 2014 in the Official Gazette, respectively 27th.01.2015 – the instance will notice that are incident the stipulations of art. 4 of the Criminal Code regarding the enforcement of the criminal law of discrimination, so that even if the imputed deed exists, this one is not stipulated in art. 16 para. (1) B thesis I of the Criminal Procedure, circumstances which by the enforcement of art. 396 para. (5) of the Criminal Procedure brings the acquittal of the defendant.

Based on art. 396 para (5) related to art. 16 para (1) B thesis I of Criminal Procedure Code , Military Appeal Court acquitted the defendant F.V. for the offence of " driving a vehicle under the influence of alcohol or other substances" prescribed by art. 336 para. (1) of the Criminal Code.

As compared to the considerations which the Decision no. 84/ 2015 of the Military Court of Appeal bases on, it is appreciated that this has incorrectly interpreted and understood the constitutional stipulations from the content of the art. 147 of the Constitution, it interpreted the passivity of the institution of the Parliament in the sense of the total discrimination of the criminal deed in the content of art. 336 of the Criminal Code.

A criminal deed so serious cannot exist from the scope of the criminal illicit law. Moreover, the law must be interpreted in the spirit for which it has been designed, not just formally.

7. Aspects of compared law

As regards the situation of the blood alcohol content when driving, an important aspect is represented by the maximum admitted limit of alcohol impregnation in blood under which the driver should adapt for not entering in the scope of the criminal illicit law at the level of the European Union.

The legislation on alcohol consumption in Europe is basically divided into two large regions: Western Europe has an allowed limit of alcohol of 0, 5 per thousands, while many of the members of the former communist bloc have zero legal limits.

There are also nuances and variations from one country to another, and also exceptions for different categories of drivers, thus, for example, the regulations related to the alcohol consumption is applied to the cyclists in Poland.

The following table represents the maximum limit of alcohol allowed in the member states of the European Union, as follows[24]:

Country	*The maximum allowed blood alcohol level g/l (%)*
Austria	0.05
Belgium	0.05
Bulgaria	0.05
Cyprus	0.05
Croatia	0.05
Denmark	0.05
Estonia	0
Finland	0.05
France	0.05
Germany	0.05
Greece	0.05
Ireland	0.05
Italia	0.05
Leetonia	0.05
Lithuania	0.04
Luxemburg	0.08
Malta	0.08
Poland	0.02
Portugal	0.05
Great Britain	0.8
Czech Republic	0
Romania	0
Slovakia	0
Slovenia	0.05
Spain	0.05
Sweden	0.02
Holland	0.05
Hungary	0

A different aspect compared to the situation from Romania is represented by the fact that in countries such as Austria or Leetonia, the level of the blood alcohol with unlawful relevance is

[24] http://www.drinkdriving.org/worldwide_drink_driving_limits.php#bac_limits

reported to the experience of the driver or the type of the driven vehicle, thus, if in Austria the legal limit is 0, 05 for the drivers who obtained the driving license less than two years or for those who drive cars bigger than 7, 5 tones, the limit is of 0,01. In Leetonia, the maximum allowed limit is of 0,02 for the drivers who have an experience of less than two years. A concentration of 0.12 draws the increase in the limits of penalty, thus, the penalty may reach at two years in prison.

In France, the maximum allowed limit of the blood alcohol level is of 0.02 per thousand for the drivers who drive vehicles intended for public transport, exceeding this limit draws the sanction represented by the fine penalty and the suspension of the right of driving for a period of maximum 3 years. A concentration of 0,8 per thousand draws the suspension of the right of driving for a period of 3 years, the penalty of fine of up to 4.500 euros and the imprisonment penalty of up to 2 years.

In Germany, the limit is of 0.03 for the driver under 21 years, for the professionals and for those who have less than 2 years of experience on road. Also, the detection in traffic of the drivers with blood alcohol content higher than the allowed limit draws and further promotes a psychological examination to regain the right to drive.

It is also mentioned that in Italy, the drivers caught in traffic with blood alcohol content exceeding 0. 15 will be penalized with the confiscation of the vehicle.

8. Conclusions

The alcohol, swallowed in the body in big quantitates and in a relatively short time, causes temporary sensory loss, producing a series of pathological phenomena, such as: mental confusion, lack of coordination, visual, auditory, sensory confusion, etc.

The studies carried out by experts have demonstrated that the alcohol, even consumed in small amounts, reduces significantly the power of discretion, the capacity of concentration and the attention of drivers, affects their reflexes, the time of reaction, etc. and the number of errors when driving and of the infringements of laws increases in direct proportion report to the amount of swallowed alcohol. It was found under the later aspect that the people under the influence of alcohol drive with higher speeds in relation to concrete conditions of circulation, fail to enter properly with the vehicles in curves, pass more frequently on the opposite side, are no longer able to appreciate the distances and are too much close to vehicles in front of them, they engage in risky overtaking, etc.

The offence of driving a vehicle under the influence of alcohol or other substances is an offence with I higher level of social danger, and following the whole normative changes and the intervention of the state we consider that there is no problem in interpreting the stipulations of art. 336 of Criminal Code.

As it was lately shown, the judicial practice has not been uniform in the enforcement of the stipulations of art. 336, the decisions of the courts of Romania provide solution totally different in similar situations.

Of course, it is admitted that, in the past, due to the Decision of the High Court of Cassation and Justice no. 3/2104, of the deficient content of art. 336 and of the methodological norms regarding the sampling, storage and transport of the biological samples, there were problems of law in practice which resulted in uneven practice and legal issues relating to the interpretation of the provisions regarding the drivers of vehicles who are in exercising the right to drive who have in blood an alcohol impregnation higher than 0. 80 g/l.

Once with the entry into force of the new Criminal Code, the Romanian system of law has known a comprehensive reform, and as regards the highway legislation, the offences such as those from the field of the Government Emergency Ordinance no. 195/2002 relating to the circulation on the public roads were abolished and introduced in the content of the Criminal Code under the influence of some normative changes. This reform was, in most of cases, welcomed by great authors and theorist, as any new aspect, was subject to some critics that in some cases have surpassed the beneficial side of the new regulations.

It is considered that the intervention of the Constitutional Court relating to standardisation of the interpretation and practice in the field of the analysed offence has been a positive thing that does not leave place for the interpretations of any nature, although there were situations where, for example the Court of Appeal from Ploiesti notified the High Court of Cassation and Justice requiring a pronouncing on a prior decision through which it is given a resolution of principle to the question of law on which the Constitutional Court ruled. In other words, the Court of Appeal from Ploiesti notified the High Court of Cassation and Justice relating to the pronouncement of a prior decision to offer a solution on the interpretation of the decision of the Constitutional Court.

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- Decision no. 84/2015 of the Military Court of Appeal.

THE ARREST PROCEDURE IN ACCORDANCE WITH THE DEMANDS OF THE CONVENTION

George Octavian NICOLAE[*]

Abstract

In order to arrest an individual certain criminal procedural formal and basic conditions must be met. However, due to our country's ratification of the European Convention on Human Rights, besides this criteria, it is also necessary that our domestic law be in accordance with the demands of article 5, paragraph 1, point "c" of "The Convention" and the jurisprudence regarding it. The focus of this project is on the analysis of the indissoluble link between our national criminal law regulations regarding the arrest procedure and the demands of the European Convention for human rights.

Keywords: *the arrest procedure, European Convention on Human Rights, criminal law, reasonable suspicion, evidence.*

1. Introduction

Pre trial detention constitutes the most intrusive preventive measure in the Romanian penal procedure.

For this reason, the Criminal Procedure Code clearly states the conditions which have to be met and when the authorities can choose it.

In order to conduct a proper analysis of this institution, certain notions have to defined and grasped such as the standard of proof, reasonable suspicion and the threat to the public.

Also, the judge who is asked to grant an arrest warrant, must account for article 5 of the European Convention For Human Rights (ECHR), provisions which offer certain procedural and mandatory guaranties for the accused.

2. Content

According to art. 202 Criminal Procedure Code (C.p.p.), preventive measures, which include the arrest procedure, may be adopted if there is evidence or indications which point to the reasonable suspicion that a person has committed a crime and are necessary to ensure normal criminal proceedings, preventing the accused to skip trial or to prevent new crimes.

In order to arrest an individual during criminal prosecution, reasonable suspicion should emerge from the evidence that the defendant perpetrated an offence and the conditions art. 223 letter. (a), (b), (c) or (d), Criminal Procedure Code, should be met.

However, in order for pre-trial detention, only a reasonable suspicion that the accused person has comitted an offence from the list mentioned in art. 223 paragraph (2) of C.p.p. is necessary, or that an offence punished by the law with 5 or more years of imprisonment be comitted.

Other factors which are to be analised include the seriousness of the crime, the manner and circumstances of committing it, his entourage and the social environment of the accused criminal history or other circumstances regarding the person, the necessity of the detention in order to prevent public disorder.

Preventive custody may be ordered exclusively by the judge, depending on the procedural stage when the measure is actually analised.

Thus, functional competence belongs to the judge of rights and freedoms, during criminal investigation, preliminary chamber judge during the preliminary procedure and to the court during the actual trial.

Under Article 339, paragraph 10 of the Criminal Procedure Code, after the judgment in the first instance, until the case is appealed, the judge may order, upon request or ex “officio” the arrest of the convicted individual.

In order to execute the arrest mandate, certain general conditions are required for taking preventive measures mentioned in Article 202 of the Criminal Procedure Code:

- evidence or indications showing reasonable suspicion that a person committed the offense;
- the overwhelming necessity for preventive measures in order to ensure normal criminal proceedings, preventing the accused to skip trial or to prevent new crimes;
- art. 16 of the C.p.p. is inaplicable.
- the preventive measure must be in relation to the gravity of the accusation.

Upon analyzing the legal text, it is clear that the burden of proof belongs the prosecutor, who needs to prove only a reasonable suspicion that the accused has committed a crime, which can stems from both direct and indirect evidence.

[*] PhD Candidate, Faculty of Law, “Nicolae Titulescu” University of Bucharest (e-mail: **nicolae.georgeoctavian@yahoo.com**).

It should be noted that the standard of proof is not particularly high, the prosecutor must administer the evidence only to establish reasonable suspicion that the defendant committed the offense and should not prove his thesis beyond any reasonable doubt.

In other words, the evidence supporting the criminal charges made in an arrest request should not be as concrete as the ones needed for a conviction.

In this sense, the High Court of Cassation and Justice has stated that the recognition of *the presumption of innocence* does not exclude preventive measures but in fact ensures that they will only be taken within the framework and under rigorous conditions laid down by the constitutional norms and the provisions of criminal procedure. Reconciliation between the necessity of the pre trial detention and the presumption of innocence throughout the criminal proceedings can be attained by observing the dynamics of the latter, from an abstract notion regarding the guarantee of the fundamental rights of an individual, hereby acquiring substance in the criminal process.[1]

According to Article 97 paragraph. 1, Criminal Procedure Code, evidence is represented by any factual element which serves to determine the existence of a crime, to identify the person who committed it and all the circumstances necessary for a fair settlement of the case and to uncover of the truth.

Evidence is the means provided by the law for stating the facts constituting evidence which can be obtained by the judicial authorities by various methods.[2]

The probation procedures are the legal way of obtaining evidence.

Clues constitute facts which can reveal an event or the guilt of the person who committed the crime.[3]

Domestic legal personalities have stated that conclusive clues can stem from sources outside the normal criminal procedure, such as a complaint, a denunciation, an informative report or during a crime in progress.

The clue is a fact, circumstance, situation which by itself has no evidentiary value, constituting merely the basis for suspicions essential to the judicial activity but which, when part of a sistem of elements in perfect accordance with themselves and with the other existing evidence, can serve to determine the judicial truth.[4]

The court dealing with an arrest request can not validate the legality of the evidence obtained by the prosecution, nor may issue opinions on the accused's defenses related to the merits of the case.

The judicial practice has established that when analysing an arrest request, the evidence administered during the pre-trial stage is indicative of the probable cause that justifies the arrest.

Thus, at this stage the judge is forbidden to analyse if the evidence has been gathered in accordance with our judicial procedures by the investigators or defences which refer to the merits of the case.

Until further notice, the evidence administered by the prosecutor cannot be ruled aut by the judge called upon to decide on the arrest, but merely allowed to examine the existence of probable cause and the other legal conditions, without the possibility of providing an opinion regarding the legality of the evidence, as this is an atribute reserved for the court conducting the actual trial.[5]

Article 53 of the Criminal Procedure Code, also states this: the judge of rights and freedoms is forbidden to analyze the legality of evidence, this activity is to be conducted exclusively by the preliminary chamber judge upon completion of the prosecutorial stage.

Moreover, the rights and freedoms judge can not change the legal classification retained by the prosecutor nor may he consider the application of Article 16 of the Criminal Procedure Code. He can only establish if the legal classification, which derives from the evidence permits the pre trial arrest.

In addition, due to our country's ratification of the European Convention for Human Rights, besides to this criteria, it is also necessary that our domestic law be in accordance with the demands of article 5 paragraph 1, point c) of the Convention and the jurisprudence regarding it.

Article 5 regarding the unlawful deprivation of liberty, can intersect with other fundamental rights protected by the Convention, such as the right to a private and family life, the protection of the individual's home and correpondance –article 8-, the freedom of expression –article 10-, the freedom of assembly and association –article 11- and not lastly the freedom of movement –article 2 protocol no. 4-

Beyond this correlation between the right ot liberty and security guaranteed by article 5 and the other fundamental rights protected by the Convention, there some common points between the warranties provided by this text and those stated in the article 6 which protects the right to a fair trial.[6]

Thus paragraph 2 of article 5 states that ,, Everyone who is arrested shall be informed

[1] I.C.C.J., criminal Division, decision no. 4284/2009, www.legalis.ro
[2] Gheorghe Theodru, *Tratat de Drept procesual penal*, Bucuresti, editura Hamangiu, 2007, p. 300.
[3] The Court of Appeal Cluj, decission No. 127 of 01.11.2011, unpublished.
[4] G. Antoniu, C. Bulai, *Dictionar deDrept penal si procedura penala*, editura Hamangiu, Bucuresti, 2001, p. 219.
[5] C.A. Cluj, dec. pen. Nr. 681/R din 4 noiembrie 2009, www.curteadeapelcluj.ro.
[6] Corneliu Birsan, Conventia europeana a drepturilor omului, editia 2, editura C.H. Beck, Bucuresti, 2010, p. 227.

promptly, in a language which he understands, of the reasons for his arrest and of any charge against him." and paragraph 3 letter a of article 6 establishes the right ,, to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him".

By comparing the two texts, the warranty instituted by article 5 is applicable in the case of a deprivation of liberty, thus establishing the possiblity of analysing the legality of such a measure and article 6 guarantees the right to receive suficient information in order to comprehend the nature of the charge and to mount an effective for the accused.

Thus, this right must be related to another warranty provided by article 6, namely the right for any accused individual to enjoy enough time and facilities for his defence. Both warranties are established by the general right to a fair trial - article 6 - .[7]

Thus, the two, which one may say intertwine,are aplicable at different stages, namely the one provided by article 5 par. 2 from the point the accused is actually deprived of his freedom, whereas article 6 par. 3 for the wholle criminal process whether or not the individual has been arrested.[8]

The same legal reasoning is applicable regarding to the correspondence between article 5 paragraph 3 -,, shall be entitled to trial within a reasonable time or to release pending trial." And article 6 par. 1 ,,everyone is entitled to a fair and public hearing within a reasonable time".

We concur that in the first case that we have discused, the warranty provided by the Convention refers to a detainee and to the necessity of analysing the legality and the opportunity of a preventive measure that is so intrusive.

In regards to the second case, the duration of the wholle criminal case is to be analysed in relation to certain factors, such as the complexity of the case, the conduct of the parties involved and the diligence of the authorities.

The Court emphasized that any preventive measure must be in accordance with the purpose of art. 5 of the Convention, namely to protect the individual against arbitrary deprivation of liberty.

By analyzing the firm statement at the beginning of art. 5 of the Convention, which defines and postulates the presumption of liberty, followed by an complete list of exceptions to this rule, one can establish the universal principle that the state of freedom is the natural state and the deprivation of an individuals freedom has essentially an exceptional character.[9]

Given this legislative postulate and it's jurisprudence, the arrest of the person appears as an exceptional measure and should be accompanied by strong guarantees against the arbitrary.

For that reason, taking into consideration the impact of deprivation of liberty on the fundamental rights of the person concerned, the proceedings should meet the basic requirements of a fair trial.[10]

Thus, par.1 of art. 5 establishes a positive obligation of the state to protect the freedom of its citizens, and if the state acts in a such a manner which leads to a violation of the Convention, it will be held accountable.[11]

The purpose of art. 5 lies in protecting against the arbitrary deprivation of any person of liberty.

The Convention is intended to guarantee rights that aren't merely theoretical or illusory but in fact practical and effective.[12]

The Court stated that, in case of deprivation of liberty, it is particularly important that the general principle of legal certainty be satisfied. Domestic law itself must be in accordance with the Convention, including the general principles expressed or implied therein.

It is therefore essential that the conditions for deprivation of liberty under domestic law be clearly defined and that the law itself be foreseeable in its application, so that it meets the standard of "lawfulness" set by the Convention, a standard which requires that all law be sufficiently precise to allow the person – if need be, with appropriate advice – to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail.[13]

We consider that the principle of legal certainty is respected by our national legal framework applicable in this matter, that national provisions are accessible, predictable, precise and contain sufficient safeguards against arbitrary action.

In the matter of deprivation of liberty, the standard of European Court of Human Rights is more mild than in the case of the extension of such measures.

The Court held that in the case of an arrest for the first time, the courts need not rely on strong presumptions, but may place high faith in aspects such as the severity of the criminal charges, the position of the suspect in society, the nature of the offense.

Thus, taking such measures are necessary only plausible reasons, with no additional conditions.

[7] ECHR, Judegment of 25 March 1999, Case of Pelissier c. France.
[8] Corneliu Birsan, Conventia europeana a drepturilor omului, editia 2, editura C.H. Beck, Bucuresti, 2010, p. 228.
[9] ECHR, Judgment of 6 November 1980, Case of *Guzzardi v. Italy.*
[10] ECHR, Judgment of 13 February 2001, Case of *Schöps v. Germany.*
[11] ECHR, Judgment of 14 October 1999, Case of *Riera Blume and Others v. Spain.*
[12] ECHR, Judgment of 28 April 2005, Case *of Albina v. Romania.*
[13] ECHR, Judgment of 23 September 1998, Case *Steel and Others v. United Kingdom.*

The notion of reasonable suspicion or plausible suspicion is an autonomous concept developed in the jurisprudence of the Court and depends on the particular circumstances of each case.

These plausible reasons must be based on facts and evidence strong enough to satisfy an objective observer that the person concerned may have committed the offence.[14]

According to the conventional standard, authorities are obligated to produce strong evidence to support a criminal charge against the accused, making it impossible to arrest a person based on some simple insights, impressions, rumors and prejudices.

This does not mean that the evidence must justify a criminal conviction, the nature of preventive arrest which doesen't entail a form of early execution of the punishment, but a preventive measure reserved for exceptional situations.

The case law of the European Court of Human Rights has developed four basic acceptable reasons for detaining a person before judgment when that person is suspected of having committed an offence:

- the risk that the accused would fail to appear for trial; [15]
- the risk that the accused, if released, would take action to prejudice the administration of justice;[16]
- the risk of committing further offences;
- the risk of causing public disorder.[17]

The danger of an accused's absconding cannot be assessed only on the basis of the severity of the sentence risked. It is necessary to take into consideration a serious number of factors related to the person's character, his moral values, his home, his occupation, his assets, family ties and all links with the State in which he is pursued.[18]

The risk of the accused disturbing the proper conduct of the proceedings cannot be calculated *in abstracto*, but in fact must be supported by factual evidence.

We appreciate that the court must procede to a concrete analysis of the good conduct of criminal proceedings.

Thus, if the majority of evidence which substanciates the criminal charge has already been administered, the risk that the accused would prevent the rule of justice and hinder the prosecution from the purpose stipulated by Article 285 of the Criminal Procedure Code greatly diminishes.

Regarding the risk of the defendant of commiting new criminal acts, the court must take into account that a criminal history does not lead, automatically, to the conclusion that there is a *ab initio* prooven risk of a new offense in the future. It is true that the existence of prior criminal weights significantly in terms of shaping the risk of committing new crimes, but this must be combined with the overall elements of the case.

In relation to the risk of disturbing the public order, the Court recognized that the particular gravity and public reaction to certain crimes can cause a social disturbance, justifying the need for preventive measures.

However, the reason of social disturbance, even if it is regulated by our domestic law, can not be regarded as relevant if it is not based on concrete facts able to convince a objective observer of the certainty of disturbances to public order, reasoning that the court must assess on a case by case basis.

Although the threat to public order should not be confused with the social ressonance of the crime, they present some common points. Thus, both legal practice and doctrine outlines that concrete danger for the public order is quantified by taking into consideration both the personal circumstances of the accused and the other factual details, such the nature and gravity of the offenses and the negative social resonance produced in the community.

Also, the court must consider the provisions of art. 202, para. (3) Criminal Procedure Code, which state that any preventive measure must be proportionate to the gravity of the accusation against the accused and be necessary in order to obtain the legal purpose of the the measure.

Moreover, according to the jurisprudence of the ECHR, the national court is obliged to take into cononsideration „ex officio" other preventive, alternative and less restrictive measures, prescribed by law, which could lead to the preventive aim in the same measure.

So, we appreciate that the whole arrest procedure regulated by our Criminal Procedure Code is predictable, accessible and clear. Our recent judicial practice prooves that the provisions of Article 5 of the ECHR are applied, in view of the primary role of Convention.

3. Conclusions

The arrest procedure in the Criminal Procedure Code represents the result of several decades of refining and reform of the legal text.

So, we appreciate that the whole arrest procedure regulated by our Criminal Procedure Code is predictable, accessible and clear.

However, given the profound intruzive nature of the pre trial detention, with each analysis of an

[14] ECHR, Judgment of 22 October 1997, Case of *Erdagoz v. Turkey.*
[15] ECHR, Judgment of 10 November 1969, Case of *Stögmüller v. Austria.*
[16] ECHR, Judgment of 25 April 1968, Case of *Wemhoff v. Germany.*
[17] ECHR, Judgment of 26 June 1991, Case of *Letellier v. France.*
[18] ECHR, Judgment of 4 October 2005, Case of *Becciev v. Moldova.*

arrest request, the rights and guaranties of article 5 of the ECHR have to be met.

Thus, given the cases in which the European Court for Human Rights has found an article 5 breach of the individuals rights, for the national judge, applying the provisions of the Convention for Human Rights is ever more frequent.

Moreover, our recent judicial practice prooves that the provisions of Article 5, ECHR are applied, in view of the primary role of Convention.

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THEORETICAL ASPECTS REGARDING THE NEW OFFENSE COVERED BY ART. 246 OF THE CRIMINAL CODE MISSAPPROPRIATION OF PUBLIC AUCTIONS AND OFFENCES COVERED BY ART. 65 OF LAW NO. 21/1996 REPUBLISHED. COMPETITION LAW

Rodica Aida POPA[*]

Abstract

The present study aims to bring to the attention of the legal law specialists the theoretical aspects related to a new incrimination as the one covered by art. 246 of the Penal Code, the misappropriation of public auctions, as well as aspects of yet another incrimination, that is the one covered by art. 65 of Law no. 21/1996 republished-competition law, trying thus to prevent certain different interpretations about the typicality of the two incriminations and encourage the possibility of highlighting other arguments that will lead to an application as accurate as possible of the two incriminations.

Presently there is no case law for the two incriminations therefore the theoretical analysis has to present interpretation arguments which will help the judicial bodies to easily classify the factual basis of the content of the two constitutive laws offering the possibility of a more detailed and contextual interpretation in relation to the reality.

The way the public auctions take place is a constant preoccupation not only for the participants who are involved in the procedure and directly interested in abiding the under law and ensuring a fair competitive climate but also for the public opinion which is as equally interested in ensuring fair social-economical relationships based on the market principles.

Simultaneously, the way the legal conditions of the second incriminations-that is the one from art.65 Law no.21/1996 republished - are interpreted in relation with the competition practices will lead to the clarification of the norm and its correct enforcement.

Keywords: *misappropriation of public auctions, anti-competitional practices; constitutive contents of the two incriminations; fair competitive climate.*

1. Introduction

The study of the two incriminations, that is the one referring to the misappropriation of public auctions covered by art. 246 of the Penal Code and the one covered by art.65 of Law no.21/1996 republished-the competition law, presents an interest from a broad perspective for the business environment since it deals with aspects regarding the compliance of some special conditions regarding organizing auctions as well as ensuring the context of preventing illegal, anticompetitive practices.

Presently, in Romania the consolidation and diversification of the business environment is an important part not only of the economy but also of the rule of law; the relationships between partners of the private environment but also the public sector that can interfere under certain circumstances, being based of special laws that can create breaches that will be solved in Court.

Thus, the two incriminations can be found –the first in the Penal Code , respectively the crime of misappropriation of public auctions, being regulated by Title II Crimes against property , in Chapter III Crimes against property by disregarding trust, while the offense covered by art. 65 of Law no. 21/1996 republished the competition law is included in the content of the special law mentioned; the common aspect of the two incrimination is the breach of trust of those working in the business environment.

From another perspective knowing how to interpret the content of the two incriminations allows the judicial bodies as well as the criminal prosecution bodies and the Courts to relate to coherent interpretation circumstances in general so that in particular cases to ensure procedural measures and the administration of evidence in order to establish the base for the legal classification of the incriminations

Thus the study will be useful in the jurisprudential area regarding the two incriminations with real consequences for the companies' prevention and emergency plans in creating a climate of trust for all business partners.

We also consider that the study is meaningful for the legislator from the point of view of the evolution of the case law as well as for the need to modify in relationship with the concrete situations that might generate such an approach in the future.

At the same time the study might be the object of further research by Company Law specialists as well as different approaches in international

[*] Judge at the High Court of Cassation and Justice, Offences Department, University Lecturer with a Doctorate in law, within the Department of Public Law at the University of Law "Nicolae Titulescu" (e-mail: **aidap@scj.ro**).

comparative law as well as Union Law with multiple consequences in the case law area as well as in the legislation area to the extent to which the legislator might intent to modify the above mentioned incriminations.

In addressing the theoretical aspects of the two incriminations mentioned we will present the conditions imposed by the legislator about their constitutive content by approaching both their common and different elements. This is the contribution and novelty of this study which we hope to be interesting to many.

The examination of the legal conditions of the two incriminations means to underline from the perspective of our own arguments which was the legislator intent and what are the implications of the application of the presented considerations.

We will thus bring to your attention each incriminated legal condition from the point of view of its way of regulating and we will present arguments for their interpretation also showing the concrete ways for practitioners to apply them in order to effectively establish the contribution of those breaking the legal provisions.

One can easily follow the judgment and the modality in which it effectively find its application through the given explanations as well as the indication of possible adjectival law measures and the administration of certain evidence which will contribute to orienting the investigation and case law in the conditions under which, until this moment, as far as we are aware, there is no cause definitively judged or dealt with.

From this perspective we want to analyze the degree of predictability and the norms' quality aiming to achieve an as correct as possible application of the legal condition of the two incriminations.

So far, in the specialized literature the incrimination covered by art.246 from the Penal Code has been analyzed in many comments on the articles of the new Penal Code, came into force in 2014, under its constituent content, as well as in a study to which we have no judicial references since this new incrimination has been recently introduced in the Code.

As for the second incrimination from the competition law, that is art. 65, it was the object of some studies published in the specialized literature[1].

2. Theoretical aspects

2.1. Theoretical aspects regarding the misappropriation of public auctions covered by art.246 from Criminal Code –new incrimination added in the Criminal Code

The Romanian legislator structured the content of the special part of the Criminal Code in a different way from the old code, grouping the crimes in titles, reconsidering the protected social values which will lead to the regulation in title I in more chapters on the crime against person, in title II, crimes against property, in title III, crimes against authority and State border, in title IV, crimes against making justice, in title V crimes of corruption and malfeasance while in office, in title VI, crimes of forgery and fraud, in title VII, crimes against public safety, in title VIII, crimes against social relationships, in title IX, crimes related to elections and referendum, in title X, crimes against national security, in title XI, crimes against the fight potential of the armed forces, in title XII, against humanity and of war.

Title II, Chapter III from the Criminal Code regulates crimes against property, by trust infringement among which misappropriation of public auctions, in the content of art.246.

We notice two new things: first, the mentioning of the way the property of a person is affected-through breaching the trust and good faith in relation with the goods that belong to a person an second, the introduction of a new incrimination –the misappropriation of public auctions.

The legislator has purposely incriminated concrete ways of misappropriation of public auctions, considering that it is necessary to regulate them through a special norm, granting thus special attention to the way procedures of public auctions take place, because abiding all legal conditions grants the trust of the participants, encourages the fair competition and strengthens the environments 'safety.

The way it is regulated, the norm also has a preventive character, discouraging those who might want to fraud a public auction.

In other words, the public auction procedure can be breached in the ways mentioned in the content of the norm, as we will further show, affecting the property through breaching trust, since breaching the legally enforced conditions of a procedure will affect the feeling that the law is abided, the good faith being breached in ways that endanger the business relationships.

The before mentioned incrimination is related to a particular condition, that is the existence of a public auction.

[1] Adriana Almășan, *The anti-competition agreements in public acquisitions: is criminal replacing contraventional or viceversa?* in the Romanian Magazine for Public-Private Partnership nr. 13/2015, Presearch Center.

The public auction is carried out according with certain procedures regulated by the new Code of Civil Procedure, under legal seizure, be it judicial execution or foreclosure or during the process of granting public supply contracts, concession, according to the conditions expressly provided by two government emergency ordinances, that is Emergency Ordinance no.34/2006 on granting public supply contracts, concession contracts, and Emergency Ordinance no.54/2006 regarding the concession agreements regime on public goods or under special regulated conditions.

We want to mention that further on we will specify some aspects we consider important related to the content of the crime, without however to present the elements that clearly define the crime of misappropriation of public auctions since these aspects can be found in the comments on the articles of the new Criminal Code.

It is interesting that this crime is related to the participants at the auction, those people who have a call, under the requirements of the law, in the case of specific auctions, that is when the auction announcement mentions in some ways the existence of certain conditions regarding the participants to the respective procedure.

We assess that the legislator has drawn on incriminating two clear ways, through the meaning of their content, regarding the action of removing a participant from the auction that is coercion and corruption

The two ways are alternatively estimated, so that under the aspect of assessing the evidence that will be administrated by the judicial bodies, there cannot be any doubts regarding the interpretation.

Of course, as far as relevance, the two ways can effectively generate specific differences in the process of establishing the actions of physical or moral coercion or corruption through offering a sum of money big enough to determine a participant to withdraw himself from the auction.

We assess that the judicial bodies that deal with such crimes have to know the way it took place, so that they proceed to specific search of the premises depending on the object of the auction, when the implicated people refuse to present the necessary documentation in order to establish the acquisition or concession conditions; the use of special surveillance methods, formulating the precise requests to the competent judge of rights and liberties.

The means of coercion or corruption through withdrawing a participant from a public auction are practices that we can call anti-competition, regulated by the Criminal Code, in the case of the crime of misappropriation of public auctions that through their nature are supposed to take place underground, which offers the judicial bodies the possibility to use the searches and the special surveillance methods.

We also consider that any evidence can by used, such as documentary evidence when from the modus operandi clearly resulted the existence of documented evidence showing that a certain participant at the auction was targeted through physical or mental threats in order to convince him to withdraw or through money offers between participants to change the wining price.

Also, the administration of testimonial evidence through public hearing of witnesses to the public auction, people who might knew of certain illegal activities or the nature of coercion or corruption or the agreement to change the price, can clarify the context of the crime.

We agree to the opinion expressed in the specialized literature that the way the contents of the crime of misappropriation of public auction has been regulated, as far as the first modality is concerned, there constitutes a special norm of incrimination the deed of blackmail done during the auction procedure and as far as the second incrimination modality, there constitutes a special norm of incrimination the deed of bribe done during the procedure of public auction [2].

Thus we consider that under the conditions in which the evidence, that might lead to clearly establish the way the crime of misappropriation of public auction took place, was appraised, the legal description of the deed is ensured.

As far as the second normative modality of incrimination regarding the agreement between participants, the judicial bodies are in charge with establishing objectively and subjectively the way the agreement has been initiated, which were the means of changing the price, how did the action took place effectively.

It is interesting to notice that the second modality of creating the constitutive content of the incrimination, the agreement between participants can affect just one concrete element of the auction and not the whole process-that is the final price, which leads to the conclusion that if the agreement is done for a different element of the public auction, such as the object or the nature of the object of the auction, the constitutive content of the misappropriation of the auction does not take place, in this second modality.

2.2. Theoretical aspects regarding the incrimination regulated by art.65 of Law no. 21/1996 republished, competitive law[3].

The incrimination regulated by art. 65 from the before mentioned law constitutes a more complex

[2] Adina Vlăsceanu, Alina Barbu, The new Criminal code commented by comparison with the old one, Publishing House Hamangiu, 2014.

[3] Art.65. *(1) The deed of any person that has a position of administrator or legal representative or any other leading position in a company to design and organize with intent either of the banned practices according to the provisions of art.5, paragraph (1) and that are not excepted*

special norm, in which content besides the ways of committing a crime in paragraphs 2 and 3, there are regulated also a clause of non-punishment as well as one of reducing the punishment under certain conditions.

Further on we will examine a couple of particularities of this incrimination without aiming to do an analysis of the constitutive content of this incrimination.

We have to underline the fact that from the perspective of the used legislative technique in paragraph 1, the legislator also used the cross referred rule, referring to the banned practices covered by art.5 paragraph (1) conditioned by their exemption under the conditions of paragraph (2), art.5.

The active subject of this incrimination is a qualified one, the administrator, legal representative or someone who has a leading position in the company, under this aspect the sphere or leading positions being much broader, leading us to the conclusion that supposing that the deed is committed by somebody else than the above mentioned people, the deed is only done by the actively indicated subject.

In other words, if the deed is committed by an employee with no leading position, he/she cannot be held liable for the deed since he/she does not have the quality regulated by the law.

We consider interested for the analysis of the constitutive content the concrete way of organizing with intent, the practices before mentioned, without being necessary to detail the two actions since their semantic meaning also covers the juridical one.

Of course then we have to establish the factual basis which will describe the legal incrimination model of art. 65 of Law no.21/1996. It is necessary to analyze which were the ways of organizing intently used of the banned practices.

Based on the evidence presented the judicial bodies have to establish the conditions in which such a crime has been committed.

We consider that the documentary evidence referring to the company formation can be run to the way the company's activities, which are the concrete activities, how they compare to the other companies with the same type of activities from the point of view of competition rules and regulations, how can it be proved that illegal practices were intently used.

Thus, the documentary evidence, the expertise related to the nature of the used practice, the testimonial evidence are meant to explain if a banned practice has been designed and organized, how was it put into practice, what consequences had on the private sector, did it affect or not the competition through imitating or controlling the production, selling, technical development, investments.

We consider that the incrimination from art. 65, competition law sanctions the illicit behavior of those doing it, its gravity being enhanced by the quality of the actively qualified subjects, their intent being clearly underlined by the creation of alternative contents and especially by the usage of banned practices.

In the specialized literature there have been performed analyses of the contravention and crime reaching interesting conclusions related to the nature and content of penalties and consequences under the

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according to the provisions of art.5 paragraph (2) constitutes crime and imposes a prison term from6 months to 5 years or a fine and the disqualification from certain rights.

(2) Will not be punished the person that before the begining of the prosecution makes a criminal complaint about his taking part in the crime mentioned in paragraph (1) allowing thus to identify and hold liable the other participants. (3) the person that commited the crime mentioned in paragraph (1) and that during the prosecution makes the complaint and thus helps to identifiy and hold liable the other persons can benefit from reduction in half of the penalty.(4) the Court orders the display or publication of the final criminal conviction.

Art. 5 of Law no. 21/1996 republished *(1) There are banned any agreements between companies, decisions taken by companies'associates, concertated practices, that have as object or effect to prevent,restrict, or distortion of competition on the Romanian market, or on a part of it especially in those parts that: a) establish directly or indirectly buying or selling prices or other transaction conditions; b) limit or control the production,selling, tehnical development or investments; c) divide markets or supply sources; d) condition the closing of contracts on the acceptance from the partners of suplimentary conditions in no way related the object of the contract 2) the prohibition regulated by paragraph (1) does not apply to the agreements between companies, or to the decisions taken by associations of companieswhen they cumulatively met the following conditions: a) contribute to the enhancement of production or distribution of goods or to the promotion of ethnic or economic progress ensuring at the same time for the consumer an advantage comparable to the one got by the agreement parties b) impose to the companies only those restrictions that are essential for attaining the goals set ; c)do not offer the companies the possibility of eliminating the competition (3) The categories of agreements, decisions and practices exempted from the provisions of paragraph (2) as well as the conditions and classification criteria are those established by the rules and regulations of European Union Council or European Comission regarding the application of the provisions of art.101 paragraph (3) from the Treat regarding the functioning of the European Union to certain categories of agreements decisions of associations or common practices, called regulations exemptions on categories which apply accordingly.*

(4) Agreements, decisions and common practices regulated by paragraph (1) that meet the conditions covered by paragraph (2) or are part of the categories covered by paragraph (3) are considered legal, without the necessity of being notified by the parties and the decision of the Constitutional Court. (5) the responsibility of gathering evidence about a breach of the provisions of paragraph (1) lies with the Competition Council. The company or association that invoke the benefit of the provisions of paragraph (2) or (3) has the responsibility to prove that the conditions regulated by these paragraphs are met.

(6) every time the Competition Council applies the provisions of paragraph (1) to the agreements, decisions or practices to the extent that these can affect the commerce between the member states, these also apply the provisions of art.101 from the Treat regarding the functioning of the European Union.

aspect of its way of application as well as solving the civil action[4].

2.3. The common and distinct aspects of the two incriminations covered by art. 246 of the Criminal Code and art. 65 of Law 21/1996 republished, competition law.

From presenting aspect of both incriminations, we reached the conclusion that they are both meant to ensure a prevention context aiming to prevent the committing of such deeds that breach the trust of the public and private sector.

Both incriminations sanction the breach of the rules regarding either public auctions or illicit activity.

Also, they both ban the anti competition practices that might affect the activity of the companies.

Both incriminations have alternate content in which they are made.

From the point of view of differences, the subject of the two incriminations are different; while when misappropriating the public auction the subjects are mere participants, in the incrimination from art.65, the active subject is qualified.

The alternating content in which the two incriminations take place has a specific character.

Also, while for the incrimination of misappropriation of public auctions there is no punishment or possibility for a punishment reduction, for the incrimination in art. 65 from competition law paragraph 2.3 there is such a clause.

Under the evidence aspect, both incriminations can be proved through different ways that help establish the detailed context of the deed, the methods used, offering the possibility to a fair legal classification by the judicial bodies.

Conclusions

The study aimed to examine a series of theoretical aspects of the crime of misappropriation of public auctions, as covered by art. 246 of Criminal Code and the crime covered by art.65 of Law no.21/1996 republished, competition law, without examining the constitutive contents.

The presentation was centered on underlining theoretical aspects of the two incriminations, in the conditions in which there is no case law, and also on common elements that lay down the prevention character in combating the anticompetitive practices in the business area.

The study reached its purpose through examining some particularities of the two incriminations which favor the coherent application through ensuring a fair judicial classification of the factual basis.

We also have presented procedural aspects related to the administration of evidence in proving the two incriminations, which offer a note of pragmatism orienting the specialists in their activity of analyzing, interpreting and application of the two crimes.

Of course, other studies of the same incriminations will be able to base themselves on the case law that will be published and analyzed offering the possibility of finding particular aspects depending on the alternative contents of the two incriminations, ensuring the variety in their application.

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[4] Adriana Almășan, Doru Trăilă, *Does Criminal Law ensure effective detterent measures against the deeds of malign competititon ? In* AUB Law 2014 Supplement. Legal Law. Special Part; Adriana Almășan, *The anticompetitive agreements in the public acquisition procedures: criminal replacing contraventional and vice versa?* in Romanian Magazine of Public-Private Partnership no. 13/2015, Presearch Center.

THE EVOLUTION OF ROMANIAN CRIMINAL AND CRIMINAL PROCEDURAL RULES APPLICABLE TO JUVENILE OFFENDERS

Andrei-Lucian PUŞCAŞU*

Abstract

With the evolution of societies, this trend to punish offenders has undergone substantial changes. Thus, ancient legislators began to gradually express concern for the adoption of a different criminal sanction regime for juvenile offenders. Through the given research we want to analyze the evolution of the criminal and criminal procedural rules applicable to Romanian juvenile offenders.

Keywords: *educational measure, minors, Romanian Criminal Code, sanctions.*

1. Subtitles

Section I: The treatment of criminal juvenile offender under the previous provisions of the Criminal Code of 1969

I.1 In Roman Law

I.2 Legislations in the Romanian Countries

I.3 The Criminal Code of 1865

I.4 The Criminal Code of 1937

Section II: The treatment of juvenile offenders according to the Criminal Code of 1969 and subsequent legislation

2. Content

Section I: The treatment of criminal juvenile offender under the previous provisions of the Criminal Code of 1969

I.1 In Roman Law

The eminent professor Ioan Tanoviceanu highlighted in his book that "the old used to punish children even with death" and gave as an example the testimony of Quintilian who claimed that the Areopagus of Athens put to death a child who had pulled out the eyes of a bird[1].

With the evolution of societies these trends to punish offenders have undergone substantial changes. Thus, ancient legislators began to gradually express concern for the adoption of a different criminal sanction regime for juvenile offenders.

In this respect, the Roman law through the law of the XII tables, divided minors into two categories; puberus and impuberus, respectively, puberty being of 14 years for boys and 12 years for girls.

Unlike puberus, impuberus benefited from a diminished criminal responsibility which drew lighter sanctions. For example, in case of a theft the puberus was beaten with rods and the victim had the right to kill him, whereas the impuberus was punished only with the rods and forced to compensation[2].

In Justinian's legion, The Digests, we may notice an improvement in the condition of juvenile offenders. Thus, it was stipulatedthat the child up to 7 years old (infans) was absolutely unable to get administered criminal responsibility, the one between 7 and 12 years old, 14 respectively for girls (infans proximus) was liable for criminal responsibility only if he committed the act with knowledge, and the one over 12, 14 respectively for girls (pubertati proximus) was liable for criminal responsibility.

We find similar regulations in the Canon law as well as in the French, Italian and German Law [3].

I.2 Legislations in the Romanian Countries

In the XVI-XVII centuries the idea of excluding minor penalty began to advance and part of the XIX century codes, thanks to the promotion of the principle of particularization of penalties some special provisions applicable to juvenile delinquents were established. The first Romanian regulations containing references to minority status were "The Romanian Book of Teaching" by Vasile Lupu in 1646 in Moldavia and "The Correction Law" by Matei Basarab in 1652 in Wallachia.

These codices contained 16 causes of removal or mitigation of punishment, including the age of the offender list:

Before the age of 7 the minor is not criminally liable, "the cocoons are forgiven of everything, no matter the mistake";

Between 7 and 14 years old for boys and 7 to 12 years old for girls the minority represented a mitigation question;

* PhD Candidate, Faculty of Law, „Nicolae Titulescu" University of Bucharest (e-mail: **lucian.puscasu87@gmail.com**).

[1] Ioan Tanoviceanu, *Law Treaty and criminal procedure*, edition II, (Tipografia Curierul Judiciar, București 1924, vol. I) p. 695.

[2] OrtansaBrezeanu, *The history of minor criminal sanctions regime in Romania*, („Penal law review", no. 2/1995), 85.

[3] Ioan Tanoviceanu, op. cit., 696-697.

Between 14 and 20 years old for boys and 12 and 25 for girls a regime of diminishing mitigating sanctions was instituted, mistakes will be less punished, except the extremely serious facts."

In the same time, The Romanian book of Teaching also stated that "those under 25 years old will be less punished for the mistakes"[4].

Similarly, The Chronicle of Criminal anaphora by Armenopol from 1799 stated that minorities constitute a mitigating issue[5].

The Legal Manual, by Andronache Donici from 1814 in Moldavia, unlike the legislations above, was a real setback since it stated without making any distinction between major offenders and the minor ones, that the willingly killer shall be punished with the punishment of the head, no matter the age[6].

The Criminal Book, by Ion Sandu Sturza from 1826 and applicable in Moldavia, as well as The Criminal Book, by Stirbei Barbu, come into force in 1852 in The Romanian Country, represented an important step towards the transition to modern criminal codes existing at the time.

It is emphasized the fact that in these legislative works, the juvenile criminal liability has been increased[7]:

Before the age 8 years old the minor is not criminally responsible;

Between 8 and 15 years old, if it was proved that he acted "without knowledge and without thinking" the juvenile deliquent supervision was entrusted for care to parents. But if he acted „"inteligently", according to the nature and extent of crime or guilt", both the punishment and the place of execution was established;

Between 15 and 21 the minor was liable for criminal responsibility.

I.3 The Criminal Code of 1865

Entered into force on May 1, 1865 under the reign of Alexandru Ioan Cuza, the first Romanian Penal Code[8] removes diversity from the criminal matters, by replacing the Criminal Code of Ioan Sandu Sturdza from Moldavia and the Criminal Code of Barbu Ştirbei from Wallachia.

Similarly to the above regulations, the legislature of the code in 1865, devotes under the Title VI of Chapter I, entitled "The Causes defending against penalty or reduces punishment" (art. 61- 65), provisions applicable to juvenile offenders.

It may be noted that criminal liability entails significant differences in the sense that:

a) before the age of 8 years old the minor was not criminally responsible and could not be subjected to civil damages;

b) between 8 and 15 the juvenile delinquent was liable for criminal responsibility if it was proved that he acted "with knowledge";[9]

Where it was appreciated that the minor in question had not "worked skillfully," the court either entrusted the custody to his parents for supervision and education, or sent him to the monastery for a period of time no longer than the age when the offender turned 20;

c) between 15 and 20 years oldthe juvenile was liable for criminal responsibility, but a minority represented a mitigation.

Also in art. 63 of the Penal Code. it was provided that "when it was decided that the accused had worked skillfully or he was older from 15 years full to 20 years full, penalties would be decided as it follows ":

- If his offense is punished with hard labor for life or limited time he will be convicted from 3 years to 15 years in prison.
- In other cases, the judge is authorized to apply imprisonment for a time at least equal to the third part or at most half the time which he could have been sentenced to one of the penalties relating to those cases. "

Regardless of the offense committed, the minor was applied only correctional penalties expressly provided which also attracted courts and correctional jurisdiction against those with jurors. This orientation of the criminal legislature led to the support of the opinion reasoned in the doctrine[10] that the crimes committed by minors were in fact offences and not crimes because they were sanctioned only by correctional penalties.

In the case of an offense by a minor together with a major the jurisdiction the offense was for the trial court jury except the case when the major participants major were dead or missing unjustified from the judgment of the case.

Regarding the arrangements for penalty, we think it is important to emphasize that the provisions

[4] Ioan Tanoviceanu, op. cit., 698.

[5] Ibidem, op. cit. 698. An example can be given : " A murderer quarreling with a man hit him twice with the ax and cut his throat. The boyars who judge him in 1799 quote Armenopol, Book VI, Title VI, prescribing cutting the hand, but because "it was insurmountable for the lawful age" they proposed two years of prison. The Lord gives three years of prison. ".

[6] Ibidem, op. cit. 698.

[7] Maria Coca-Cozma, Cristiana Mihaela Crăciunescu, Lavinia Valeria Lefterache, *Juvenile justice.Theoretical studies and jurisprudence. Analysis of legislative changes in the field.*, (Ed. Universul Juridic, Bucureşti, 2003), 56.

[8] Penal Code from 1865 was promulgated on October 30 1864 and implemented on May 1865.

[9] The provisions of the Criminal Code of 1865 were incomplete in regard to the concept of " knowledge" the legislature preferring to leave it to the discretion of the judge. Professor Ioan Tanoviceanu argues in his book that the correctional courts were doing incorrectly because they first examined whether the deed required the implementation of punishing or penalty and later declared that the juvenile delinquent acted with knowledge.

[10] Ioan Tanoviceanu, op. cit., p.716.

of art. 64 provided for a derogation from the general law providing that imprisonment is executed in an "establishment specifically intended for this" or "in a separate part of the correctional house prison."

In this respect, the Regulation on the prison regime[11] has regulated that the penalties applicable to minors will be executed in the homes of convicted juvenile correctional education.

I.4 The Criminal Code of 1937

The entry into force of the Penal Code[12] and Criminal Procedure[13] in 1937, establishes a new punitive treatment and special rules of research and trial of juvenile offenders, considerably improved.

The material is also to be found in the Criminal Code in Title VII - "The causes that defend the criminal or diminish the punishment", Section XI - "minority" art. 138- 153.

In the new conception of the criminal legislator all persons under the age of 19 were considered minor, while establishing criminal liability according to two stages:

a) before the age of 14, called childhood, the child is not criminally liable;

b) between 14 and 19 years old, adolescence, the juvenile is liable for criminal responsibility if it proved that at the time of the offense, he had acted with discernment;

Also, the legislature's Criminal Code of 1937 considered appropriate to replace the criterion of "knowledge" with discernment, thus managing to eliminate the existing conflicting discussions both in practice and from the doctrine[14].

The burden of proving the existence of discernment is the responsibility of the courts which could request a medical examination whenever there is doubt about the mental state of the juvenile delinquents. For the first category as well as for adolescents who committed the offence without discernment, according to art. 140 of the Penal Code. and art. 575 C. pr. pen., courts could order the following measures of educational, guardianship and protection, until the age of 21 years old:

1. the child custody entrusted family to oversee as well as the informing of the education authority in order to take disciplinary measures provided by the school rules;

2. reassignment to the closest relatives where juvenile offender had no family or if it this one did not present "sufficient guarantee of morality";

3. the custody entrusted to an honorable person patronage of a company or a public or private institution authorized by the State for this purpose if the minor had no relatives;

4. If the Court finds that the above measures couldn't be applied, it could order the juvenile offender to be entrusted to a moral re-education institute.

Regarding the enforcement regime of the minors criminally liable, this was the composite of educational safety measures (supervised freedom, corrective education) and penalties (reprimand, educational imprisonment or simple correctional detention).

By taking **supervised release**, the convicted juvenile was allowed to leave on a trial period of one year under the supervision of his legal representative or a public body created for this purpose, a judgment being deferred until the deadline. The measure could not be taken against the teenager who suffered imprisonment exceeding one month.

At the expiry of the above, the court, based on information received, was to consider whether it was necessary to extinguish the criminal action as a result of improved juvenile delinquent behavior or if it was necessary to revoke supervised release and taking corrective education measure or the imposition of a sentence.

In terms of **corrective education** the court decides to take such action if, in relation to criminal antecedents, the living environment or the nature of the crime, finds that the juvenile offender was in a "state of moral decay."

The measure could be taken indefinitely, but until the age of 21 years old at the most and its execution was done in specially designated institutions under the guidance of a board of supervisors, to straighten the juvenile delinquent behavior until this one learnt a trade.

If the Supervisory Board determined, after the passing of a period of one year, that the child had improved his behavior, it could order his release on a trial period of two years.

Where two years after finding that the adolescent behavior has evolved the release became final and otherwise, the court could decide admission to an institute of remedial education until the age of 21 years at the most.

The **reprimand** punishment consisted of the minor reprovment instruction in the offense and his warning that in case of committing a new criminal offense will be subject to a more serious penalty.

Reprimand may not be ordered where the teenager has committed an offense for which the law stipulated correctional imprisonment or simple detention exceeding one year or if it has committed an offense for which he has been applied any of the safety measures.

[11] Decree no. 1002/1874 General Regulations of the Juvenile Correction Center , published in the Official Gazette . no. 104 of May 14, 1874.
[12] Criminal Code of Carol II published in the Official Gazette no. 65 of 18 March 1936 entered into force on January 1, 1937.
[13] Code of Criminal Procedure of Carol II published in the Official Gazette no. 66 of 19 March 1936 entered into force on January 1, 1937.
[14] Ioan Tanoviceanu, op. cit., 716.

The correctional imprisonment or simple imprisonment are executed in special institutions and it could be applied to the juvenile delinquent for a period:

1. from 3 to 15 years if the offense was punishable by law with "criminal punishment";

2. half of the limits of punishment if the offense was punishable by law with correctional imprisonment or simple imprisonment, but the maximum punishment can not be more than 3 years.

In the event that a major was trialed for an offense committed during the period in which he was aged between 14 and 19, it was the task of the court to apply the penalties outlined above.

Regarding criminal liability prescription as well as the sentence execution, we specify that the legislature's Criminal Penal Code of 1937, unlike 1865, manages to register a new breakthrough. Thus it is established by way of exception that in the case of the offenses committed by minors, the limitation periods set for adults are reduced by half.

Shortly after the entry into force of the 1937 Criminal Code, this one has undergone important amendments and additions applicable to criminal treatment of minors[15]:

a) the decrease of penal majority from 19 to 18;

b) the replacement of child and adolescent notions with that of the minor;

c) the lowering of the age at which he was liable for criminal responsibility from 14 to 12 years;

d) between 12 and 15 the juvenile was liable for criminal responsibility if it was proved to have acted with discernment;

e) between 15 and 18 the minor was liable for criminal responsibility, but the minority is a question of mitigation.

Also, by Decree Law no. 3629/1939[16] the legislature inserted into art. 144 of the Penal Code. a provision that was a real setback in the matter of the minority. Thus, the juvenile offender over 15 found guilty of offenses which related to public order inside or outside safety of the state was liable to the same sanction regime as for adults.

In terms of the Criminal Procedure Code in 1937, it contains derogations for the minor offender under Title I, Book a- VI entitled "Special procedures and measures of public interest".

Juvenile defendants are of the exclusive competence of specialized panels composed of a single judge, appointed by the Minister of Justice for a term of three years on the recommendation of the President of the tribunal, of the tribunal judges.

However, in the courts with several departments, senior prosecutor was obliged to appoint a prosecutor to settle only juvenile cases.

Where a criminal offense is committed with the participation of majors with minors criminally liable or if a major is prosecuted for crimes committed when he was a minor common law procedure is applied under the jurisdiction of the courts.

The complaints or the denunciations related to injuries created through crime by minors exclusively address the specialized court.

In this respect, the criminal procedural legislator has established the requirement of conducting research and training with these cases, by juvenile courts, the prosecutor and the defense of the minor having the right to attend the investigation.

Also, the Public Ministry had to submit a report containing the conclusions regarding the act and the existing evidence as well as the proposals regarding the measures it considers appropriate.

During the investigations were gathering information on the moral and material situation of the family of the minor character on his history, on the conditions under which he grew up and on his intellectual development.

Similarly to the current provisions in force, during investigations the court may order preventive measures.

With the completion of investigations, the court set a hearing or it could obtain dismissal by closure, if it was not considered when necessary to take protection measures.

At the first hearing, the court was obliged to verify that juvenile delinquent has legal aid and otherwise it could appoint a lawyer.

In order to protect the juvenile, the court proceedings were not made public, the people who could witness the debates being exhaustively provided. After hearing the juvenile the court had to order his removal from the courtroom.

Decisions and actions taken against children were brought out by the tribunal's prosecutor, with the help of the police officers or judicial police agencies or companies of patronage.

The court could apply one of the preventive measures of art. 140 of the Penal Code, in the case of the minors exposed to committing offenses under criminal law, as well.

The Penal Code of 1936[17] reissued in 1948 did not bring significant changes to the existing penal provisions at the time.

Not the same can be said about the Criminal Procedure Code, republished in 1948[18] and fully

[15] The Law of 24 September 1938 published in the Official Gazette no. 222 of the same date.
[16] Published in the Official Gazette no. 233 of October 7, 1939.
[17] Published in the Official Gazette no. 48 of 27 February 1948.
[18] Published in the Official Gazette no 36 of 13 February 1948.

amended by Decree No. 186/1949[19] and no. 198/1950. By these acts, special provisions applicable to research and trial of the juvenile offenders have undergone many reforms.

Thus, according to the new provisions the offenses committed by minors under 15 years old were judged. according to the power and the ordinary proceedings, by the ordinary courts, apart from the cases where the law provided otherwise.

The judge had all the powers of criminal prosecution body being able to delegate the performance of certain acts of research to the militia officers or judicial organs of social assistance.

On completion of the research, the judge, in relation to the seriousness of the offense, may order the prosecution filing or settlement.

The new regulation was kept on holding hearings provision, people can participate, whilst stability I that the proceedings of flagrant crimes could not be applied when judging juvenile offenders under 15 years old.

Changes in the prosecution and trial of offenders have been brought by Decree no. 213/1960 amending the Code of Criminal Procedure.

Tracking offenders are carried out according to common law procedure except as otherwise expressly provided.

To carry out criminal prosecution had summoned a parent, guardian or person in whose care the minor guardianship authority and delegate to be present.

The new provisions also require and social inquiry by the prosecuting authority itself or by the guardianship authority.

One positive aspect worth mentioning is the mandatory legal assistance in the prosecution of juvenile defendants.

Regarding the trial of cases involving minor offenders, exclusive jurisdiction in the first instance the responsibility of a special panel who could appreciate the special status of the juvenile delinquent, consisting of judges specially appointed Minister of Justice and judges of the people.

The legislator also extend the jurisdiction of the court and to the causes that with minors and majors were judged criminally liable or where the minor age of 18 during the trial.

The new regulation kept the provision regarding the people who can participate, whilst establishing as well that the proceedings of flagrant crimes could not be applied when judging juvenile offenders under 15 years old.

Changes in the prosecution and trial of offenders were brought by Decree no. 213/1960[20] amending the Code of Criminal Procedure.

The tracking of the juvenile offenders was carried out according to common law procedure exceptthe derogationss expressly provided.

To carry out criminal prosecution one of the two parents had to be summoned to be present, the guardian or the person in whose care the minor was, as well as the guardianship authority delegate.

The new provisions also require social inquiry made by the prosecuting authority itself or by the guardianship authority.

One positive aspect worth mentioning is the mandatory legal assistance in the prosecution of juvenile defendants.

Regarding the trial of cases involving minor offenders, the exclusive jurisdiction in the first instance was the responsibility of a special panel who could appreciate the special status of the juvenile delinquent, consisting of judges specially appointed by the Minister of Justice and judges of the people.

The legislator also extends the jurisdiction of the court regarding the causes in which, together with the minors criminally liable, the majors were judged as well, where the minor turned 18 during the trial.

Proceedings in cases involving juvenile defendants were nonpublic, except the situation in which juvenile defendants over 15 years were tried with adult defendants.

In cases involving juvenile defendants, the prosecutor and the lawyer's presence was mandatory.

Taking preventive measures against minors aged between 10 and 18 exposed to the commission of the offense shall be ordered by the court or by the prosecutor's proposal or the guardianship authority.

Pending a decision in this regard, the minor may be detained by police bodies.

If the court notification was not made within 5 days of arrest, detention extension measure couldbe taken, but only by the prosecutor and for a period of maximum 30 days.

During detention, to motivate the document instituting the proceedings, social investigation had to be carried out by the guardianship authority.

Judgment in cases concerning the protection of minors exposed to commit criminal acts could be held urgently by the special panels mentioned above. Listening to the minor was mandatory and the court could hear evidence or dispose of restoration or completion of the social investigation, situation that drew the return of the file of the guardianship authority.

If a sentence was delivered regarding a protection measure, it was also agreed on the persons who owed maintenance according to civil law, the mandatory contribution to the costs that the state supports for the maintenance of the minor.

[19] Published in the Official Gazette no 25 of 30 April 1949.
[20] Published in the Official Gazette no. 9 of 18 June 1960.

At the request of the guardianship authority of the prosecutor or any interested person, the court may lift the measure taken before the period when the minor reaches the age of 18.

In similar circumstances, the court may order the extension of the measure which establishes that the juvenile remains in the rehabilitation institute, with no more than 2 years over the age of 18, if deemed necessary.

As regards the arrangements for enforcement of criminal sanctions applicable to juvenile delinquents or to those exposed to commit criminal acts, we think it is important to note that the law on the organization of prisons and institutions for prevention from 30 July 1929 following institutes were regulated[21]:

1. correctional institutions for juvenile convicts who are serving a sentence;
2. forced education institutes for the minors unsuitable for penal code;
3. institutes of protection for abandoned minors, vagabonds, mentally retarded and ill mannered who were prone to committing crimes.

Section II: The treatment of juvenile offenders according to the Criminal Code of 1969 and subsequent legislation

Penal Code which entered into force on 1 January 1969 gives expression to the principles of the classical school and the positivist one in the senseof their contemporary acception, it reflects the Romanian legal thinking, the experience of our country and of other countries in criminal justice and it takes into account the Romanian tradition in this matter[22].

Unlike the previous regulation which provided the minority only among the causes responsibility that defend the criminal or shrinks it, The Criminal Code of 1969 devotes to this matter a distinct title, Title V of the General Part, respectively.

We also want to highlight the fact that the new criminal enactment records a new breakthrough in that it provides minority among the causes eliminating the criminal nature of the act.

This change had as justification the fact that it was appreciated that the lack of discernment directly affects the criminal guilt offense and the existence of the offense implicitly.

In this regard, according to the doctrine[23] that existed at the time, through causes eliminating the criminal nature of the act it was meant those conditions, situations or circumstances whose existence during the commission of the crime make it impossible to carry out one of the essential features of crimes.

It is worth mentioning that the criminal legislature opted for increasing criminal liability limits thus the minor:

a) before the age of 14 is not criminally liable;

b) between 14 and 16 criminal liability only if it is proved that he committed the offense under the criminal law with discretion;

c) between 16 and 18 held criminally responsible.

Regarding the enforcement regime of the juvenile offender, the Criminal Code of 1969 establishes a mixed system composed of sanctions educational measures and punishments.

For a sanction of the two categories listed above the court was to assess the seriousness of the offense committed and analyze the physical status, intellectual development and welfare of the juvenile delinquent, his behavior, the conditions in which the child was raised and any other items capable of representing his person.

It is essential to note that the penal provisions provided for a prioritized enforcement of educational measures as opposed to punishment. The court may pronounce a sentence to execution of a sentence only if it considered that "taking an educational measure would not be sufficient to rehabilitate the minor." [24]

In this case we exemplify the following judicial practice [25]:

By penal No. 77 of 4 April 2002 the Court of Brasov the juvenile defendants R. A and D.A.G. were convicted to the 3-year imprisonment for the offense of robbery.

Defendants appealed against the sentence asking for sentence reduction.

The appellate court found that the sentence is objectionable in terms of judicial individualization of the penalty imposed to the minor defendant as the prosecution file follows that:

1) before committing the crime the defendants had behaved totally improperly in family and society,disobeying the authority and supervision of the family;

2) both defendants were from broken homes;

3) the transcripts of the two defendants showed they were both repeaters in several years.

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[21] Ioan Chiș, Alexandru Bogdan Chiș, *Execution of criminal sanctions*, (Ed. Universul Juridic, București, 2015), 47.

[22] Costică Bulai, Nicolae Bogdan Bulai, *Manual of criminal law. General part*, (Ed. Universul Juridic, București, 2007), 79.

[23] Vintilă Dongoroz et al. *Theoretical explanations of the Romanian Penal Code. General part*, (Ed. Academiei Române, Ed. All Beck, 2003, vol. I), 298.

[24] The doctrine held that through the expression " take an educational measure would not be not sufficient " should be understood both the fact that by an educational measure would not be able to ensure the rehabilitation of the minor as well as the situation where, in comparison to the age close to major of the minor where the educational measure could not be executed over a period sufficient to ensure effectiveness . – Vintilă Dongoroz et al. , op . cit. 227.

[25] Brasov Court of Appeal, Criminal Division, Decision no. 113 / AP June 12 , 2002, in Maria-Crina Kmen, Ruxandra Rata, op . cit. 40.

In relation to all these elements that characterize the two defendants, the court of appeal considered it appropriate to apply an educational measure such as internment in a rehabilitation center.

As educational measures they regulated, reprimand, supervised freedom, internment in a rehabilitation center, hospitalization in a medical-educational.

By applying the reprimand measure the child was scolded by the court that explained to him the social danger of the crime committed and he was advised to direct his behavior under the warning that if he commits a criminal offense he will have a more severe educational measure or will be subject to punishment

Supervised freedom consists in allowing the minor in liberty for one year under the supervision of parents or of a guardian and in warning the juvenile delinquent of the consequences of his behavior. In case the court considered that they could not provide supervision satisfactorily juvenile custody supervision was disposed to a trustworthy person, preferably a closer relative, at his request, or to an institution legally responsible for the supervision of minors.

Also, during the execution of the measure, the court may impose juvenile delinquent to fulfill one or more obligations, namely: a) not to frequent certain established places; b) not to come into contact with certain persons; c) to perform without remuneration work in a public institution set by the court, lasting between 50 and 200 hours, no more than 3 hours per day, after school, on public holidays and vacation.

If the court considered that the educational measures outlined above are not sufficient to straighten the conduct of the minor, it could dispose of internment in a rehabilitation center, through which it was provided the opportunity to acquire the necessary teaching and professional training according to his skills.

The measure of internment in a medical-educational institute could be applied to juvenile delinquents who needed medical treatment and a special education due to their physical or mental state.

Penalties that could be imposed were imprisonment or a fine provided by law for the offense committed reduced by a third and the minimum punishment after this reduction may not exceed 5 years. If the offense is provided for the death penalty for the minor the penalty shall apply from 5 years to 20 years.

The doctrine[26] was argued in the courts by asserting that the court dealing with the trial that juvenile offenders should first determine which of the two categories of sanctions was the right and only after analyze concretely what penalty was to be imposed.

In all cases, convictions for offenses committed during minority do not entail any disability or limitation.

Among the ways to individualize the sentence of imprisonment it was provided the possibility of conditioned suspended sentence and suspended sentence under supervision or control.

Similarly with criminal Legiuirea from 1937 on criminal offenses committed by minors limitation periods and criminal liability of the sentence were halved.

Shortly after the entry into force of the provisions of the Criminal Code of 1969 it was assessed as appropriate waiving the joint enforcement regime applicable to minor offenders that date in favor of a sanctioning system composed exclusively of educational measures.

In this regard it was adopted Decree no. 218/1977[27] on certain transitional measures for penalizing and reeducation through labor of persons who have committed offenses under criminal law.

According to the law mentioned above, the minor criminal responsibility aged between 14 and 18 who commits:

1) an offense for which the punishment is imprisonment of more than five years, it had custody of juvenile delinquent in working or learning team while establishing "strict discipline and behavior";

2) very serious offenses, could decide the extent of sending in special education and rehabilitation work centers over a period of 2-5 years.

In doctrine[28], some authors rightly opined that with the entry into force of the decree abovethe provisions of the Criminal Code on educational measures were implicitly repealed, except internment in a medical- educational institute. This conclusion stems from the imperative expression of Articles 2 and 3 of the Decree.

The express repeal[29] of Decree No. 218 / 1977 and Law No.59 / 1968 the whole concept on punishing the whole concept the juvenile offenders had returned broadly to the fundamental thesis of the original version of the current penal code.

[26] Costică Bulai, Nicolae Bogdan Bulai, op. cit., 606;

[27] Decree no. 218 of July 12, 1977 published in the Official Gazette no. 71 of 17 July 1977 approved by Law no . 47 of November 25, 1977;

[28] Corneliu Turianu *Legal liability for criminal acts committed by minors*, (Ed . Continent XXI, Bucureşti, 1995), 45;

[29] Decree no.218 / 1977 and Law no. 59/1968 were repealed by Law no. 104 of 22 September 1992 , published in Official Gazette no. 244 of October 1, 1992.

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CODE SETTING TRENDS IN ELECTORAL MATTERS - CODE OF GOOD PRACTICE IN ELECTORAL MATTERS - VENICE 2002

Mircea-Constantin SINESCU*
Mihai-Daniel ONIȘOR**

Abstract

The integrated and ongoing effort of the of the states in the European area to modernize and adapt their laws to the current needs and exigencies of the citizens is transposed, in terms of constitutional matters, in the actions of the European Commission for Democracy through Law, better known as the Venice Commission, as Venice is the place of the proceedings of this Council of Europe's advisory body on constitutional matters.

Keywords: *constitutional justice, universal suffrage, electoral fraud prevention, strict vote confidentiality.*

1. Foreword

The Venice Commission was established in May 1990 by 18 Council of Europe Member States. Currently, the Venice Commission has 60 member states: the 47 Council of Europe member states, plus 13 other countries (Algeria, Brazil, Chile, Israel, Kazakhstan, the Republic of Korea, Kosovo, Kyrgyzstan, Morocco, Mexico, Peru, Tunisia and the USA).

The role of the Venice Commission is to provide legal advice to its member states and, in particular, to help states wishing to bring their legal and institutional structures into line with European standards and international experience in the fields of democracy, human rights and the rule of law. These fundamental principles of the European constitutional heritage stand as the guidelines for the Commission works in three areas: democratic institutions and fundamental rights; constitutional justice and ordinary justice; elections, referendums and political parties. [1]

2. Content

Ever since its establishment, the Commission's work has consisted of providing opinions on the draft electoral laws in various states, including Romania. This action has taken on a completely new dimension in 2002, following the setting up of the Council for Democratic Elections. Thus, the Venice Commission and the Council for Democratic Elections, in their efforts to ensure the stability of electoral legislations, have developed the principles of the European electoral heritage by developing the Code of Good Practice in Electoral Matters. [2]

As the wording itself of the Guidelines[3] and of the Explanatory Report to the Code of Good Practice in Electoral Matters[4] clearly specifies, the five principles underlying Europe's electoral heritage are universal, equal, free, secret and direct suffrage. Furthermore, elections must be held at regular intervals.

Obviously, a main component in the attempt to ensure fairness of the elections is linked to the free nature of the suffrage and is set forth in paragraph 3.2 of the Guidelines on Elections related to the Code - Freedom of voters to express their wishes and actions to combat electoral fraud:

i. voting procedures must be simple;

ii. voters should always have the possibility of voting in a polling station. Other means of voting are acceptable under the following conditions:

iii. postal voting should be allowed only where the postal service is safe and reliable; the right to vote using postal votes may be confined to people who are in hospital or imprisoned or to persons with reduced mobility or to electors residing abroad; fraud and intimidation must not be possible;

iv. electronic voting should be used only if it is safe and reliable; in particular, voters should be able to obtain a confirmation of their votes and correct them, if necessary, respecting secret suffrage; the system must be transparent;

v. very strict rules must apply to voting by proxy; the number of proxies a single voter may hold must be limited;

vi. mobile ballot boxes should only be allowed under strict conditions, avoiding all risks of fraud;

* Assistant Professor, PhD, Faculty of Law, "Nicolae Titulescu" University (e-mail: **mircea.sinescu@sinescu-nazat.ro**).
** PhD candidate, Faculty of Law, "Nicolae Titulescu" University (e-mail: **danielonisor08@gmail.com**).

[1] http://www.venice.coe.int/WebForms/pages/?p=01_activities

[2] adopted by the European Commission for Democracy through Law at its 52nd Plenary Session (Venice 18-19 October 2002), adopted under CDL-AD(2002)23rev by the Parliamentary Assembly of the Council of Europe in its 2003 session – 1st part and by the Congress of Local and Regional Authorities in Europe in its Spring session 2003.

[3] Adopted by the Venice Commission at its 51st Plenary Session (Venice, July 5-6 2002).

[4] http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD%282002%29023rev-rom

vii. at least two criteria should be used to assess the accuracy of the outcome of the ballot: the number of votes cast and the number of voting slips placed in the ballot box;

viii. voting slips must not be modified or marked in any way by polling station officials;

ix. unused voting slips must never leave the polling station;

x. polling stations must include representatives of a number of parties, and the presence of observers appointed by the candidates must be permitted during voting and counting;

xi. military personnel should vote at their place of residence whenever possible. Otherwise, it is advisable that they be registered to vote at the polling station nearest to their duty station;

xii. counting should preferably take place in polling stations;

xiii. counting must be transparent. Observers, candidates' representatives and the media must be allowed to be present. These persons must also have access to the records;

xiv. results must be transmitted to the higher level in an open manner;

xv. the state must punish any kind of electoral fraud.

Another aspect highlighted in the Explanatory Report of the Code of Good Practice in Electoral Matters is the equality of voting rights, which "requires each voter to be normally entitled to one vote and to one vote only. Multiple voting, which is still a common irregularity in the new democracies, is obviously prohibited – both if it means a voter votes more than once in the same place and if it enables a voter to vote simultaneously in several different places, such as his or her place of current residence and place of former residence." [5]

Stressing out the state's obligation to ensure the fairness of elections and to sanction any possible fraud in electoral matters, the Venice Commission argues that electors should be able to cast their votes for registered lists or candidates, which means that they must be supplied with ballot papers bearing their names and that they must be able to deposit the ballot papers in a ballot box at the premises that the state has to make available for electoral operations.

Furthermore, electors must be protected from threats and or constraints that are likely to prevent them from either casting their votes or from casting them as they wish, whether such threats come from the authorities or from individuals. The state is obliged to prevent and sanction such practices.

A first recommendation for preventing election fraud is that the voting procedure be kept simple.

Thus, starting from the idea that political forces involved in elections are represented equally in the central electoral commissions and, as such, substantial fraud is difficult, the fairness of the ballot should be judged by two main criteria alone: "the number of electors who have cast votes compared with the number of ballot papers in the ballot box. The first measure can be determined by the number of signatures in the electoral register.

Human nature being what it is (and quite apart from any intention to defraud), it is difficult to achieve a total congruity between the two measures. Any further control such as numbering the stubs of the ballot papers or comparing the total number of ballot papers found in the ballot box plus those cancelled and unused with the number of ballot papers issued to the polling stations may give some indication, but one should be under no illusion that the results of these various measures will coincide perfectly.

The risk in multiplying the measures used is rather that the differences in the totals, and in the end the real irregularities, will not be taken seriously. It is better to have strict control over two measures than slack – and hence ineffective – control over a large number of variables.

Any unused ballot paper should remain at the polling station and should not be deposited or stored in different premises. As soon as the station opens, all the ballot papers awaiting use must be in full view on the table of the senior station official. No ballot papers should be stored in cupboards or in other places.

The signing and stamping of ballot papers should not take place at the point when the paper is presented to the voter, because the signatory or the person affixing the stamp might mark the paper so that the voter could be identified when it came to counting the votes, which would violate the secrecy of the ballot.

The voter should collect his or her ballot paper and no one else should touch it from that point on.

It is important that the polling station officials include multi-party representatives and that observes assigned by the candidates be present." [6]

The Commission also attaches considerable weight to the postal voting or proxy voting, which, however, is acceptable and encouraged only where the countries organizing the election procedure are capable to put in place measures designed to prevent electoral fraud. This voting method is rather used in western countries:

"It should be allowed only if the postal service is secure – in other words, safe from intentional interference – and reliable, in the sense that it functions properly. Proxy voting is permissible only if subject to very strict rules, again in order to prevent fraud; the number of proxies held by any one elector must be limited.

[5] Point 11 of the Explanatory Report adopted by the Venice Commission at its 52nd Plenary Session (Venice 18-19 October 2002.
[6] Points 32-36 of the Explanatory Report to the Code of Good Practice in Electoral Matters.

Neither of these practices should be widely encouraged, if problems with this postal service are added to the difficulties inherent in this kind of voting, including the heightened risk of "family voting". Subject to certain precautions, however, postal voting can be used to enable hospital patients, persons in custody, persons with restricted mobility and electors resident abroad to vote, in so far as there is no risk of fraud or intimidation. This would dispense with the need for a mobile ballot box, which often causes problems and risks of fraud. Postal voting would take place under a special procedure a few days before the elections." [7]

The beneficiaries of the Code of Good Practice are also informed that the use of mobile ballot boxes should be avoided as much as possible, where they involve a serious risk of fraud, in the absence of very strict rules such as the attendance of several members of the polling station election commission representing different political groupings.

The Commission's recommendations do not lose sight of the military voting either, which, truth to say, does not benefit from an incriminatory protection under the Romanian criminal law, in the sense of an express provision requiring that a special supervisory commission be set up in order to prevent the risk of superior officers' imposing or ordering certain political choices to be expressed during elections.

With respect to electronic voting, the Explanatory Report encourages the application of this voting method, especially when a number of elections are taking places at the same time, even though certain precautions are needed to minimize the risk of fraud, for example by enabling the voter to check his or her vote immediately after casting it. The recommendation in this case is to design the ballot papers in such a way as to avoid confusion and, if possible, to provide for a machine that could print votes onto ballot papers, with ballot papers to be placed in a sealed container where they cannot be viewed or accessed. Note is made that this voting method should necessarily ensure vote confidentiality, in addition to vote security and reliability.

Electronic voting methods are secure if the system are capable to prevent deliberate attack and if they can function on their own, irrespective of any shortcomings in the hardware or software employed. Furthermore, the voter must be able to obtain confirmation of his or her vote and, if necessary, correct it without violating in any way the secrecy of the ballot. Last but not least, the electronic voting system must be transparent, in the sense that it must be possible to check whether the system and the voting process are functioning properly.

In terms of vote counting, the Commission recommends that votes should be counted at the polling stations, to eliminate the need to transport the ballot boxes and accompanying documents, thus mitigating the risk of substitution of votes.

Vote counting, too, should be conducted in a transparent manner. Another requirement, which, unfortunately, has not be transposed in the Romanian election law, is that voters registered in the polling station be authorized to attend the counting operation, along with the national and international observers whose presence on the premises must be allowed in all circumstances. One of the practical precautions recommended is that the record of proceedings should be written in ballpoint pen rather than in pencil, as text written in pencil can be erased.

Another recommendation is to avoid as much as possible treating too many ballot papers as invalid or spoiled and to make an attempt, in case of doubt, to ascertain the voter's intention instead.

In terms of election security in relation to the polling premises, the Code of Good Practice pays particular attention to the polling stations, given that the quality of the voting and of the vote counting systems and the proper compliance with the electoral procedure depend on how polling stations are organized and operate. In this regard, the Code speaks of a series of technical irregularities noticed by international observers, such as "wrongly printed or stamped ballot boxes, overly complex ballot papers, unsealed ballot boxes, inadequate ballot papers or boxes, misuse of ballot boxes, insufficient means of identification of voters and absence of local observers. All these irregularities and shortcomings, in addition to political party electioneering inside the polling station and police harassment, can seriously vitiate the voting process, or indeed undermine its integrity and validity." [8]

The Venice Commission also recommends that the principle of strict vote confidentiality be applied not only in vote casting, but also during the vote counting process, specifying further that noncompliance in this case must be punished by disqualification of any ballot paper whose secrecy is violated. In line with the secret suffrage principle, family voting (whereby one member of a family influences the vote cast by the other members) must be prohibited and the list of persons actually voting should not be published, given that this kind of conduct, too, may represent a choice made by the individual.

Another important issue tackled by the Venice Commission deals with regulating the funding of political parties, which, in the Commission's view, should be transparent and operate at two levels: "The first concerns campaign funds, the details of which must be set out in a special set of carefully

[7] Points 38-39 of the Explanatory Report to the Code of Good Practice in Electoral Matters.
[8] Points 105-106 of the Explanatory Report to the Code of Good Practice in Electoral Matters.

maintained accounts. In the event of significant deviations from the norm or if the statutory expenditure ceilings are exceeded, the election must be annulled.

The second level involves monitoring the financial status of elected representatives before and after their term in office. A commission in charge of financial transparency takes formal note of the elected representatives' statements as to their finances. The latter are confidential, but records can, if necessary, be forwarded to the public prosecutor's office." [9]

In addition, the Commission recommends the member states to arrange that specific public bodies supervise the parties' accounts, especially where the funding of political parties is sourced from public funds.

Efforts made by the Venice Commission to consolidate and unify legislations in electoral matters, as transposed in the Code of Good Practice in Electoral Matters, were later followed by stronger trends towards strengthening democracy through electoral process surveys performed by experts in the field.

Thus, under CDL-AD(2010)043, the Council for Democratic Elections, at its 35th meeting (Venice, 16 December 2010), and the Venice Commission at its 85th Plenary Session (Venice, 17-18 December 2010) adopted the Report on Figure Based Management of Possible Election Fraud[10], whose role was to assess the possibility of detecting electoral frauds through statistical methods.

The experts in charge of carrying out the survey that has materialized into the said Report found that two of the most important obstacles in conducting elections that are fully compliant with the international standards of democracy are the lack of electoral experience and/or the ambiguities or omissions in written laws, both of which are inevitably leading to elections that are distorting the public will.

As such, in the opinion of the Venice Commission and of the Council for Democratic Elections, implementing a clear and unambiguous legal framework plays a special role in the conduct of genuine and honest elections.

The Venice Commission and the Council for Democratic Elections recognize, however, that "ambiguities in written law may be the result of lack of electoral experience or legal drafting skills, in particular during periods of political transition from authoritarian regime to democratic form of governance.

However, if advice to remove possible ambiguities in legal framework is systematically ignored, questions may arise with regard to the nature of intentions to keep such ambiguities, as they are generally conducive for fraud.

If ambiguities remain in the legal framework, generally, the election administration would be expected to clarify them. As this may amount to determining the outcome of election, in particular if the clarifications are provided after the vote, such responsibility may test the limits of the authority of the election administration.

Generally, international (including European) standards for democratic elections do not provide for specific antifraud measures. Rather, standards emphasize on respect for fundamental civil and political rights and provide general guidance for establishment of sanctions for possible fraudulent activities as well as legal remedies for complainants against alleged fraud." [11]

To identify possible fraud, the experts consider it necessary to analyze the vulnerable stages in an electoral process. Chronologically speaking, the first stage in the electoral process that is most prone to the risk of election tampering is the registration of persons entitled to vote. At voter registration stage, the following potential election fraud hazards have been identified by the authors of the Report:

"(a) To many voters entries in the polling station voter lists due to inclusion of non-existing voters, deceased voters, voters residing abroad and/or voters included in the lists more than once (multiple entries);

(b) Too few voters included in the voter lists, resulting in disenfranchisement of eligible voters through omissions from the voter lists;

(c) To many voters added to the voter lists on election day, especially if on unclear grounds; and

(d) Manipulation of electoral constituency borders to favor the incumbents on the basis of incorrect numbers of population and/or registered voters." [12]

To assess allegations of voter registration fraud and prevent fraud linked to eligible voter registration it is recommendable to update the Voter Register by comparing it with the population census figures. In the case of voters residing abroad, the Commission gives examples of practices applied by some countries, whereby, in the absence of international standards, such voters are required to register themselves with the diplomatic representation offices in advance.

The alternative of allowing registration of voters on the election day, which is practiced in some states, may create conditions for electoral frauds. In some states, legislation requires that the voter

[9] Point 109 of the Explanatory Report to the Code of Good Practice in Electoral Matters.
[10] The Report was based on the comments made by 2 experts – Nikolai Vulchanov (Bulgaria) and Anders Eriksson (Sweden).
[11] Points 17-19 of the Report on Figure Based Management of Possible Electoral Fraud.
[12] Point 45 of the Report on Figure Based Management of Possible Electoral Fraud.

registration be completed some period of time before election day, after which the voter register is closed and updates of records are not permitted any more, such alternative being seemingly preferable for transparency considerations.

In any case, in the opinion of the Venice Commission, the following three aspects of an election process are crucial for preventing possible electoral fraud: transparency of the process, accountability of all state officials involved in the conduct of election and public confidence in the process. The transparent and professional performance of the Election Administration, the public scrutiny of voter lists, use of appropriate results forms, timely and comprehensive reporting of results, the presence of election observers and the parallel vote tabulation/counting are the key conditions for any election process to be conducted in full compliance with the principles of democracy.

The conclusions of the Report drafted by the experts on identification of possible electoral frauds are as follows:

"* Detection and prevention of possible figure based fraud requires detailed analysis of the legal provisions that have an impact on the election results and outcome, in particular when voters' choices result in narrow margins;

* Voter registration fraud requires significant resources; therefore issues related to potentially incorrect voter registration figures are more likely to arise from insufficient understanding of the system for voter registration and sloppy performance of the responsible authorities rather than due to international fraud;

* The most efficient methods to combat figure based election fraud stem from transparency of the electoral process; and

* Distinction should always be made between possible fraud and insufficient election administration experience; reasonable allegations for committed fraud should only be made after in-depth analysis of the relevant circumstances." [13]

4. Conclusions

In line with the considerations above, the constant recommendations made by international and European bodies (European Commission for Democracy through Law - Venice Commission) are in the direction of creating a flexible, integrated, consistent and transparent legal framework, that is free of ambiguities; in other words, an electoral legislation that, on the one hand, is easy to understand by individuals, while, on the other hand, prevents possible electoral fraud.

In conclusion we propose the transposition and incorporation of the recommendations above under the umbrella of an Election Code, leaving aside election crimes, an issue to which lawmakers have devoted a special title in the Revised Romanian Criminal Code, which would nevertheless become fully effective, if the entire regulatory framework in election matters were consistent and uniform, eliminating any blurring or irregularities in the application of incriminating legal texts, so that the election process may become the true expression of the free will of the people.

References:

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- Dosanto C. C., Simmons N. L. – Federal Prosecution on Election Offenses – Ed. a 7-a, Practicing Law Institute, 2007;
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- www.venice.coe.int/WebForms/pages/?p=01_activities;
- www.venice.coe.int/webforms/documents/?pdf=CDL-AD%282002%29023rev-rom.

[13] Point 143 of the Report on Figure Based Management of Possible Electoral Fraud.

EU COMPETITION LAW AND THE TELECOMS SINGLE MARKET: NETWORK NEUTRALITY IN THE AFTERMATH OF THE TSM REGULATION

Noemí ANGULO GARZARO[*]
Amaya ANGULO GARZARO[**]

Abstract

Since the early 1990s, a sharp increase in the Internet traffic has been experienced. Technology, once again, has proven to be able to develop faster than regulation. In this endlessly evolving scenario, operators in the technology markets, as well as end-users, often find themselves under-protected. Therefore, it comes as a major concern the need to regulate those technological markets and, more specifically, the use –or abuse– of Internet.

All Internet traffic should be treated equally and that is, precisely, what network neutrality aims at. Consequently, network operators may not take advantage of their position in the market to affect competition in related markets. All in all, network neutrality is crucial to achieve the highest degree of competition. In the absence of network neutrality, the Internet would find itself unable to qualify as a market merely driven by innovation, and it would unfailingly turn into one ruled by deal making. Competition law claims that the higher the neutrality is – i.e., the more equal the treatment is, the better it is for the consumer. If network operating companies create an exploitative business model, they might be able to block competitors' websites and services; in other words, it may facilitate adoption of anticompetitive practices – namely, the abuse of their dominant position.

Transcending all the arguments raised against network neutrality –such as the prevention of an overuse of bandwidth–, we will demonstrate that it must be deemed essential from a Competition law perspective. In addition, we will argue, the imperative necessity of leaving the market under the tough scrutiny of competition authorities, which are best placed to assess the anticompetitive character of the practices brought about by market operators.

Keywords: *EU Competition law, network neutrality, Telecommunications Single Market, TSM Regulation, European integration.*

1. Introduction

The use of the Internet has experienced an outstanding growth, due both to its worldwide development as a means of communication and to its validation as an engine of economic progress[1]. Such increasingly important role played by the Internet has raised the awareness of competition authorities over the risk that operators of the network may succumb to the temptation of distorting the competitive dynamics of the market, unduly favoring the network traffic of some content providers over the applications or information of others[2]. Ultimately, not only the Internet, but also all the telecommunication networks, have been placed in the spotlight of competition authorities[3]. All in all, it is of major importance guaranteeing that all traffic is treated equally – i.e., network operators may not take advantage of the structure of the market –of their commercial bonds *vis-á-vis* downstream operators– to affect competition either in the market of reference or in related market. Affiliated content providers should not wilfully benefit from a preferential treatment when it comes to traffic management. That is, precisely, what network neutrality aims at: the more neutral the network is, the better for users, as it may enable them to enjoy a wider scope for choice.

With regard to the European Union (EU), the importance of the electronic communication networks is likewise unremitting: they bring along several benefits that range from a potential increase in innovation, through a widening of access to information, to a facilitation of the interaction of content providers and end-users, who utilize the

[*] PhD candidate, Faculty of Law, University of Deusto (e-mail: **noemi.angulo@deusto.es**).

[**] PhD candidate, Faculty of Law, University of the Basque Country (e-mail: **amaya.angulogarzaro@gmail.com**).

[1] Ben Scott, Mark Cooper and Jeannine Kenney, "Why Consumers Demand Internet Freedom Network Neutrality: Fact vs. Fiction", in *Free Press* (2006), accessed 3 February, 2016 http://www. freepress.net/sites/default/files/fp-legacy/nn_fact_v _fictio n_final.pdf, 7.

[2] Directorate General for Internal Policies, *Network Neutrality Revisited: Challenges and Responses in the EU and in the US*, Study for the IMCO Commission (2014), 11.

[3] Some authors underline that it is not until 15 years ago that competition authorities have begun to monitor the internet sectors more carefully. *Vide* Rolf H. Weber, "Competition Law Issues in the Online World", in *20th St. Gallen International Competition Law Forum ICF* (2013), accessed 3 February, 2016, http://ssrn.com/abstract=2341978, 1. In this research paper we will make reference to "network" to refer, primarily, to the Internet, but the fast development of electronic networks, such as the ones used for mobile communication, forces us to include all those other networks that may also be captured by their provider.

platform to telecommunicate[4]. However, the EU, instead of irrevocably opening up the Telecomms market to competition, has opted for regulating it more intensely[5].

In this study we will challenge the decision of the EU institutions of adopting a Regulation. We intend to identify what is the hurdle that has impede the development of the Telecoms Single Market so far. We will conclude that, albeit the adequacy of a regulation to ensure harmonization, the mere existence of the Telecoms Single Market is dependent on the preservation and ensurance of the network neutrality principle. Further, we will demonstrate that it is high time to de-regulate the market and to open it to the scrutiny of competition authorities, which are best placed to assess, on a case by case basis, whether the practices carried out by network operators do actually harm the competition dynamics.

2. The Telecoms Single Market, a chimera in the EU agenda?

To date, the EU has experienced a low level of network neutrality incidents, but there is a consensus on the fact that network providers do have incentives to anticompetitively discriminate against unaffiliated providers of complementary products with a view of excluding them from their network[6]. Further, the debate over the desirability of protecting the neutrality of telecommunication networks was not due to a worry about the Internet; instead, the English *Law of common carriage* did include an obligation for communication and transport network providers to render the service without unduly discriminating among their users[7].

In this scenario, the EU is determined to take the necessary measures to establish a Telecoms Single Market that works under conditions of vigorous competition and enables thus the creation of a legal environment that guarantees access of all European content providers to the network[8]. In short, it aims at achieving a connected continent[9].

2.1. Electronic communication networks: Internet as the paradigm of modern telecommunication networks

When it comes to the telecommunications sphere, EU regulatory philosophy is technologically neutral[10]. This implies that no difference will be made regarding the diverse technology platforms – i.e., the considerations made with regard to a specific platform –e.g., the Internet– may be equally valid for the other electronic communication networks[11]. In this research paper, when clarity requires a greater exemplification, we will consistently resort to the Internet as an example of a network, but the conclusions drawn may be extensively applied to any other type of electronic network.

The Internet is a platform that enables the communication between two distinct groups of actors, who provide each other with benefits: on one side, content providers, who make use of the network to upload information or applications; and, on the other side, end-users, who access the network to download such information or applications[12]. Therefore, network providers are in charge of rendering access to the network through the provision of data transmission services to their customers, who may be either content providers or end-users[13].

The specificity of this type of multi-sided markets is the creation of externalities – that is,

[4] Directorate General for Internal Policies, *Network Neutrality Revisited… op. cit.,* 39; Rolf H. Weber, "Competition Law Issues in the Online World", *op. cit.*, 2.

[5] European Parliament, *The EU rules on network neutrality: key provisions, remaining concerns* (Briefing, November 2015).

[6] Barbara van Schewick, "Towards an Economic Framework for Network Neutrality Regulation", *op. cit.*, 2 and 35. Also, on the reasons that explain the low level of network neutrality incidents within the EU, *vide* Directorate General for Internal Policies, *Network Neutrality Revisited… op. cit.,* 14.

[7] Kenneth R. Carter, J. Scott Marcus and Christian Wernick, *Network Neutrality… op. cit.*, 4.

[8] This Telecoms Single Market will enable the attainment of other goals set out in the Digital Agenda for Europe; namely, the establishment of a Digital Single Market where content, application and other digital services can freely circulate. *Vide* European Commission, *Proposal for a Regulation of the European Parliament and of the Council laying down measures concerning the European single market for electronic communications and to achieve a Connected Continent, and amending Directives 2002/20/EC, 2002/21/EC and 2002/22/EC and Regulations (EC) No 1211/2009 and (EU) No 531/2012*, COM(2013) 627 final (Brussels, 11 September 2013), 2. Also, *vide* European Commission, "Net neutrality in the EU", in *Agenda for EU – A Europe 2020 iniciative*, accessed 4 February, 2016, https://ec.europa.eu/digital-agenda/en/eu-actions.

[9] *Vide* the title of the Proposal for a Regulation: "laying down measures concerning the European single market for electronic communications and to achieve a Connected Continent". European Commission, Proposal for a Regulation, COM(2013) 627 final, *cit*.

[10] Framework Directive 2002/21, recital 18.

[11] Kenneth R. Carter, J. Scott Marcus and Christian Wernick, *Network Neutrality: Implications for Europe*. (Bad Honnef: WIK Diskussionsbeitrag, n. 314, 2008), 40.

[12] A feature of high-tech markets is, precisely, their multi-sided nature. *Vide* Rolf H. Weber, "Competition Law Issues in the Online World", *op. cit.*, 2.

[13] Peggy Valcke, Liyang Hou, David Stevens and Eleni Kosta, "Guardian Knight or Hands Off: The European Response to Network Neutrality – Legal considerations on the electronic communications reform", in *Communications & Strategies* (no. 72, 4th quarter 2008, pp. 89-112) fn 1. In this paper we will not enter into the analysis of the physical operation of the network; therefore, by network providers we refer to operators that provide Internet Access and transport services over the network. On the differences, *vide* Barbara van Schewick, "Towards an Economic Framework for Network Neutrality Regulation", in *The 33rd Research Conference on Communication, Information and Internet Policy (TPRC 2005)* (September 2005), 3.

network effects[14]. The higher the number of users –participants– of a given network is, the higher the value of the network is, as the number of parties with whom the subscriber could potentially interact has increased[15].

As a consequence of those externalities, first, users of a particular network may be less likely to opt for a network different from the one of the leading provider – manly due to the switching costs; and, second, a provider that offers access to a wide number of users has an significant market power not only in the segment of the provision of the network, but also in the related segment of the provision of content[16]. These barriers to entry hinder the access of new operators to the segment of the network provision and, in addition, are prone to generate distortions in the competitive dynamics of the market[17].

In relation with the switching costs, they may be either inherent or strategic – that is, they may arise from the nature of the product or the market (such as the need to inform other users of new contact information of learning costs) or they may be created by the network provider to keep users from changing providers (such as contract cancellation fees)[18]. Furthermore, the network itself requires a certain size to be efficient, so newly created networks are less likely to grab the attention of users so as to encourage them to change their network provider[19]. While strategic switching cost may be efficiently addressed through regulation –by, for example, simply banning their inclusion in the contracts for the provision of the network–, inherent switching costs, specially those arising from the nature of the market, unfailingly require a case by case analysis. Whereas regulatory responses are intended to apply indistinctly, competition responses are tailored to the factual circumstances of the case. A regulatory *ex ante* intervention is only justified to the extent that its social benefits are larger than the costs, as burdensome rules that diminish network providers' return may reduce network providers' incentives to innovate at the network level and to deploy network infrastructure[20]. Contrariwise, an *ex post* intervention of the competition authorities serves a double purpose: on one hand, it may not constrain the incentives of network providers to innovate, as they will be allowed to look for the most convenient way to expand their profits, with the sole limitation of respecting the competition dynamics of the market; and on the other hand, it may also foster application-level innovation, as content providers will benefit from a undistorted neutral network[21].

As for the significant market power of network operators, it is certain that in markets where no network provider has a dominant market share operators are more inclined to look for interoperability and interconnection options[22]. However, it is also unquestionable that network providers will seek to enlarge their networks in order to capture the externalities derived from the size of the network, to the detriment of both active and potential operators. Provided that they cannot further expand the size of their network, network providers will proceed to project their market power in the adjacent related segment of the provision of contents.

In such a scenario, it comes as indispensable the preservation of a neutral network, which will hamper an unconstrained expansion of the network providers' market power throughout the segment of the provision of content. Some detractors of network neutrality regulations have claimed their need to discriminate among network users with a view of managing the capacity of the network, which is limited[23]. Nevertheless, network neutrality claims do not hinder such management need since network operators are indeed allowed (and, to the extent that the bandwidth is limited, obliged) to prioritize –not

[14] Kenneth R. Carter, J. Scott Marcus and Christian Wernick, *Network Neutrality… op. cit.*, 11.

[15] The mere act of joining a network boosts the value of the network to all network users, even if they were not parties to the transaction, as explained in Kenneth R. Carter, J. Scott Marcus and Christian Wernick, *Network Neutrality… op. cit.*, 12. Also *vide* Rolf H. Weber, "Competition Law Issues in the Online World", *op. cit.*, 2.

[16] Rolf H. Weber, "Competition Law Issues in the Online World", *op. cit.*, 5.

[17] The literature refers to vertical conflicts –between players in the same value chain, such as a network provider and a content provider–, horizontal conflicts –between players at the same level of the value chain, such as two network providers– and diagonal conflicts –between players in different, but interconnected, value chains, such as a network provider and the user of a different network provider–. *Vide* Kenneth R. Carter, J. Scott Marcus and Christian Wernick, *Network Neutrality… op. cit.*, 18-23.

[18] Kenneth R. Carter, J. Scott Marcus and Christian Wernick, *Network Neutrality… op. cit.*, 12-13; Rolf H. Weber, "Competition Law Issues in the Online World", *op. cit.*, 4.

[19] Rolf H. Weber, "Competition Law Issues in the Online World", *op. cit.*, 5.

[20] Barbara van Schewick, "Towards an Economic Framework for Network Neutrality Regulation", *op. cit.*, 35-38. On the seven communication markets that the European Commission considered susceptible to ex ante regulation, *vide* Directorate General for Internal Policies, *Network Neutrality Revisited… op. cit.,* 89.

[21] On the conception of the Internet as a general-purpose technology and its implications in relation with innovation, *vide* Barbara van Schewick, "Towards an Economic Framework for Network Neutrality Regulation", *op. cit.*, 38-39.

[22] Directorate General for Internal Policies, *Network Neutrality Revisited… op. cit.,* 40.

[23] The bandwidth is limited. The Internet, as well as other electronic networks, is a good whose use and consumption limits the access of other users –rival good–. On the rival character of the Internet, *vide* Noemí Angulo Garzaro, Amaya Angulo Garzaro and David Férnández Rojo, "Neutralidad en la red y competencia en la UE: la regulación del mercado de las comunicaciones electrónicas tras el Reglamento sobre el Mercado Único de las Telecomunicaciones", in *Revista de Derecho de la Competencia y la Distribución* (La Ley, n. 17, 2015), 3.

discriminate– the execution of the contents that run through their network[24].

The neutrality of the network may be sought through regulatory measures or its preservation may rather be left in the hands of competition authorities. Whereas in the realm of a monopolistic market, where there is just a single network provider, a regulatory intervention is imperative in order to accomplish the liberalization of the market, in so far as the market gradually opens to competition, regulatory intervention must diminish[25]. In conclusion, regulation is a necessary step in the transition from a monopolistic market to normal competition. Indeed, in the European arena there existed various monopolistic telecoms markets – nearly as many monopolistic markets as Member States[26]. It must be borne in mind that the ultimate goal is the establishment of a Telecoms Single Market, working under conditions of vigorous competition[27]. Consequently, we will proceed to analyze to what extent the initial picture –that is, the several existing monopolistic national telecoms markets– has changed – i.e., whether national telecoms markets have been finally liberalized and, nowadays, are effectively competitive. Only if national telecoms markets are competitive, we may proceed to the next step towards the attainment of the Telecoms Single Market: an EU-wide telecoms market, where no undertaking is favorized, nor wilfully discriminated, due to nationalistic interests.

2.2. The pursuit of the Telecoms Single Market: from several monopolistic national markets to a (non-yet) competitive EU-wide electronic communications market

In the pursuit of a Telecoms Single Market, the EU has adopted different regulatory instruments, whose binding force varies from one instrument to the other, as well as it does the objective of the EU institutions: from liberalizing the monopolistic national markets to trying to accomplish a single competitively working EU-wide telecoms market.

The first legislative package was passed in 1998. It was formed by one general and four specific directives: the Framework Directive 2002/21 and the Authorisation Directive 2002/20, the Access Directive 2002/19, the Universal Service Directive 2002/22 and the Directive 2002/58 on privacy and electronic communications[28]. By passing such a regulatory package, the EU aimed at designing a European Framework for electronic communications, which was ultimately intended to make the first move in the path towards the attainment of the Telecoms Single Market – i.e., the liberalization of the Member States' national telecommunication markets[29]. National telecoms markets were, in the majority of cases, monopolist[30]. However, such legislative package did not specifically address network neutrality[31].

In 2007, the Commission suggested a review of the legislative package. In the context of the review, proponents of network neutrality raised their awareness in respect of the identification of violations of network neutrality, and different alternatives were thus considered: (1) to impose specific network neutrality rules; (2) to maintain the existing regime unchanged, or (3) to maintain the existing regime, but make the appropriate improvements with regard to consumer rights[32]. Finally, a midway option was preferred and, in 2009, a new regulatory framework was passed.

The regulatory framework enacted in 2009 put in place measures intended (a) to ensure that consumers are fully informed of the relevant practices of their network operator; (b) to reduce the strategic switching costs; (c) to empower national regulators to impose minimum Quality of Service standards on network operators; (d) to establish the

[24] Such prioritization is referred to as 'Quality of Service'. *Vide* Noemí Angulo Garzaro, Amaya Angulo Garzaro and David Férnández Rojo, "Neutralidad en la red y competencia en la UE… *op. cit.*, 3-4.

[25] Martin Cave, "Economic aspects of the new regulatory regime for electronic communications services", in P.A. Buigues and P. Rey, *The Economics of Antitrust and Regulation in Telecommunications - Perspectives for the New European Regulatory Framework* **(**Cheltenham, Edward Elgar, 2004, 27-41), 30.

[26] On the explanation of the reasons that favorized the creation of such monopolies or, in some cases, duopolies, *vide* Ben Scott, Mark Cooper and Jeannine Kenney, "Why Consumers Demand Internet Freedom Network Neutrality: Fact vs. Fiction", *op. cit.*, 7. It is submitted that the number of physical networks to transmit contents is very small and non-competitive.

[27] Martin Cave, "Economic aspects of the new regulatory regime for electronic communications services", *op. cit.*, 30.

[28] Directive 2002/21/EC of the European Parliament and of the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services (Framework Directive), *Official Journal of the European Communities*, L 108/33, 24 April 2002; Directive 2002/20/EC of the European Parliament and of the Council of 7 March 2002 on the authorisation of electronic communications networks and services (Authorisation Directive), *Official Journal of the European Communities*, L 108/21, 24 April 2002; Directive 2002/19/EC of the European Parliament and of the Council of 7 March 2002 on access to, and interconnection of, electronic communications networks and associated facilities (Access Directive), *Official Journal of the European Communities*, L 108/7, 24 April 2002; Directive 2002/58/EC of the European Parliament and of the Council of 12 July 2002 concerning the processing of personal data and the protection of privacy in the electronic communications sector (Directive on privacy and electronic communications), *Official Journal of the European Communities*, L 201/37, 31 July 2002.

[29] Martin Cave, "Economic aspects of the new regulatory regime for electronic communications services", *op. cit.*, 27.

[30] Noemí Angulo Garzaro, Amaya Angulo Garzaro and David Férnández Rojo, "Neutralidad en la red y competencia en la UE… *op. cit.*, 7; Martin Cave, "Economic aspects of the new regulatory regime for electronic communications services", *op. cit.*, 30.

[31] Directorate General for Internal Policies, *Network Neutrality Revisited… op. cit.,* 90.

[32] Kenneth R. Carter, J. Scott Marcus and Christian Wernick, *Network Neutrality… op. cit.*, 52-53.

right of end-users to access content and applications of their choice[33].

In April 2011, the Commission asked the Body of European Regulators for Electronic Communications (BEREC) to undertake a fact-finding exercise with regard to the attainment of an open and neutral Internet[34]. The BEREC, after its traffic management investigation, published in May 2012 a report concluding that there was an undeniable problem regarding open Internet in Europe[35]. Right after that report, in Spring 2013, the European Council requested the Commission to make a proposal for achieving, once and for all, a single market in the telecommunications sector and, in September 2013, the Commission finally adopted a legislative package aimed at building a connected, competitive continent, where all traffic would be treated equally and no unjustified, disproportionate discrimination would be allowed[36].

The form of the legislative instrument was openly debated, as several delegations raised their concerns in relation with the adoption of a regulation[37]. Transcending those reticence's, the Commission, in its Impact Assessment, concluded that the most adequate instrument was a regulation and, accordingly, on 27 October 2015, the Telecoms Single Market Regulation, which contains the first EU-wide net neutrality rules, was finally passed, after undergoing two reading votes in the European Parliament, who introduced, in its first-reading vote, amendments banning zero rating and defining specialized services as physically and logically separate to the Internet[38]. However, the Council of Ministers revised the amended text and, in a trilogue with the Commission and the Parliamentary Committee Chair, made it resemble the original proposal[39]. Likewise, the introduction of potential amendments in the second-reading vote of the Parliament equally failed.

The final text is subject to controversy, as, on one side, its ample ambiguity hinders a direct application by the Member States of key aspects – e.g., the Regulation introduces multiple exceptions, which are to be appreciated by the network provider, to the general principle of equal treatment of the traffic; and, on the other side, it implies the adoption of additional rules, what could impede the ultimate transition from regulation to competition law[40]. Indeed, while harmful divergence among Member States must be combated, if a competitive Telecoms Single Market is to be achieved, flexibility needs to be ensured[41]. From our standpoint, the solution does not rest in the adoption of further pieces of legislation – i.e, in regulating the market more fiercely, instead, as we will address in the following section, the time for a de-regulation, for leaving the market in the hands of competition law (and of competition authorities), has come.

3. The de-regulation of the Telecoms Market: rowing fiercely, but purposefully, against the current

Market regulation takes place in a three-stage process: (1) market definition; (2) market analysis; and (3) imposition, when needed, of remedies[42]. When, after analyzing the market, one concludes that it has proven to be self-correcting – that is, when, thanks to the correcting powers of the market itself,

[33] Directorate General for Internal Policies, *Network Neutrality Revisited… op. cit.,* 14.

[34] European Commission, "Net neutrality in the EU", *op. cit.*

[35] Body of European Regulators for Electronic Communications, *A view of traffic management and other practices resulting in restrictions to the open Internet in Europe*. Findings from BEREC's and the European Commission's joint investigation, BoR (12) 30 (29 May 2012).

[36] European Commission, COM(2013) 627 final, *cit.*; European Commission, *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on the Telecommunications Single Market*, COM(2013) 634 final (Brussels, 11 September 2013), 2. Also, *vide* Noemí Angulo Garzaro, Amaya Angulo Garzaro and David Férnández Rojo, "Neutralidad en la red y competencia en la UE… *op. cit.*, 7-8.

[37] Council of the European Union, *Draft Progress Report on Proposal for a Regulation of the European Parliament and of the Council laying down measures concerning the European single market for electronic communications and to achieve a Connected Continent, and amending Directives 2002/20/EC, 2002/21/EC and 2002/22/EC and Regulations (EC) No 1211/2009 and (EU) No 531/2012*, Hellenic Presidency, 9950/14, 2013/0309 (COD), 8-9. Also, *vide* Noemí Angulo Garzaro, Amaya Angulo Garzaro and David Férnández Rojo, "Neutralidad en la red y competencia en la UE… *op. cit.*, 8.

[38] All in all, "A Regulation, by its directly binding nature without the accompanying need for a transposition at national level, addresses the need for quick implementation. By virtue of its direct applicability, a Regulation also reduces the risk of national divergences and thus fragmentation", *vide* European Commission, *Commission Staff Working Document – Impact Assessment: Accompanying the document Proposal for a Regulation of the European Parliament and of the Council laying down measures concerning the European single market for electronic communications and to achieve a Connected Continent, and amending Directives 2002/20/EC, 2002/21/EC and 2002/22/EC and Regulations (EC) No 1211/2009 and (EU) No 531/2012*, SWD(2013) 331 final (Brussels, 11 September 2013), 57-58 and 88. Also, *vide* European Parliament, *The EU rules on network neutrality… op. cit.*; Christopher T. Marsden, "Comparative Case Studies in Implementing Net Neutrality: A Critical Analysis", in *TPRC 43: The 43rd Research Conference on Communication, Information and Internet Policy Paper* (March 31, 2015), accessed 26 February, 2016, http://ssrn.com/abstract=2587920, 4.

[39] Christopher T. Marsden, "Comparative Case Studies in Implementing Net Neutrality... *op. cit.*, 16.

[40] Kenneth R. Carter, J. Scott Marcus and Christian Wernick, *Network Neutrality… op. cit.*, 53.

[41] Directorate General for Internal Policies, *Network Neutrality Revisited… op. cit.,* 15.

[42] Kenneth R. Carter, J. Scott Marcus and Christian Wernick, *Network Neutrality… op. cit.*, 40. For Prof. Hou, the three-stage process is as follows: (1) definition of the relevant market, (2) designation of the undertaking(s) with Significant Market Power (SMP) and (3) imposition of obligations upon undertakings with SMP. *Vide* Liyang Hou, "On Market, Competition and Regulation in the EU Telecom Sector" (February 4, 2015), accessed 1 March 2016, http://ssrn.com/abstract=2560667, 2.

there is low likeliness that the harm to competition is long-lasting, competition laws are preferred –rather than sector regulation– to react to anti-competitive behavior[43].

The core goal of proponents of network neutrality is the observance of the principle of non-discrimination when network providers manage the traffic that flows over their limited network. Competition both in the segment of the provision of contents and in the segment of the provision of the network must be granted – or, to put it in other words, network providers must refrain from either excluding competitors by abusing of their market power or projecting such market power in adjacent markets to unduly discriminate among market operators[44]. It is submitted that, in order to address those distortions of competition, competition authorities are best placed[45].

Competition authorities are empowered to assess, in view of the factual circumstances of the case, whether, in order to be cleared, the prioritization strategies carried out by network operators do meet the transparency standars and, similarly, whether such strategies are proportionate to the aim –deal with traffic congestions– and non-discriminatory. Sometimes, normal business strategies may be confused with anticompetitive practices, mainly due to the fact that market operators adopt future-oriented measures that cry for a balance between the benefits –in terms of incentives to innovate– and the harm to competition[46]. In any case, a foreclosure of the market –impeding or hardening the entry of operators to the market or, if they are already active, the provision of their services– indicates the existence of an anti-competitive behavior[47]. In a market opened to free competition, network providers would not be allowed to hide behind favorable regulatory provisions to shield from the competition authorities' scrutiny.

The adoption of overtly stringent legislation hinders a flexibilized application of the competition principles that ground the attainment of a Telecoms Single Market working under conditions of vigorous competition[48]. Further, it may thwart operators' incentives to innovate, which comes as essential in this endlessly innovation-based competitive high tech markets[49]. Likewise, too traditional an approach on the side of competition authorities may also impair the dynamics of the market; competition authorities must be thus ready to adapt their assessment and enforcement actions to the fast evolving technological progress, not undermining its development[50].

In conclusion, the achievement of a competitive Telecoms Single Market mandates its de-regulation and ultimate opening to competition. First, the once fragmented national markets have already been effectively liberalized. Second, the fast development of the high tech markets prevents the perdurance of long-lasting anti-competitive practices that could justify a regulatory intervention. And, finally, measures taken by national regulatory authorities, which could have been justified on the basis of a pure national public interest, risk to be deemed anti-competitive for the sake of establishing an EU-wide Telecoms Single Market.

4. Conclusions

The EU has embarked on the task of regulating the Telecoms Single Market more intensely. At the beginning of the telecoms markets liberalization process, the existence of several national markets obliged Member States to resort to regulation in order to open their national markets to competition. Today, focus is placed on the achievement of an EU-wide telecoms market –rather than several national markets–, working under conditions of vigorous competition.

It is submitted that the Telecoms Single Market will only be established if –counter to the latest decision of the EU regarding the adoption of a Regulation– the practices of market operators are

[43] Several legal commenters have supported this view, *vide* Nicolai Van Gorp and Olga Batura, *Challenges for Competition Policy in a Digitalised Economy*, Study for the European Parliament, IP/A/ECON/2014-12 (2015), accessed 1 March, 2016, http://www.europarl.europa.eu/RegData/etudes/STUD/2015/542235/IPOL_STU%282015%29542235_EN.pdf, 62-63. Contra, arguing the lack of expertise with digital technologies of competition authorities, Lapo Filistrucchi, Damien Geradin and Eric Van Damme, "Identifying Two-Sided Markets", in *TILEC Discussion Paper No. 2012-008* (February 21, 2012), accessed 1 March, 2016, http://ssrn.com/abstract=2008661, 9-12; OECD, *The Digital Economy*, OECD Hearings, DAF/COMP(2012)22 (2012), accessed 1 March, 2016, https://www.oecd.org/daf/competition/The-Digital-Economy-2012.pdf, 147.

[44] Nicolai Van Gorp and Olga Batura, *Challenges for Competition Policy in a Digitalised Economy*, *op. cit.*, 29-33; Nicolai Van Gorp and Stephanie Honnefelder, "Regulation and Competition: Challenges for Competition Policy in the Digitalised Economy", in *Digiworld Economic Journal* (no. 99, 3rd Q. 2015), 155.

[45] Stephen G. Breyer, "Antitrust, Deregulation, and the Newly Liberated Marketplace", in *California Law Review* (Vol. 75, Issue 3, May 1987), 1007; Günter Knieps and Volker Stocker, "Network Neutrality Regulation: The Fallacies of Regulatory Market Splits", in *Intereconomics* (2015), 47.

[46] Nicolai Van Gorp and Stephanie Honnefelder, "Regulation and Competition… *op. cit.*, 155.

[47] Nicolai Van Gorp and Olga Batura, *Challenges for Competition Policy in a Digitalised Economy*, 68.

[48] On the reasons that explain why economis objectives aimed by competition and economic regulation are better achieved indirectly, that is, through competition law, *vide* Stephen G. Breyer, "Antitrust, Deregulation, and the Newly Liberated Marketplace", *op. cit.*, 1006.

[49] Nicolai Van Gorp and Olga Batura, *Challenges for Competition Policy in a Digitalised Economy*, 67-68; Nicolai Van Gorp and Stephanie Honnefelder, "Regulation and Competition... *op. cit.*, 156.

[50] OECD, *The Digital Economy, op. cit.*, 108.

supervised by competition authorities. From our standpoint, the adoption of a Regulation does not contribute to the ultimate attainment of the Telecoms Single Market: while regulation is indispensable in the transition from several fragmented monopolist national markets to several liberalized national markets, the achievement of an EU-wide telecoms market implies its opening to the forces of competition.

All in all, competition authorities are best placed to adapt their analysis of a particular prioritization conduct that, albeit necessary, may unduly harm the competition dynamics in the Telecoms Single Market by obviating network operators' obligation of non-discrimination among competitors. That is, competition authorities may balance whether the prioritization strategies carried out by network operators are indeed proportionate to the aim –deal with traffic congestions–.

The EU, as said, has opted for the regulatory instrument that ensures best an integration of the national legal systems. However, not only did it opt for a more stringent normative instrument, but also the Regulation itself is not absent of controversy, and, as pointed out by the literature, its ambiguity is expected to give rise to interpretative problems that may harden its uniform application throughout the Union.

Time (and research conducted hereafter) will tell to what extent this has been a missed opportunity of deregulating the telecoms market and leaving it in the hands of competition authorities.

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CONSIDERATIONS WITH REGARD TO THE USUFRUCT OVER THE RIGHT OF VOTE AS GUARANTY APPLIED IN THE BUSINESS ACTIVITY

Florin CONSTANTINESCU[*]

Abstract

The aim of the present article is to scrutinize the usufruct over the right of vote related to a share as legal concept (from foregoing and current Romanian legislation and doctrine standpoint) and to highlight also the legal traits and the effective benefits provided as guaranty. To the same extent, the consolidation of the legal regime of this concept as guaranty is also the pursued objective.

Although the usufruct over the right of vote has been not considered as a valid guaranty, the companies from Romania (mostly the banks) used this mechanism as guaranty within the (sophisticated) lending transactions.

It is worthy to be mentioned that the right of vote may be related to a share belonging to a joint-stock company or to a social part belonging to a limited liability company.

The main scope of such guaranty is to strengthen the creditor's rights besides other established hard collaterals (mortgages over real estates, shares, receivables etc.). Thus, the creditor may influence the corporate will of a company (within the general shareholders meeting).

Moreover, the guaranty has to be set up in the form of a notarized deed (authenticated by a Notary Public) aiming to be considered a writ of execution and to enable the creditor to commence the foreclosure if needed.

Having in mind the above, this paper mainly regards: the content of the right of vote related to a share, security, social part, the applicability of the usufruct to the shares belonging to different companies (joint-stock companies listed or not listed to the Stock Exchange, other companies of capitals and persons), the relevant differences between the usufruct as dismemberment of the ownership right and the usufruct as guaranty, the significant aspects regarding the guaranty agreement, proposals to amend the legislation.

Keywords: *Usufruct, Joint-Stock Company, Limited Liability Company, Shares, Social Parts.*

1. Introduction

1.1. Which is the area/domain covered by the theme of the present study?

The present study aims to analyze the legal framework related to the usufruct over the right of vote related to a share, security, social part or part of interest belonging to a company and to provide arguments in order to consolidate the status of guaranty of this legal concept. In accordance with the Romanian New Civil Code, the usufruct is considered a dismemberment of the ownership right. On the basis of the usufruct right, the holder of the usufruct right has the exclusive use of the asset inclusively the right to enjoy the benefits deriving from the use of the asset ("to pick up the fruits").

Following this judgement, the usufruct over the right of vote tends to secure the reimbursement obligation of a society towards a creditor. Taking into consideration all these traits, the guaranties area (pertaining to the civil law) is the first covered area on one hand. On the other hand, such guaranty is applicable to the shares, securities etc., which form the share capital of the societies regarding the commercial activity (professional traders). Having in view the field of applicability we deem that the commercial law is the second covered area.

So there is a *mixtum compositum* between the civil traits of the guaranty and the commercial aspect regarding the applicability of this guaranty. Such mixture does not involve a contradiction in legal terms but it highlights a necessary complementarity.

I.2 Which are the importance of the study and the pursued objectives?

The envisaged importance of the study consists in:

(i) fortifying the legal status of the usufruct over the right of vote as a guaranty;

(ii) fostering the visibility and the utility of such guaranty both within the sophisticated transactions and ordinary (domestic) transactions;

(iii) providing ancillary legal arguments and a new perspective over such guaranty aiming to be extensively utilized by the legal professionals (practitioners, theoreticians, students) and companies (joint-stock companies, limited liabilities companies etc.) in current activity.

The pursued objectives of the study are:

(i) to consolidate the legal regime of this guaranty that may enhance the creditor's rights both when such guaranty is accompanied by a movable mortgage over the shares/social parts/securities and when it is not;

(ii) to emphasize the effective benefits;

[*] PhD Student, Faculty of Law, "Nicolae Titulescu" University of Bucharest (e-mail: **florinconstantinescu110@hotmail.com**).

(iii) to analyze the form of the guaranty agreement, the relevant clauses/situations that may occur;

(iv) to depict the publicity formalities.

I.3. By which modality the answer to the aforesaid objectives shall be provided ?

The main envisaged modalities to reach the objectives are:

(i) researching the relevant civil and commercial doctrine prior to the new Civil Code;

(ii) researching the relevant provisions from the new Civil Code, the commercial legislation;

(iii) researching the relevant practices in the area.

The research will be made through comparative method, logical method and historical-teleological method.

1.4. The main directions of the doctrine in the area are as follows:

1.4.1. Prior to the entering into force of the new Civil Code (01.10.2011):

In conformity with the foregoing Article 124, 1st paragraph (abrogated through Law no.71/2011 commencing with 01.10.2011) from the Law no.31/1990 on companies, further amended and completed, the holder of the usufruct right over the shares held the vote within the ordinary shareholder's meetings whilst the legal owner of the shares kept the right of vote within the extraordinary shareholders meetings.

The above-mentioned Article 124, 1st paragraph was justified by the fact that the holder of the usufruct right was interested to collect the interests produced by the shares; therefore, he had the right to vote within the general assembly that decides on the distribution of the dividends and also on the administration current issues of the companies. Also, this article was applicable to the shares issued in dematerialized form (which are considered fungible assets).[1]

1.4.1.1. The said article regards the shares (specific to the joint-stock companies which are not listed to the Stock Exchange), the securities (specific to the joint-stock companies listed to the Stock Exchange) and the shares specific to a company limited by shares, pursuant to the Article 187 from Law no.31/1990. Based on the principles of the legal interpretation the same article was not applicable to the social parts related to the limited liability companies and to the parts of interest related to the companies of persons.

1.4.1.2. With regard to the form of the usufruct agreement, the doctrine did not extensively analyze such aspect.

We highlight that the legal practice in the area was to be signed notarized deeds (authenticated by a Notary Public) aiming to be considered a writ of execution.

1.4.1.3. With regard to the publicity formalities, the usufruct agreement was enrolled to the shareholder's registry so any creditor/person who justified an interest might investigate such registry. It was not allowed by the law to enroll the usufruct agreement with the Electronic Archive of Real Movable Securities.

1.4.2. After the entering into force of the new Civil Code (01.10.2011):

1.4.2.1. In accordance with the Article 741, 1st paragraph from the new Civil Code, the right of vote related to a share, other security, to an undivided quota from the ownership right or related to any other asset belongs to the holder of the usufruct right.

Nonetheless, the legal owner is the holder of the vote that has as effect the modification of the substance of the main asset such as the share capital or the co-owned asset or the modification regarding the destination of such asset or the cessation of the company, the reorganization or the cessation of the legal entity or of an enterprise, on case by case basis (Article 714, 2nd paragraph from the new Civil Code).

1.4.2.2. Concerning the form of the usufruct agreement and the publicity formalities we reiterate the considerations mentioned with the above points 1.4.1.2.and 1.4.1.3.

2. The usufruct. Concept

2.1. Overview of the legal provisions pursuant to the former Civil Code

2.1.1. First of all, the right of ownership was defined as a right held by a person based on which this person enjoys and disposes of an asset, but within the limits as provided by the law (Article 480 from the former Civil Code).

The doctrine considered that the ownership right is the most complete real right because it comprises all the 3 attributes: the possession, the use and the disposition that may be used by the holder in the entire plenitude of these attributes, being exclusive towards any other persons' rights over the same asset[2].

The conception of the prior Civil Code was in the direction to streamline and diversify the applicability of the ownership right by enabling the third parties (other than the legal owner) to utilize one or two of the attributes of the ownership right.

Thus the dismemberments of the ownership right are these real principal and derived rights over a third party's assets, opposable to anyone, inclusively to the owner, that are established or attained through their separation or through the

[1] Stanciu D.Carpenaru et.al., *The Law Of The Companies. Commentary On Articles* (Bucharest: C.H.Beck Publishing House, 3rd edition, 2006), 375.

[2] Corneliu Barsan,Maria Gaita, Mona Maria Gaita, *Civil Law.The Real Rights* (Iasi:The European Institute, 1997), 153.

limitation of one attributes from the legal content of the ownership right.[3]

2.1.2 Following the provisions of the Article 517 from the foregoing Civil Code, the usufruct was defined as a persons' right to enjoy the asset owned by a third party as the owner himself having the duty to conserve the substance of the asset. The usufruct may regard movable or immovable assets (Article 520 from the former Civil Code). So the essence of the usufruct was the right to use an asset and to enjoy the benefits produced by the assets.

At the cessation of the usufruct by any reason, the asset must be restituted to the legal owner (Article 557 and the following from the former Civil Code).

2.1.3. The usufruct is applicable only to the assets that form the object of the private property.

Taking into consideration that the assets that form the object of the public property may be not alienated (as provided by the Article 136, 4th paragraph from the Constitution of Romania), such assets may not represent the object of the usufruct right.

2.2. Overview of the legal provisions pursuant to the new Civil Code

2.2.1. In conformity with the Article 703 from the new Civil Code, the usufruct is the right to use other persons' asset and to enjoy the benefits produced by the asset, having the obligation to conserve the substance of the asset.

Following the conception of the former legislation, the usufruct may regard the movable or the immovable goods, corporal or incorporeal, inclusively a patrimonial mass, a factual universality or an undivided quota of them, in conformity with the Article 706 from the new Civil Code.

Regarding the incorporeal assets, the novelty consists in the fact that the usufruct may be established over receivables, capital, lifelong annuity, fond of commerce or right of vote.

2.2.2. The usufruct is essentially temporary and the holder of the usufruct right is undertaken to restitute the assets at the cessation of the usufruct.

2.2.3. In lack of a contrary stipulation, the holder of the usufruct right has the exclusive use of the asset, inclusively the right to enjoy the benefits produced by the assets, based on the Article 709 from the new Civil Code.

2.2.4. The usufruct may be not transmitted *mortis causa*, but the assignment of the usufruct is allowed only by legal acts signed between alive persons.[3]

2.3. It has to be mentioned that the Law 31/1990 comprised a legal provision (Article 124, 1st paragraph) based on which the usufruct over the shares granted to the holder of the usufruct the right to vote within the ordinary shareholders meeting whilst the legal owner of the shares had the right to vote within the extraordinary shareholders meeting. This article was abrogated through Law no.71/2011 starting with 01/10/2011 the argument being that the usufruct right is distinctively regulated by the new Civil Code.

2.4. In comparison with the former Article 124,1st paragraph from the Law no. 31/1990 on companies that comprised a a limitation meaning the usufruct right was applicable only to the shares pertaining to a joint stock company and limited by shares company, the Article 741, 1st paragraph from the new Civil Code stipulates that the right of vote related to a share, other security, to an undivided quota from the ownership **right or related to any other asset belongs to the holder of the usufruct right.**

So we consider that there is an extension of the applicability of the aforesaid article meaning the right of vote may regard the social part (related to a limited liability company) a part of interest (related to the societies of persons). We have primarily in view the legal wording **(right of vote) related to any other asset that includes the social parts and the parts of interests.**

Furthermore, the usufruct right may be established over the shares, securities, regardless their form (materialized or dematerialized).

The holder of the usufruct right and the legal owner of the shares may take part both in the extraordinary general shareholders meeting and in ordinary general shareholders meeting *observing the object of the resolution that shall be taken*; this is in contrast with the former legal provision based on which the holder of the usufruct right was enabled to participate *only in the extraordinary general shareholders meeting* and the legal owner was allowed to participate *only in the ordinary general shareholders meeting.* As effect, in the light of the new Civil Code, the holder of the usufruct right may vote within the ordinary general shareholders meeting (on issues like the approval of the financial situations, appointment and dismissal of the administrators) and within the extraordinary general shareholders meeting (on issues like the change of the object of activity, relocation of the registered office etc.). The legal owner may vote within the *ordinary general shareholders meeting* (on issues like closing of some units of the company if it generates a reorganization) and within the

[3] Gabriel Boroi, Carla Alexandra Anghelescu, Bogdan Nazat, *Course Of Civil Law.The Principal Real Rights In Conformity With The New Civil Code* (Bucharest: Hamangiu Publishing House, 2013), 142.

extraordinary general shareholders meeting (on issues like merge or splitting-up of the company, reduction or rise of the share capital and on other issues that are directly linked to the substance, destination of the shares).[4]

3. The right of vote. Concept. Applications. Legal nature

3.1. Concept

The right of vote is one of the shareholders' rights pursuant to the shares held by each shareholder with the share capital.[5]

3.2. Applications

3.2.1. With regard to the joint stock companies, besides the right of vote, the shareholder have the right to take part in the general shareholders meeting, the right to information, the right to dividends and the right over the part derived from the company winding-up.[6]

Based on the Article 101 from the Law no.31/1990, any paid share entitles the shareholder to one right of vote within the general shareholders meeting except for otherwise had been stipulated within the constitutive deed of the company; the constitutive deed may limit the number of the votes for the shareholders who hold more than one share;also, the right of vote may be suspended for the shareholders who hadn't paid the due owed contributions.

3.2.2. The shares of a joint stock company are of 3 types:

a) the nominative shares that identify the holder (Article 91 from the Law no.31/1990).

A nominative share will mainly comprise the following information in this respect, based on the Article 93 3rd paragraph form the Law no.31/1990: the name, the forename, the personal identification number, the domicile related to the shareholder individual and also the identification data for a shareholder legal entity (the name, the registered office, sole registration code). Such shares may be issued in material form (on paper support) or in dematerialized from when they will be enrolled with the shareholders registry.[6]

b) the shares to bearer does not identify the bearer so the owner is the persons who effectively holds the share.

c) the preferential shares. In accordance with the Article 95 from the Law no.31/1990, a joint-stock company may issue preferential shares with priority dividend without the right of vote that grant to the owner: (i) the right to a priority dividend charged over the distributed benefit of the financial exercise, prior to any other charging; (ii) the right recognized to the shareholders holding ordinary shares, inclusively the right to attend the general meeting *except for the right of vote. In the absence of the right of vote, the establishment of the usufruct as guaranty is not possible.*

3.2.3. The companies listed on the Stock Exchange issue securities that means, in compliance with the Article 2, po.33 from the Law no. 297/2004 on the capital market: (i) the shares issued by the companies and other equivalent securities negotiated on the capital market; (ii) the bonds and other receivable titles, inclusively state bonds, negotiated on the capital market; (iii) any other currently negotiated titles which grants the right to purchase the respective securities through underwriting or exchange, enabling a settlement in cash except for the payment instruments.

3.3. Representation issues. Regarding *the joint-stock companies*, the shareholders may take part and vote within the general assembly by representation based on a power of attorney granted for the respective general assembly. The members of the Board of Administrators, the managers, the members of the Directorate and of the Supervision Council or the officers may not represent the shareholders under the sanction of the absolute nullity, if without the vote of the aforesaid persons the required majority would not have been attained (Article 125 from the Law no.31/1990).

3.3.1. Regarding the *companies listed on the Stock Exchange*, based on the Article 243, 6^1 and 6^2 paragraphs from the Law no.297/2004, the representation of the shareholders within the general shareholders meeting may be done through other persons than other shareholders, on basis of special or general empowerment; the special empowerment may be granted to any person for a sole representation within the general shareholders meeting and it comprises specific instructions to exert the right of vote; the general empowerment may be granted for a period of 3 years enabling the proxy to vote on all the issues on the agenda of any companies mentioned in the empowerment inclusively with regard to the acts of disposition,

[4] Stanciu.D.Carpenaru, Gheorghe Piperea, Sorin David, *The Law Of The Companies. Commentary On Article* (Bucharest: C.H.Beck Publishing House, 5th edition, 2015), 409-410.

[5] Stanciu D.Carpenaru, *Treatise Of Romanian Commercial Law* (Bucharest: Universul Juridic Publishing House, 4th edition, updated, 2014), 323.

[6] Stanciu D.Carpenaru, *Treatise Of Romanian Commercial Law* (Bucharest: Universul Juridic Publishing House, 4th edition, updated, 2014), 322-324.

under the condition that the empowerment to be granted by the shareholder- as a client- to an intermediary as defined by the law or to a lawyer.

3.4. Concerning the social parts belonging to the societies of persons the following aspects must be emphasized:

(i) although the parts of interests are strongly linked to the person of the holder, the assignment of the parts of interest is expressly permitted by the Articles 87 and 90 from the Law no.31/1990, if it is stipulated by the constitutive deed;

(ii) the possibility to contract a bank loan by a societies of persons may be not excluded. Consequently, the bank may require to be established a usufruct over the right of vote. So, the conclusion is that the usufruct over the right of vote related to the parts of interests may be established if it is stipulated within the constitutive deed or all the shareholders grant their unanimous consent in this respect.

3.5. With respect to the social parts belonging to the limited liability, there are the following commentaries: (i) although the social parts are strongly linked to the person of the holder, the assignment of the social parts is expressly permitted between the shareholders of the same company and also to the third parties by the Article 202 from the Law no.31/1990. For the last situation, the prerequisite is to exist a resolution of the shareholders representing ¾ from the social capital;

(ii) the possibility to contract a bank loan by a limited liability company may be not excluded.

Consequently, the bank may require to be established a usufruct over the right of vote. So, the conclusion is that the usufruct over the right of vote related to the social parts may be established based on the resolution of the general shareholders meeting, following the legal provisions in force and the constitutive deed.

3.6. Legal nature

3.6.1. The juridical doctrine prior to the entering into force of the new Civil Code did not extensively investigate the legal nature of the usufruct over the shares and also the guaranty traits of this concept if it related to a repayment undertaking.[7]

3.6.2. Some authors consider that the usufruct over a security is no longer a real right because neither the right from it is originated is not a real right.

Subsequently, the usufruct over a receivable is an ordinary right to use the receivable.[8]

3.6.3. In compliance with other opinion expressed within the current doctrine, the usufruct is a dismemberment of the ownership right. If the right of vote regards operations of administration and conservation of the asset object of the usufruct, the right of vote will belong to the holder of the usufruct; if the right of vote regards operations of disposition over the asset object of the usufruct, the right of vote will be held by the legal owner.[9]

3.6.4. Although the usufruct over the shares (prior to the former Civil Code) was not legally considered a guaranty, the same affirmation may be done in connection to the usufruct over the right of vote based on the new Civil Code.

3.6.5. Regarding the usufruct over the right of vote that secures a repayment obligation towards a creditor (mostly banks), we consider that the usufruct agreement may be notarized by a Public Notary, aiming to become a writ of execution in conformity with the Article 100 from the Law no.36/1995 on the Notaries Public and notarial activity, further amended and completed.

3.6.6. On a basis of the current legislation we may not exclude the possibility to validly sign a usufruct agreement and subsequently to conclude a movable mortgage over the usufruct over the right of vote that is writ of execution, based on the Articles 2347, 1st paragraph, 2389, letter l) and 2431 from the new Civil Code.

But this solution may be bureaucratic because of the two documents that must be signed and most likely it does not reach the requirement of celerity specific to the business milieu.

3.6.7. On the other hand, the solution to be notarized the usufruct agreement is safer and faster because:

(i) the whole content of the agreement shall be previously verified by the Notary Public from the legality standpoint;

(ii) the consent of the signatory parties shall be checked beforehand by the Notary Public;

(iii) any document notarized by a Notary Public that ascertains a certain and exigible

[7] Stanciu D.Carpenaru, *Treatise of Romanian Commercial Law* (Bucharest: All Beck Publishing House, 3rd edition, 2001), 307.

[8] Gabriel Boroi, Carla Alexandra Anghelescu, Bogdan Nazat, *Course Of Civil Law.The Principal Real Rights In Conformity With The New Civil Code* (Bucharest: Hamangiu Publishing House, 2013), 142.

[9] Corneliu Barsan, *Civil Law. The Principal Real Rights Based On The New Civil Code* (Bucharest: Hamangiu Publishing House, 2013), 280-281.

receivable is writ of execution at the maturity date of the receivable;

(iv) the date of the document is out of any doubt;

(v) the notarized agreement will be enrolled with the registry of shareholders-for priority rank issues- so any diligent lender will previously verify this registry We stress that between a guaranty enrolled with the Electronic Archive and the usufruct agreement enrolled with the shareholders registry, the first guaranty shall have priority;

(v) on a basis of the wit of execution, the creditor has the prerogatives to commence the foreclosure if an event of default shall occur.

3.6.8. Having in mind the above, there are many arguments to consider the usufruct agreement as a guaranty except for the publicity formalities within a database aiming to assure the opposability towards any third party. Thus, the legislation regarding the Electronic Archive must be amended in this respect aiming to enable the registration of the usufruct agreement with the Electronic Archive.

4. Relevant clauses/operations that must be included with the usufruct agreement

4.1. The usufruct over the right of vote shall become effective when an event of default- as stipulated by the credit agreement/legal document that ascertains the debt-shall occur. In such a case, the creditor will automatically be entitled to attend the general shareholder meeting and to effectively exert the right of vote.

4.2. The right of vote shall be exerted by the holder of the usufruct in respect to the operations of administration and conservation. The right of vote concerning the operations of disposition belongs to the legal owner of the shares. The distribution of the right of vote in other conditions that these stipulated with the Article 741, 1st and 2nd paragraphs from the new Civil Code is not opposable to the third parties, except for the case when the third parties had expressly acknowledged of these conditions (Article 741, 3rd paragraph from the new Civil Code).

4.3. Regarding the usufruct over the right of vote-as guaranty- the usufruct agreement is advisable to comprise the following clauses:

(i) the holder of the usufruct right undertakes to respect the destination of the asset (the right of vote), except for the case when a fostering of the asset value is assured or the interests of the legal owner are not prejudiced, as provided by the Article 723 from the new Civil Code. It means mean that the holder of the usufruct will exert the right of vote observing the legal provisions in force, the stipulations of the constitutive deed but also his interests as a creditor (disregarding if the interests of the legal owner may be prejudiced), in conformity with the applicable legislation. Such right may be exerted in good faith;

(ii) based on the Article 714 from the new Civil Code, the possibility to be ceded-gratuitously or onerously- the right of usufruct by the holder of the usufruct right; the holder of the usufruct is liable towards the legal owner for the obligations arisen before the assignment of the usufruct; until the notification of the assignment, the holder of the usufruct and the assignee are jointly liable towards the legal owner. After the notification of the assignment, the assignee is liable towards the legal owner in respect to the obligations arisen after the notification. In such a case, the legal provisions regarding the surety are applicable to the holder of the usufruct.

We deem that the onerous assignment of the usufruct may be justified when the creditor has a fast interest to work-out the guaranty.

(iii) based on the Article 725 from the new Civil Code, the holder of the usufruct is responsible to indemnify the legal owner for any prejudice caused by the improper use of the right of vote. This clause is applicable to the situations when the potential prejudices are not linked to the exerting of the right of vote in consideration of defending the creditor's rights;

(iv) based on the Article 726 from the new Civil Code, the holder of the usufruct may be obliged to establish a surety aiming to secure the fulfillment of its obligations. We reasonably consider that such a clause is unsuitable taking into consideration the usufruct as guaranty;

(v) in compliance with the Article 733 from the new Civil Code, the holder of the usufruct bears all the charges and the outlays ensued by the litigations regarding the use of the asset, the picking-up of the fruits and the cashing of the incomes.

We consider that such obligation may be transferred to the legal owner;

(vi) the holder of the usufruct is bound to immediately inform the legal owner in respect to any usurpation of the main asset and to any contestation regarding the ownership right under the sanction to pay indemnifications (Article 734 from the new Civil Code);

(vii) the holder of the usufruct may rent the asset object of the usufruct, based on the Article 715 from the new Civil Code We consider that such clause is unsuitable to be stipulated within the usufruct agreement (as guaranty);

(viii) based on the Article 707 from the new Civil Code, the usufruct is extended over all the accessories (i.e. dividends) of the asset that forms the object of the usufruct;

(ix) the expenses and the charges related to the ownership are incumbent to the legal owner (Article 735 from the new Civil Code).

When such costs are born by the holder of the usufruct, the legal owner is bound to reimburse such costs; when there is an onerous usufruct, the legal owner is obliged to pay the legal interest.

5. Conclusions

5.1. The main directions and the obtained results

5.1.1. The main directions approaches in this study are:

(i) presentation of the relevant differences between the foregoing legal regime regarding the usufruct over the shares and the current juridical regime concerning the usufruct over the right of vote;

(ii) analysis of the legal nature of the usufruct over the right of vote, the main applications of the usufruct over the right of vote and providing legal arguments that the usufruct over the right of vote is applicable to the social parts (specific to a limited liability company) and to the parts of interest (specific to the societies of persons);

(iii) analysis of the form of the usufruct agreement as guaranty;

(iv) the main clauses that must be inserted with the usufruct agreement as guaranty.

5.1.2. The results obtained are:

(i) the usufruct over the right of vote is applicable to a wider range of shares (shares belonging to the joint stock-companies, social parts and parts of interest);

(ii) the notarized form of the usufruct agreement as guaranty confers the quality of the writ of execution that enable the creditor to start the foreclosure. The notarized form better responses to the needs of the companies within the business activity;

(iii) there are many arguments to consider the usufruct over the right of vote as guaranty, except for the opposability towards the third parties.

Given the existing legal framework, such guaranty may be enrolled in the shareholders' register.

Although the shareholders register is legally required only for joint-stock companies and limited liability companies, there is no legal banning to exist such a registry also for the societies of persons.

Such guaranty may be not registered with the Electronic Archive so the priority rank towards the third parties is not wholly assured;

(iv) such guaranty may be used both in sophisticated transactions and in domestic transactions regardless if the creditor is a bank or a different person.

5.2. Envisaged impact of the obtained results

5.2.1. The main novelty consists in the fact that the usufruct over the right of vote may be applicable to a broader categories of companies meaning joint stock-companies, limited liability companies and societies of persons.

5.2.2. The practitioners and theoreticians in cooperation with the business environment should gather their efforts in order to strengthen the status of guaranty of the usufruct over the right of vote and to make lobby aiming to be adjusted the current legislation in respect to the priority rank issues as mentioned with the po.5.1.2. above.

5.3. In respect to the trends of the legal research in the area, the main recommendations are:

(i) to be amended the Civil Code aiming to be expressly regulated the status of the usufruct over the right of vote as a special guaranty applicable to he shares, social parts and parts of interests regardless their form of issuance (materialized or dematerialized).

Subsequently, the same law shall stipulate that the usufruct over the right of vote may be validly concluded through an act under private signature which is writ of execution when it secures a repayment undertaking;

(ii) to be amended the Civil Code with the scope to regulate that the usufruct agreement –when it is concluded as a guaranty- may be enrolled within the shareholders register and within the Electronic Archive, the last registration assuring the priority rank towards any third party (creditors).

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GOVERNMENT EMERGENCY ORDINANCE NO. 44/2008 BETWEEN INNOVATION AND CHANGE

Gabriela FIERBINȚEANU[*]

Abstract

The evolution of the regulations standardizing the performance of the economic activity by the natural persons, i.e. associations of family members, is one showing the need for a continuous adaptation to the needs of the society. The proposal contained by this work is far from criticising the regulation manner of these activities, as it rather intends to identify solutions for the practical situations which are sometimes preventing or questioning the access to these forms of organization or the manner of performing the activity.

Keywords: *dedicated assets, insolvency, enterprise, self-employed person, individual enterprise, patrimonial masses.*

1. Introduction

Although at the moment the regulation in force is included in GEO (Government Emergency Ordinance) no. 44/2008 regarding the performance of the economic activities by the self-employed persons, individual enterprises and family enterprises (Official Gazette, Part I no. 328 of 25 April 2008) with its subsequent amendments, we consider it timely to review the reasons and social and economic contexts which have led to constituting the normative documents in this field, in order to be able to create a clearer perspective on the possible causes which currently require the modification of GEO no. 44/2008.After describing the economic context of the GEO (Government Emergency Ordinance) no. 44/2008, the article will point the advantages brought by this regulation and will underline some of the aspects that need to be changed.

2. Short history of the regulations in the field

Although at the moment the regulation in force is included in GEO (Government Emergency Ordinance) no. 44/2008 regarding the performance of the economic activities by the self-employed persons, individual enterprises and family enterprises[1] with its subsequent amendments, we consider it timely to review the reasons and social and economic contexts which have led to constituting the normative documents in this field, in order to be able to create a clearer perspective on the possible causes which currently require the modification of GEO no. 44/2008.

As far back as the publication of Decree Law no. 54/1990 of 05 February 1990 regarding the organization and performance of economic activities based on the free initiative, it seemed important to understand, on the one hand, the need to develop the free initiative in the small industry sectors and services, and on the other hand, the need to identify levers for increasing the extent of workforce use. Thus, at this stage, they have created the legal framework in order for the members of a family with a joint household to be organised in family associations, i.e. for authorising the natural persons to perform independent activities in the services field or for manufacturing certain products (as art. 23 and 25 of the normative document shall further show). At the same time, we cannot omit an important aspect which intervened in a normative document which had appeared after a long period of planned economic hegemony characteristic to the communist period, i.e. the one related to the taxation manner of these activities, as DL 54/1990 stipulated in art. 34 the fact that "the income tax of the family associations and the income tax of the persons authorised to perform an independent activity are established, in a differentiated manner, for each field and depending on the social utility of the activity, with a stimulating and progressive nature, aiming at highlighting the individual and collective initiative, under the conditions of providing the social justice in the field of the personal incomes". Law no. 507/2002[2] regarding the organization and performance of certain economic activities by natural persons, has extended the range of the subjects who can perform the economic activity from citizens residing in Romania to natural persons, Romanian citizens or citizens of the European Union member states and of other states belonging to the European economic area. It has also extended the range of the economic activities to "all fields, jobs and occupations, except for those established or banned by special laws", preserving the recipients of the legal dispositions - natural person or family association. An important comment appears at the

[*] Assistant reasercher, PhD, Faculty of Law, "Nicolae Titulescu" University of Bucharest (e-mail: **gabriela.fierbinteanu@gmail.com**).

[1] Official Gazette, Part I no. 328 of 25 April 2008.

[2] Official Gazette, Part I no. 582/06 August 2002.

same time as this law is adopted, namely that "the natural person that independently and on its own legs performs economic activities, as well as the natural persons that are members of family associations, without implying labour relations towards an employer, have the quality of own employee", without being able to employ persons with an individual labour contract for performing authorised activities (art. 3 of Law no. 507/2002). They have also included conditions regarding the proof of the skill required by the economic activity for which the authorization is requested, and they also clarify the bodies involved in the record keeping of the persons opting for this form of performing the economic activity, so that after obtaining the authorization from the mayors of communes, towns, municipalities, i.e. sectors of the Bucharest municipality, on the territorial range of which the natural persons reside, "the family associations and natural persons independently performing economic activities are obliged to get registered with the trade register and the territorial tax bodies" (art. 10 of Law no. 507/2002). At the time this normative document has appeared, Romania felt the need to simplify and clarify the legislative framework which could provide a solution for increasing the employment extent, considering the fact that, at that time, the workforce demand was under the supply level, and in parallel, the transition period to the market economy implied several employment cuts. Moreover, signing the association agreement of 01 February 1993 in Brussels with the European Communities and their member states (European Agreement ratified by means of Law no. 20/1993) forced Romania to grant a treatment not less favourable than the one granted to their own citizens for the operations performed by the citizens in the Community. Although, at the time Law no. 507/2002 appeared, Romania had ratified, as we have shown, the European Agreement which stipulated the need to cooperate with the Community in order to improve the fundamental aspects leading to a healthy market economy, and in 2002 the Romanian Government had also adopted the European Charter for Small and Medium Enterprises, in which they recommended, without a doubt, to reduce the complexity of the requested documents and procedures applied to the business environment, they needed the intervention of the 2003 Regular Commission's Report on Romania's progress towards accession in this process, in order for a new normative document to appear, i.e. Law no. 300/2004 regarding the authorization of the natural persons and family associations independently performing economic activities[3]. The normative document has reduced the deadlines for solving the authorization request, has instituted a direct communication procedure between the issuer of the authorization (city hall) and the trade register, has extended the notion of "family" to the 4th degree relatives (thus clarifying the range of the persons who can constitute a family association), has eliminated the competence of the delegated judge regarding the verification of the conditions provided by the law for the authorization and issuance of the registration certificate (considering the verification performed by the mayor in order to issue this authorization). Not less importantly, it has maintained the provisions regarding the quality of own employee for the natural person who independently performs economic activities, i.e. for the natural persons who are members of family associations, with the interdiction of employing persons with an individual labour contract for performing activities for which the authorization has been obtained, but has not preserved the tinge regarding the performance of the activities by the natural person on its own legs.

2.1. GEO no. 44/20084 regarding the performance of the economic activities by self-employed persons, individual enterprises and family enterprises - daring normative document

In 2008, the urgency in amending the legislative framework in the field has resulted from the need to reduce bureaucracy, avoid non-unitary interpretations occurring at the level of the local public administrations with attributions in the authorization activity, the need to simplify the authorization and registration process of those who "wish to perform an economic activity under one of its simplest forms", as shown in the preamble of GEO no. 44/2008.

The mentioned ordinance changes the paradigm regarding the recipients of the regulations in the field, and has included besides the self-employed person, also the family enterprise and the individual enterprise as forms by means of which any natural person, Romanian citizen or citizen of another member state of the European Union or European Economic Area, can perform economic activities on the Romanian territory. Anticipating the enforcement of the Civil Code, the normative document operates with the notion of enterpriser and economic enterprise, defining the latter in a manner referring to the exploitation of the enterprise, as regulated by the Civil Code in art. 3 align. 3. Moreover, as a daring provision, it defines the dedicated assets as a distinct fraction of the patrimony of the self-employed person, the holder of the individual enterprise or members of the family enterprise, separated by the general guarantee of their personal creditors.

[3] Official Gazette, Part I no. 576/29.06 2004.
[4] Official Gazette, Part I no. 328/25.04.2008.

As for the difference between the individual enterprise and the self-employed person, this could be achieved upon the emergence of the normative document starting from 2 elements, i.e. firstly from the fact that the self-employed person performs any form of economic activity allowed by the law, mainly using its workforce, while the individual enterprise represents the economic enterprise, without a juridical personality, organized by an enterprising natural person (while the enterpriser was defined by art. 2 letter e) of GEO no. 44/2008 as a natural person organising an economic enterprise), and secondly from the interdiction to employ persons, enforceable in the case of the self-employed person. Moreover, according to art. 19 of GEO no. 44/2008, the self-employed person performs its activity mainly using its workforce and professional skills, and cannot also cumulate the quality of the enterprising natural person, holder of an individual enterprise. One must also mention the fact that, according to the dispositions of the Tax Code enforceable at that time (Law no. 571/2003, with its subsequent amendments and additions), irrespective of the form of organization opted for, the due tax was for the obtained incomes, according to art. 15 of GEO no. 44/2008, while the self-employed person, the holder of the individual enterprise and the representative of the family enterprise was in charge of the single-entry bookkeeping. Although the self-employed person could not employ third parties with a labour contract, it could collaborate, in order to exert the activity for which it had been authorised, with other authorised self-employed persons, enterprisers natural persons, holders of individual enterprises or representatives of family enterprises or with other natural persons or legal entities, while this would not change their acquired legal status. (art. 16 of GEO no. 44/2008).

In order to try a justification of the assessment of the normative document in the very title of this section of the work, we shall add short comments meant to justify the option chosen. The need to easily regulate the economic activities of trading natural persons (currently, according to the Civil Code, professionals or enterprisers, as defined by art. 2 letter e) of GEO no. 44/2008) clearly results from the short review of the manners of field enactment and from looking, at the same time, beyond the wording of the law towards the economic and social realities which should lead to maintaining an alert spirit of the law. The delimitation of this type of activities from those performed by legal entities further to signing partnership deeds which lead to the emergence of structures with a juridical personality under the form of companies is necessitated by their very simplicity and the granting of a possibility for supplementing the incomes of those categories which, for several reasons, do not choose to channel their own entrepreneurial spirit towards constituting more complicated constructions. On the other hand, one must not ignore the situations in which the contractual collaboration with a self-employed person or individual enterprise is the result of a decision of the former employer who prefers such a form of remuneration of the activity to the one resulting from an individual labour contract which implies a more burdening taxation. Creating the individual enterprise has not however observed a main principle, namely the use of one's own workforce or one's own professional skills, allowing the individual enterpriser to turn into a genuine employer who does not perform an economic activity, but organizes an enterprise, at their own risk indeed, bringing it however to the level of a company due to the number of employees and multitude of activities performed, from several fields. In its attempt to "remedy" the treatment difference between a self-employed person and the individual enterprise regarding the possibility of employing third persons with an individual labour contract, the legislator eliminates this modification of juridical regime by means of Law no. 40/2013[5] (for approving Government Emergency Ordinance no. 46 of 11 May 2011 for amending and completing art. 17 of the Government Emergency Ordinance no. 44/2008 regarding the performance of the economic activities by the self-employed persons, individual enterprises and family enterprises, published in the Romanian Official Gazette, Part I, no. 350 of 19 May 2011); thus the new wording of art.17 of GEO 44/2008 becomes "the self-employed person can perform its activity according to the provisions of art. 4 letter a) or can employ, as an employer, third persons with an individual labour contract, signed according to the law". In order to summarise, at this moment, according to the definition given by art. 2 letter i) corroborated with art. 4 letter a) and the above-mentioned text, the natural person, mainly using its own workforce, can individually and independently perform, as a self-employed person, any form of economic activity allowed by the law, or can employ third persons with an individual labour contract (i.e. in developing its activity). The recitals to the draft law approving GEO no. 46/2011[6] as well as the preamble of this latter normative document are almost similar, as the motivation for the occurring modification is related to the impossibility of developing the financing contracts from non-refundable European funds by the self-employed persons, holders of these contracts, as the "business development" is endangered by the impossibility of employing any personnel. We shall not analyse this argumentation but we shall limit ourselves to wondering whether, upon the time of the

[5] Published in the Official Gazette, Part I no. 129 of 11 March 2013.
[6] available at http://www.cdep.ro/proiecte/2011/400/10/4/em580.pdf

amendment, it would not maybe have been timely to renounce one of the two forms under which the enterprising natural person can organise its activity, while exclusively maintaining its self-employed person status, the phrase "mainly using its workforce" being a very fine line, considering the fact that it is very unlikely that the self-employed person does not currently organise in fact an enterprise but only performs an activity[7] .

Moreover, the provisions referring to the need for proving the fulfilment of the professional training conditions, if by means of the special laws, it is necessary to fulfil them, are far from leading to the simplification of the formalities specific to the registration and authorisation of the operation. Under the conditions in which, according to art. 7 of GEO no. 44/2008, the obligation to request the registration with the trade register and the authorization of the operation lies, according to the same normative document, with the natural persons provided by art. 4 letter a) and letter b) and the representative of the family enterprise, prior to the commencement of the economic activity, as self-employed persons, i.e. enterprising natural persons, holders of an individual enterprise or family enterprise, we consider the control performed by the trade register regarding the fulfilment of the conditions provided by special laws to be excessive.

Last but not least, the regulation manner of the dedicated assets determines in practice various interpretations, to which we will return hereinafter, interpretations generating controversies regarding their utility.

2.2. Modification of GEO no. 44/2008 regarding the development of the economic activities by the self-employed persons, individual enterprises and family enterprises

The modification of this normative document finds its justification in several reasons among which we will only deal with a few, resulting from the need to correlate its dispositions with the provisions of the Civil Code and Insolvency Code.

As for the Civil Code, regarding the abrogation of the Commercial Code, one can note a constant preoccupation to replace the term "trader" with the term "professional". Analysing the dispositions of art. 6 and art. 8 of Law no. 71/2011 for the enforcement of Law no. 287/2009 regarding the Civil Code, we consider that, as for GEO no. 44/2008, it would be excessive to change the terminology, at a formal level at least (under the aspect of the registration obligation with the trade register)[8] from the interpretation of the above texts, being at most, as a modification of the text, in the presence of the natural person subject to the registration with the trade register.

In relation to the Civil Code, one must however adjust the temporary or occasional nature of the economic activity, as mentioned in the wording of art. 6 align. 1 of GEO no. 44/2008 to the notion of economic enterprise, as an "economic activity performed in an organised, permanent and systematic manner", as defined by art. 2 letter f) of the normative document and in the dispositions of art. 3 align. 3 of the Civil Code regarding the exploitation of the enterprise as a systematic exertion of an organised activity. It is perfectly true that an economic activity taking place temporarily without its registration and authorisation with the trade register can generate confusion, but we opine that the wording of the ordinance could separately deal with the operations taking place in a temporarily limited manner. Moreover, the wording of GEO no. 44/2008 has a different perspective in approaching the acquirement of the "trader" quality of the natural person and of the manner in which the insolvency of the self-employed person, i.e. of the individual enterpriser, is dealt with. Although the enterprising natural person, holder of the individual enterprise, is a trading natural person since the date he was registered with the trade register, according to art. 23, the regime enforceable in the case insolvency intervenes, is not differentiated in its case, as it happens in the case of the self-employed person, for whom it is inferred that, although registered with the trade register, may not have the trader quality[9] , in which case creditors shall execute their claims according to the general law (art. 20 GEO no. 44/2008). The dispositions to which we refer should also be correlated with the new legislation in the field of insolvency which considers, according to art. 38 align 2 letter f), the enforcement of the simplified procedure also to the persons performing activities specific to professionals, without having obtained the authorization requested by the law for exploiting an enterprise and without being registered in the special advertising registers, as such a situation must be sanctioned, so that it would not be perpetuated. One must add that, up to the modification of the insolvency legislation by means of Law no. 85/2014, the courts of law have considered it necessary to open the simplified insolvency procedure, starting from the wording of art. 1 align 2 which provided the enforcement of the simplified procedure also in the case of traders, natural persons, acting individually (i.e. even unregistered with the trade register). In this respect, the court has assessed that "one of the conditions requested by the law in order for somebody to be a trader is for them to act independently, at their own risk and responsibility",

[7] V.Nemeș, Drept Comercial, Ediția a doua revizuită și adăugită, Ed.Hamangiu, 2015, p 31.
[8] S.Angheni, Drept comercial.Profesioniștii- comercianți, ed.Ch.Beck, București, 2013, p.8.
[9] for details see Gh.Piperea, Introducere în dreptul contractelor profesionale, Ed.CH.Beck, București, 2011, p.27.

as the "individual" criterion differentiates the two theses of art.1 align 2 letters a) and b) of Law no. 85/2006 (see in detail civil decision no. 900 of 15 June 2015 of the Cluj Court of Appeal, Civil Section II, Contentious Administrative and Tax Matters, published in the Bulletin of the Insolvency Procedures no. 12917/20.07.2015).

As for the dedicated assets, the normative document has offered a comprehensive definition, within art. 2 letter j), showing that they represent the "entirety of assets, rights and obligations of the self-employed person, holder of the individual enterprise or members of the family enterprise, dedicated to the purpose of exerting an economic activity, constituted as a distinct fraction of the patrimony of the self-employed person, holder of the individual enterprise or members of the family enterprise, separated by the general guarantee of their personal creditors". Skipping the observation regarding the lack of dispositions mentioning the manner of constituting and declaring the dedicated assets with the trade register (in the case of the self-employed persons or individual enterprises), while the only landmark is the incorporation agreement indicated in the case of the family enterprises (according to art. 30 of GEO no. 44/2008 by means of the incorporation agreement of the enterprise, its members can stipulate the incorporation of such a patrimony), we consider that it is essential, in the case of declaring such a patrimony, to fully understand the manner of positioning the personal creditors and those whose claims have emerged in relation to the "professional" obligations of the trader, as well as the compatibility of the ordinance dispositions with those of the Civil Code. As shown in the doctrine, the dedicated assets can be regarded as a "patrimony organizing technique", a manner of limiting the holder's responsibility for the obligations assumed in developing his economic or professional activity[10]. According to the Civil Code, art. 31 align 1, the patrimony includes all rights and debts assessable in money belonging to their owner, natural person or legal entity, and can be subject, according to align 2, to division or dedicated assets in the cases and conditions provided by the law. From the analysis of the definition contained by GEO no. 44/2008, for the correlation with the dispositions of the Civil Code, we believe that, for the sake of the text accuracy, the assets must be removed from this definition, considering the fact that the patrimony exclusively implies rights (i.e. possibly, rights of the assets dedicated to the economic activity). According to the Civil Code, dedicated assets are fiduciary patrimonial masses, patrimonial masses dedicated to exerting an authorised profession, as well as other legally determined patrimonies (art. 31 align 3 of the Civil Code). As for relating to the joint guarantee of the creditors, according to art. 2324 Civil Code align 3, while maintaining the hypothesis of patrimony separation regulated by art. 31 Civil Code, "the creditors whose claims have emerged in relation to a certain division of the patrimony, authorised by the law" initially aim at the goods which are the subject of that patrimonial mass, and if these are not enough to satisfy the claims, they can aim at the other assets of the debtor. In this respect, it has been assessed by the courts of law that a debt held by the contesting creditor against the holding self-employed person must be recovered by all means of execution, exerted also on the personal patrimony of the natural person, while there is an identity between the natural person and the self-employed person, as it is about one and the same natural person, "the distinction occurring by adding the term PFA (self-employed person) to the name of the natural person only being determined by the authorisation and registration form imposed by the law, so that the natural person could perform an economic activity" (County Court decision no. 894 of 23 September 2015, Beiuș District Court, text available at http://rolii.ro/). One must very clearly mention that the text does not limit the prosecution to a certain patrimonial mass but only establishes the prosecution order. As also mentioned in the specialised literature[11] in the case of the dedicated assets regulated by GEO no. 44/2008, there is no advantage awarded to the patrimonial divisions dedicated to the exertion of an authorised profession, situation in which the creditors whose debts have emerged in relation to the respective profession cannot aim at the other assets of the debtor (art. 2324 align 4). An interesting, however objectionable interpretation of art. 20 align 1 of GEO no. 44/2008, especially if we consider the very definition of the dedicated assets contained by GEO no. 44/2008, can be found in the considerations of the Timișoara Court of Appeal when pronouncing the recourse against civil sentence no. 2894/24.10.2013 of the Arad District Court (available at http://legeaz.net/spete-drept-comercial/procedura-insolventei-jurisprudenta-faliment-2894-2013) which mentions that "after grammatically examining the disposition in this article, one finds that the legislator has not included in the content of the provision any reference to the natural person, as a distinct subject of law, but has stated that only the self-employed person is responsible for its obligations with the dedicated assets, and if this is insufficient or accepting that it has not been constituted in any way, shall also be responsible with the fraction of the patrimony which has not been dedicated to the economic activity, while it has

[10] L.Tuleașcă, Patrimoniul de afectațiune - instrument în derularea afacerilor, www.juridice.ro, 24. 12. 2014.
[11] St.D.Cărpenaru, Tratat de drept comercial român, Ed.a IV a, actualizată, Ed.Universul juridic, 2014, p 43, C.Gheorghe, Drept comercial român, Ed.C.H.Beck, București, 2013, p 94.

however been about "its" patrimony, i.e. of the self-employed person".

3. Conclusions

Draft Law no.377-2008[12] approving Government Emergency Ordinance no.44 / 2008 regarding the performance of the economic activities by the self-employed persons, individual enterprises and family enterprises represents an opportunity for the legislator to adjust the text to the changed realities and to clarify the distinction between individuals enterprises and self employed person as we pointed is needed.Simplifying administrative procedures, interconnection with Civil Code and Insolvency Code and also refreshing the text in regard of the new concept of enterprise should also be objectives to remember.

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[12] http://www.cdep.ro

ALTERNATIVE DISPUTE RESOLUTION

Mihaela Irina IONESCU[*]

Abstract

Alternative dispute resolution (ADR) includes dispute resolution processes and techniques that act as a means for disagreeing parties to come to an agreement short of litigation. It is a collective term for the ways that parties can settle disputes, with (or without) the help of a third party.

Despite historic resistance to ADR by many popular parties and their advocates, ADR has gained widespread acceptance among both the general public and the legal profession in recent years. In fact, some courts now require some parties to resort to ADR of some type, before permitting the parties' cases to be tried.

The rising popularity of ADR can be explained by the increasing caseload of traditional courts, the perception that ADR imposes fewer costs than litigation, a preference for confidentiality, and the desire of some parties to have greater control over the selection of the individual or individuals who will decide their dispute.

Directive 2013/11/EU of the European Parliament and of the Council on alternative dispute resolution for consumer disputes and amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC (hereinafter „Directive 2013/11/EU") aims to ensure a high level of consumer protection and the proper functioning of the internal market by ensuring that complaints against traders can be submitted by consumers on a voluntary basis, to entities of alternative disputes which are independent, impartial, transparent, effective, simple,quick and fair.

Directive 2013/11/EU establishes harmonized quality requirements for entities applying alternative dispute resolution procedure (hereinafter "ADR entity") to provide the same protection and the same rights of consumers in all Member States.

Besides this, the present study is trying to present broadly how are all this trasposed in the romanian legislation.

Keywords: *alternative dispute resolution, complaints, consumers, EU regulation, national legislation.*

At present, at **European Union** level, differences between Member States regarding complaints systems both in terms of sectors covered by these and quality procedures are noticed. These differences represent a barrier to the internal market and is one of the reasons why many consumers do not purchase goods and services from another Member State and do not have confidence that potential disputes with traders could be solved in an easy, quick and inexpensive manner. Given these issues, it was considered important to implement common principles in all Member States for solving consumer complaints.

In this regard, in May 2013, *Directive 2013/11/EU of the European Parliament and of the Council on alternative dispute resolution for consumer disputes and amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC (Directive on consumer ADR)* and *Regulation (EU) no 524/2013 of the European Parliament and of the Council of 21 May 2013 on online dispute resolution for consumer disputes and amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC (Regulation on consumer ODR)* were adopted.

*Directive 2013/11/EU of the European Parliament and of the Council on alternative dispute resolution for consumer disputes and amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC (*hereinafter „Directive 2013/11/EU") aims to ensure a high level of consumer protection and the proper functioning of the internal market by ensuring that complaints against traders can be submitted by consumers on a voluntary basis, to entities of alternative disputes which are **independent, impartial, transparent, effective, simple,quick and fair**.

Directive 2013/11/EU establishes **harmonized quality requirements** for entities applying alternative dispute resolution procedure (hereinafter "ADR entity") **to provide the same protection and the same rights of consumers in all Member States**.

The Directive requires Member States to facilitate consumer access to procedures for alternative dispute resolution (hereinafter 'ADR procedures') in case of national disputes and cross-border referring to contractual obligations in contracts for sales or contracts for services in all commercial sectors. In this respect the following requirements that the ADR entities must meet are established:

- **expertise**, **independence** and **impartiality**: the natural persons in charge of ADR should possess the necessary expertise, including a general understanding of law and be independent and impartial;
- **transparency**: ADR entities should make publicly available on their websites, on a durable medium upon request, and by any other means they consider appropriate, clear and easily

[*] Lector, PhD, "Nicolae Titulescu" University of Bucharest (e-mail: **mihaelairinaionescu@anpc.ro**).

understandable information on the entity and the procedure;

- **effectiveness:** ADR procedures should be effective by fulfilling certain requirements such as the procedure to be available and easily accessible online and on paper for both parties irrespective of where they are, to be free of charge or at moderate costs for consumers, the outcome of the ADR procedure to be available to the parties within 90 calendar days of the date on which the ADR entity has received the complaint;

- **fairness:** in this respect criteria that ADR procedure must meet are established, such as: the parties have the possibility of expressing their point of view, of being provided by the ADR entity with the arguments, evidence, documents and facts put forward by the other party, any statements made and opinions given by experts, and of being able to comment on them; the parties are notified of the outcome of the ADR procedure in writing or on a durable medium, and are given a statement of the grounds on which the outcome is based;

- **liberty:** an agreement between a consumer and a trader to submit complaints to an ADR entity is not binding on the consumer if it was concluded before the dispute has materialised and if it has the effect of depriving the consumer of his right to bring an action before the courts for the settlement of the dispute.

In order to provide an effective tool for solving consumer complaints when purchasing goods and services online and that the ADR procedure to be available and easily accessible online to both parties, Regulation no. 524/2013 provides for an online dispute resolution platform (hereinafter 'ODR platform') so that consumers and professionals benefit of a single point of entry for online alternative dispute resolution through ADR entities that are connected to the platform.

From the IT perspective, the ODR platform will be an interactive website, free of charge and available in all official languages of the European Union. This platform: will provide a complaint form to be completed and submitted online by the applicant; will inform the defendant about the complaint; will identify relevant ADR entities, etc. Therefore the Directive 2013/11/EU and Regulation (EU) no. 524/2013 are two interrelated and complementary legislative instruments.

To ensure that ADR entities meet the quality requirements, the Directive provides for the designation of one or more **competent authorities**, and the appointment of a competent authority as a **contact point** for the European Commission.

Currently, in Romania, in disputes between consumers and traders, when both traders and consumers are resident in Romania, consumers may contact:

a) public authorities in charge of consumers protection, such as National Authority for Consumers' Protection, Ministry of Transport, Ministry of Health, National Authority for Management and Regulation in Communications, National Tourism Authority which solve the complaints free of charge;

b) mediators, according to Law no. 192/2006 regarding mediation and the mediation profession;

c) courts.

In case of cross-border disputes between consumers and traders, consumers may contact the European Consumer Centre. European Consumer Centres Network is a network established at EU level in order to strengthen consumer confidence, advising Europeans on consumer rights and facilitating the resolution of the problems in an amiable way.

Transposition and implementation in Romania

The Directive 2013/11/EU was transposed into national legislation by *Government Ordinance no 38/2015 regarding alternative dispute resolution between consumers and traders* (hereinafter "GO no 38/2015").

GO no 38/2015 establishes the legal framework in order to allow consumers to submit voluntarily complaints against traders to ADR entities that solve them in an independent, impartial, transparent, effective, fast and fair manner. GO no 38/2015 takes over all the quality requirements imposed by the Directive 2013/11/EU.

According to the national legislation, an ADR entity may propose a solution that will become binding on the parties if it is accepted by both parties and/or impose a solution which is binding on the parties. If the ADR entity offers both solutions, it is the consumer who chooses if the entity proposes or imposes a solution. GO no 38/2015 stipulates that ADR entities designate natural persons who meet the conditions of expertise, independence and impartiality to conduct ADR procedures.

Considering the provisions of point 24 of the recital of the Directive according to which ADR entities can function "within the framework of national consumer protection authorities of Member States where State officials are in charge of dispute resolution. State officials should be regarded as representatives of both consumers' and traders' interests.", GO no 38/2015 provides that ADR entity may be any central government authority or autonomous administrative authority with responsibilities in consumer protection field. Therefore, excepting the financial area, ADR procedures can be performed only by central authorities or autonomous administrative authorities. In this way it was meant to ensure that principles of independence and impartiality are respected, given that point 41 of the recital of the Directive provides: "ADR procedures should preferably be free of charge for the consumer. In the event that costs are applied, the ADR procedure should be accessible,

attractive and inexpensive for consumers. To that end, costs should not exceed a nominal fee."

Thus, any other entity, except public institutions, would have to obtain funds, most likely from traders to operate and impartiality and independence would be very difficult to guarantee.

Setting up ADR entities

An ADR entity will be set up within the National Authority for Consumers Protection. This entity will be impartial and independent of the market surveillance and control activities. The entity will be run by a Director and 25 employees will be implied in the procedures. The procedures carried out by this entity will ensure coverage of all the country and will also cover all the fields of activity, except if other specialised ADR entities are set up.

For the financial field, given its complexity and the impact of banking services on consumer, a Centre for Alternative Dispute Resolution in the banking system was set up. The work of this centre is coordinated by a Steering College. The Steering College is composed by a representative of National Bank of Romania, of National Authority for Consumers' Protection, of Romanian Banking Association, of a consumer association and an independent person.

Centre for Alternative Dispute Resolution in the Banking system (CSALB) is an autonomous legal entity, governmental, apolitical, non-profit, public interest legal person with a mission to organize, manage and monitor settlement through ADR procedures, disputes between consumers and traders whose activity is regulated, authorized and supervised / monitored by National Bank of Romania, as well as subsidiaries of traders carrying out activities in Romania in banking.

ADR Center main duty consists in organizing, managing and monitoring resolve disputes through ADR procedures or internationally, arising from contracts for provision of services between consumers and traders mention in Article 1. (3).

Disputes have an international character when the consumer is domiciled or habitually resident in another state in the European Union or the European Economic Area, as well as the territory of the Swiss Confederation, when concluding the contract service for the merchant of Romanian nationality, or performing activities on Romania's territory.

Consumers may submit the dispute for ADR ADR procedures administered by the Center if they prove that, previously, have tried to settle the dispute directly with the trader in question.

ADR procedures organized by CSALB runs out of court intervention and consist of a conciliator who, depending on the procedure chosen by the consumer, may propose or impose a solution on the parties. ADR procedures organized by CSALB are voluntary, independent, impartial, transparent, effective, fast and fair.

Organization and Alternative Dispute Resolution Rules are governed by the ADR procedure completed with the suggested solution on the ADR procedure and rules finalized by imposing a solution.

ADR procedure completed with suggested solution, further called conciliation procedure is optional for parties and reliance on it is established at the initiative of consumer merchant agreement formulated during trying binding settlement of the case together with the merchant directly.

The procedure does not involve its continuation through a judicial or arbitral procedure, if the parties' agreement does not register on the solution proposed by the conciliator, or achieved only a partial understanding in this regard.

Either party may at any time withdraw from the procedure.

When the parties agree to resort to conciliation organized and managed by ADR Center, by that very fact they accept the rules.

Parties must personally participate in the proceedings.

The consumer may be assisted or represented, if necessary, by a representative of the association of consumers who belongs or a lawyer whose fees support it.

The trader participate through a legal representative by a legal adviser or lawyer whose fees support it.

The procedure is free only for the consumer.

ADR procedure completed with imposing a solution is described as arbitration, organized and managed by ADR Center

ADR Center as permanent arbitration institution, operates in compliance with Government Ordinance no.38 / 2015 on alternative disputes between consumers and traders, Directive 2013/11 / EU on Alternative Dispute Resolution in consumer and amending Regulation (EC) nr.2006 / 2004 and Directive 2009/22 / EC of the civil procedure Code in force and the Regulation for the organization of the Centre for alternative Dispute Resolution in Banking and functioning of the Steering College.

The person in the list of conciliators established by ADR Center, appointed or chosen in a dispute in which the parties have opted for the ADR procedure completed with an imposed solution acquires in that dispute, an arbitrator.

ADR Center organizes dispute settlement arbitration proceedings if the parties have concluded this compromise.

If by compromise, the parties have entrusted the Centre ADR settlement of the dispute through an ADR procedure finalized by imposing a solution by itself this fact the parties have accepted the application of these Rules of Procedure.

The arbitration may be entrusted by the compromise concluded, one or more people invested

sides to hear the case and deliver a final and binding on them.

The sole arbitrator or, where appropriate, the three referees invest constitute, in the present rules, the arbitral tribunal.

Settlement of the dispute lies with the arbitral tribunal that hears in full independence and impartiality and pronounces a final and binding on the parties. The decision is enforceable under the provisions of the Civil Procedure Code.

Under the nullity of the arbitral decision, the entire arbitration procedure must ensure equal treatment of the parties, the right to defense and contradictory debates.

ADR Center, the arbitral tribunal, the Secretariat of the Center ADR procedure and its entire staff are obliged to ensure the confidentiality of arbitration. The case file is confidential and no foreign person does not have access to it without the consent of the parties and the arbitral tribunal prior approval.

Arbitral awards may be used for statistical purposes or information in cooperation work of the competent authorities under the Regulation of organization the Centre for Alternative Dispute Resolution in Banking and functioning of the Steering College and other entities ADR on legal issues arising in litigation without mention of the name / designation of the parties or data that might harm their interests.

The parties have a duty to exercise their procedural rights in good faith to cooperate with the arbitral tribunal for the development of corresponding arbitral process and its completion within the deadline.

At any stage of the dispute, the arbitral tribunal will try its solution based on agreement of the parties.

Nevertheless, any public authority or autonomous administrative authority may set up ADR entities in their field of activity.

As competent authority and contact point with the European Commission the Ministry of Economy, Trade and Businesses was designated.

Currently, measures are being taken in order to ensure that ADR entities are set up and function at the beginning of 2016.

Conclusions

Romanian legislation transposing Directive 2013/11/EU is recent, the implementation process is not completed yet, so until the effective functioning of the system of alternative dispute resolution involved are still steps to go.

In this respect it is necessary, besides the actual existence of the legal framework, to take place and a more ample information, more extensive, on this new activity, especially in the legal professions.

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- Regulation (EU) no 524/2013 of the European Parliament and of the Council of 21 May 2013 on online dispute resolution for consumer disputes and amending Regulation (EC) No 2006/2004;
- GO (Governmental Ordinance) 38/2015 regarding alternative dispute resolution between consumers and traders;
- CSALB (Centre for Alternative Dispute Resolution in the Banking system) - Regulation for the organization of the Centre for Alternative Dispute Resolution in Banking and functioning of the Steering College.

ISSUERS OF FINANCIAL INSTRUMENTS

Cristian GHEORGHE[*]

Abstract

The rules laid down by Romanian Capital Market Law and the regulations put in force for its implementation apply to issuers of financial instruments admitted to trading on the regulated market established in Romania. But the issuers remain companies incorporated under Company Law of 1990. Such dual regulations need increased attention in order to observe the legal status of the issuers/companies and financial instruments/shares.

Romanian legislator has chosen to implement in Capital Market Law special rules regarding the administration of the issuers of financial instruments, not only rules regarding admitting and maintaining to a regulated market. Thus issuers are, in Romanian Law perspective, special company that should comply special rule regarding board of administration and general shareholders meeting.

Keywords: *capital market, investments, issuers, regulated market, shareholders protection.*

1. Introduction

Romanian legislator has chosen to implement in Capital Market Law (no 297/2004) special rules regarding the administration of the issuers of financial instruments, not only rules regarding admitting and maintaining to a regulated market. Therefore Chapter VI of the Romanian Capital Market Law contains special provisions regarding the companies admitted to trading.

Thus issuers are, in Romanian Law perspective, special company that should comply special rule regarding administration and decisions in general shareholders meeting.

From the beginning, the Romanian Capital Market Law was designed as a comprehensive code for its field. Therefore this law encompasses not only everything about capital market but companies rules too.

As it happens in banking or assurance field, overregulation of the special purposes companies (i.e. banks or assurance companies) is expected and detailed. Adequate capital, exclusive activity object, elaborate prudential requirements and administrative supervision, all these are in place in order to protect such companies. Capital Market Law uses all these mechanisms when it comes to investments firms. In European Union these companies are the intermediaries, legal persons whose regular occupation or business is the provision of one or more investment services to third parties, the performance of such investment activities on a professional basis[1]. All these regulations find their place in Capital Market Law but the situation is different for the issuers.

The originality of the Romanian Capital Market Law stands in its option to put a genuine layer of regulation on the general rules of joint stock companies, for all listed companies. Such layer of regulation addresses sensible issues for companies traded on regulated market: shareholders' rights and equitable treatment of shareholders, clear rules for shareholders meetings and advanced framework for directors' appointment. All these regulations ensure the basis for an effective corporate governance background. In this way the Romanian Capital Market Law adheres to OECD Principles of Corporate Governance in an applied manner. Inspired of these principles the Romanian legislator enhanced the regulation of the issuers with special rules, unknown for the rest of the companies[2].

2. Special provisions. General Meetings.

In order for the General Meeting of Shareholders to be legally convened the directors should communicate the reference date which is an important issue for exercising the shareholders' rights: only the persons who are registered as shareholders at the reference date shall participate and vote in the General Meeting of Shareholders. The reference date may not be more than thirty days prior to the date of the general meeting to which it applies[3].

The general meeting shall be convened by the board of administration or executive board according to the provisions of the incorporating instrument, but the time allowed until the meeting may not be shorter than 30 days from the publication of the calling. Nevertheless this time limit shall not

[*] Associate Professor, PhD, Faculty of Law, University "Nicolae Titulescu" (e-mail: **profesordrept@gmail.com**).

[1] Directive no 2014/65/EU of the European Parliament and of the Council on markets in financial instruments and amending Directive 2002/92/EC and Directive 2011/61/EU (MiFID II), Art. 4 para (1).

[2] OECD Principles of Corporate Governance, http://www.oecd.org/daf/ca/corporategovernanceprinciples/31557724.pdf

[3] Law no. 297/2004, Art. 243 para (4). Company Law (Art. 123 para 2), prescribes that the reference date will be no more than 60 days before the date the general meeting is called for the first time.

apply for the second or any further call of the general meeting caused by the fact that the quorum necessary for the meeting called for the first time was not formed, provided that no new item was added to the agenda and at least ten days lapsed between the final call and the date of the general meeting[4].

Attendance right and proxy voting. The access of the shareholders entitled to participate in the general meeting of the shareholders is allowed by proving their identity (valid ID is requested only) in the case of natural person shareholders. In the case of legal persons (or natural person representing shareholders) the access is allowed by the power of attorney granted to the natural person representing them. Such provisions prevent the company to obstruct in any way the general meeting attendance under specific consequences: if a shareholder who meets the legal requirements is prevented from participating in the general meeting of shareholders, any person concerned has the right to request the court to annul the resolution of the general meeting of shareholders[5].

The Capital Market Law assents that shareholders may be represented in the general meeting of shareholders also by persons other than the shareholders, based on a limited or general proxy.

There are special regulations depending on the type of power of attorney. The limited proxy may be granted to any person for representation purposes in one general meeting and shall contain specific voting instructions from the issuing shareholder. Such limited proxy may be granted to the company's directors and clerks too[6].

General proxy are accepted by law in shareholders' general meetings but with specific provisions regarding the conflict of interest. Thus the shareholder may grant a valid proxy for a period which shall not exceed three years, allowing its proxy holder to vote in all aspects (even regarding acts of transfer of ownership) debated in the general meetings of shareholders (even of more companies, identified in the proxy) provided that the proxy is given by the shareholder, as client, to an investment firm or to a lawyer. Conflict of interest rule prevents the shareholders to be represented in the general meeting of shareholders, based on a general proxy, by a person who is in a situation described in any of the following cases: a) such person is a majority shareholder of the company, or another entity, controlled by that shareholder; b) such person is a director or a member of a management or supervisory body of the company, of a significant shareholder or controlled entity; c) such person is an employee or auditor of the company or of a significant shareholder or of a controlled entity; d) such person is the spouse or relative of any of the natural persons abovementioned[7].

The powers of attorney may not be transmitted. Thus the proxy holder may not be substituted. If the proxy holder is a legal person, then its powers may be exercised through any person belonging to its board of directors or executive board, or its employees.

Remote attendance (by means of electronic communication) and vote by correspondence. Romanian Capital Market Law is favorable to remote participation in general meetings and voting by mail.

Listed companies may allow their shareholders to participate in the general meeting in any form through electronic communication. Of course, such means should be implemented by companies first.

Even proxy holders may be appointed and revoked through electronic communications. If such advantages depend on company's willingness to implement them voting by mail will be compulsory for listed company. Consequently companies shall prepare procedures which shall give the shareholders the possibility to vote by mail, prior to the general meeting. If resolutions requiring a secret ballot are on the agenda, the vote by mail shall be cast in a manner that prevent disclosure to anyone but to the persons in charge with counting the secret ballots, at the moment when the other secret ballots (from the attending shareholders or by the representatives of the shareholders participating in the meeting) are also cast[8].

The vote cast personally or by proxy prevails to vote by mail. If the shareholder casting its vote by correspondence happens to participate (personally or by proxy) in the general meeting, the vote cast by correspondence shall be cancelled[9].

3. Special provisions. The increase of the share capital.

Company Law provides general rules regarding capital increase: rules regarding shareholders' resolution in the framework of the

[4] Law no. 297/2004, Art. 243 para (1). Company Law (Art. 117 para 2, Art. 118 para 2), prescribes that the second meeting may be indicated from the beginning in the call but, if the day for the second meeting is not indicated in the calling published for the first meeting, the period for the meeting may be reduced to 8 days.

[5] Law no. 297/2004, Art. 243 para (5). Such right is not expressly recognized under Company Law.

[6] Company Law forbids such operations (Art. 125 para 5). The directors of the company and its clerks may not represent the shareholders if, without their votes, the required majority would not have been met.

[7] Law no. 297/2004, Art. 243 para (6).

[8] Ibidem.

[9] Law no. 297/2004, art. 243 para (9).

extraordinary general meeting, conditions regarding quorum and bailout for approval of the motion, preemptive rights and rules for the share capital increases by in kind contribution[10].

Issuers of financial instruments traded on regulated market face a new layer of regulation represented by special provisions included in the Capital Market Law which derogate from the Company Law.

Any increase in the share capital shall be decided by the extraordinary general meeting of shareholders. Nevertheless, the administrators may decide, following the delegation of duties, the increase in the share capital[11]. Such delegation of duties shall be granted by the instruments of incorporation or the extraordinary general meeting which may authorize the increase in the share capital up to a maximum level. Such competence shall be granted to administrators up to a limit of capital level and for maximum one year (the delegation may be renewed by the general meeting for a period which may not exceed one year for each renewal).

Following the principle of symmetry, the resolutions adopted by the administrators in the exercise of the duties delegated by the extraordinary general meeting of shareholders shall have the same regime as the resolutions of the general meeting of shareholders (as regards their publicity and the possibility to be challenged in court)[12].

Capital Market Law establishes special and restrictive conditions for the share capital increases by in kind contribution and the annulment of the shareholders' preemptive right to subscribe new shares if the share capital is increased.

Capital increase by in kind contribution. In the view of the Capital Market Law the share capital increase by in kind contribution is an unusual operation for a company traded on a regulated market. Therefore the law put in force almost impossible demands: the share capital increases by in kind contribution shall be approved by the extraordinary general meeting of shareholders attended by shareholders representing at least 85% of the registered share capital and with the vote of the shareholders representing at least ¾ of the voting rights.

The contribution in kind shall be evaluated by independent experts and the number of shares allotted as a result of the in kind contribution shall be determined as a ratio between the value of the contribution, established by experts and the highest value established between: i) the market price of a share, ii) the value per share calculated based on the net asset book value and iii) the face value of the share[13]. And in the end, the in kind contributions may consist only of new and efficient assets required to conduct the company's activity.

Annulment of the shareholders' preemptive right. The annulment of the shareholders' preemptive right to subscribe new shares, if the share capital is increased, shall be decided in the extraordinary general meeting of shareholders attended by shareholders representing at least 85% of the share capital subscribed, and with the vote of the shareholders holding at least ¾ of the voting rights. Those shares disallowed to shareholders shall be offered for subscription by the public, in compliance with the provisions on public offers. The number of shares shall be determined using the same algorithm put in force for in kind contribution, respectively a ratio between the value of capital increase and the highest value established between: i) the market price of a share, ii) the value per share calculated based on the net asset book value and iii) the face value of the share[14]. The law seems unclear in this point but it should be construed as referring to the price of the shares publicly offered. That means the offer price shall not be less than either of the prices above mentioned.

4. Registration/Record date.

The shareholders which shall benefit from dividends or other rights granted by the resolutions of the general meeting of shareholders shall be established by such resolution by setting a registration date (record date). Such date shall be at least ten working days subsequent to the date of the general meeting of shareholders.

After the declaring of dividend, the general meeting of shareholders shall also establish the time limit within which it shall be paid to the shareholders. Such time limit shall not exceed six months from the date of the general meeting of shareholders declaring the dividends[15]. The Company Law has a different approach. In its view the shareholders entitled to exercise their rights in a general meeting of shareholders (access, vote) are the same with the shareholders who shall benefit from dividends or other rights which are affected by

[10] Law no 31/1990, Art. 210-221.

[11] Law no. 297/2004, Art. 236 para (1)-(2). Company Law provides that such delegation shall be granted by the instruments of incorporation for a period of time up to five years and for an increase value up to a half of the registered value of the share capital (Law no 31/1990, Art. 221[1]).

[12] Ibidem, Art. 236 para (3).

[13] Law no. 297/2004, Art. 240 para (2)-(4). Company Law states no special condition for the adoption of resolutions concerning the capital increase by in kind contribution (Law no 31/1990, Art. 215).

[14] Law no. 297/2004, Art. 240 para (1), (5). Company Law states regarding the annulment of the shareholders' preemptive right that such operation shall be decided in an assembly attended by shareholders representing at least 75% of the share capital subscribed, and with the vote of the shareholders holding at least 1/2 of the voting rights present or represented in the assembly. (Law no 31/1990, Art. 217).

[15] Law no. 297/2004, Art. 238.

the resolutions of the general meeting of shareholders[16].

5. Directors' election.

Election of directors follows an electoral voting system. The voting system put in force by the Company Law adheres to majority rule: all the directors from the board of directors are elected in the ordinary shareholders meeting with the vote of the shareholders holding at least a half plus one vote of the voting rights exercised in the meeting. Such majority rule assigns all seats of the board to a shareholder or shareholders who have obtained the majority[17].

As an alternate to majoritarian method the Capital Market Law accepts a proportional representation system by which divisions in shareholders' structure are reflected proportionately in the elected body (board of directors)[18]. The system used by the Romanian Capital Market Law is cumulative voting[19].

The members of the board of directors of the companies admitted to trading on a regulated market may be elected by cumulative vote. This method shall be mandatory at the request of any significant shareholder (which holds over 10% stake).

A cumulative voting system permits voters in an election for more than one seat council to put more than one vote on a preferred candidate (usually the cumulated votes are the shareholders' votes, attached to the shares, multiplied by the number of seats of the board). In order to work out such a system, any company where the cumulative vote method is applied shall be managed by a board of administration consisting of at least five members[20]. It is expected that voters in the minority concentrate their votes to a preferred candidate and increase their chances of obtaining representation in board of directors.

The application of the cumulative vote method is established by Financial Supervisory Authority (FSA – the Romanian supervisory body for capital market) regulation[21]. This regulation solves the weak points of the procedure: the number of elected seats and the dismissal procedure.

A shareholder or shareholders holding individually or together at least 5% of the share capital or a smaller share, if the instruments of incorporation so provide, may request at most once a year the call of a general shareholders meeting having on its agenda the election of the board of directors through the cumulative vote method[22].

The cumulated votes to which each shareholder is entitled are the votes obtained by multiplying the votes held by any shareholder, according to participation in the share capital, with the number of directors that will form the board of directors. The directors in function at the date of the general shareholders meeting shall be included in the list of candidates for the new board of directors and those one which are not reelected in the board of directors through cumulative vote are considered revoked. The application of the cumulative vote method requires the election of the entire board of directors, comprising of at least five members, in the same general shareholders meeting[23].

In exercising their cumulative votes, the shareholders may grant all the cumulated votes to a single candidate or to several candidates. The candidates who have been assigned most cumulated votes during the general shareholders meeting shall be declared elected members of the board.

6. Conclusions

The Romanian Capital Market Law (no 297/2004) was designed as a broad code for capital market. Therefore this law encompasses about everything about capital market, even special rules designed for issuers, companies traded on regulated market. The current trend in Romanian capital market rules reversed and now we observe a process of fragmentation of the Capital Market Law. Undertakings for collective investment in transferable securities (UCITS) and investment management companies are now subject of the Law No. 10/2015 approving Government Emergency Ordinance No. 32/2012 and the correspondent rules from the Capital Market Law have been repelled.

The issuers of the financial instruments are undertakings from very different fields, joint stock companies incorporated under Company Law. Strictly speaking the issuers are not subject of the Capital Market Law, but their titles are.

In this light the regulation of the listed company within the framework of the Capital Market Law is not necessary. These companies, the issuers, remain undertakings functioning following the rules laid down by the Company Law. Rules on

[16] Law no 31/1990, Art. 123.
[17] Majoritarian method is the only method accepted by Company Law (Law no 31/1990, Art. 112).
[18] Cristian Gheorghe, *Capital Market Law*, Bucharest: C.H. Beck, 2009, p. 291-312.
[19] Cumulative voting is implemented in US. (*See e.g., Minnesota Statutes, Section 302A.111 subd. 2(d). https://www.revisor.mn.gov/statutes/?id=302a.111).*
[20] Law no. 297/2004, Art. 235.
[21] Regulation no. 1/2006 on issuers of and operations with securities (issued by former Romanian National Securities Commission).
[22] Regulation no 1/2006, Art. 124 para (2).
[23] Regulation no 1/2006, Art. 124 para (3) – (8).

administration of the issuers and financial instruments will have the same fate as UCITS: they will be put outside the Capital Market Law.

The project of a unique Capital Market Code seems to be an illusion as FSA (Romanian Financial Supervisory Authority) prepared a draft[24] for a new law in order to segregate issuers and market operation from the Capital Market Law.

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- I. Turcu, *Teoria şi practica dreptului comercial român,* Bucharest: Lumina Lex, 1997.

[24] See *Draft Law on Issuers of financial instruments and market operations.* http://www.asfromania.ro/legislatie/consultari-publice?start=40.

IN-DEPTH ANALYSIS OF THE HISTORICAL TERMS RELATED TO THE COMMON LAW "TRUST"

Irina GVELESIANI[*]

Abstract

"It is at least possible that the trust will in the 21st century join those other English inventions, such as football and the steam engine, which have swept the world"[1]*.The given optimistic definition of common law "trust" enables us to regard it as a unique legal instrument. However, its origin is the source of numerous debates of the scholars of the world. Scientific literature presents three theories concerning the origin of the "trust": Roman, Germanic and Islamic. Until the nineteenth century, it had been believed, that the trust had been modeled on the Roman legal institution "fideicommissum". However, by the nineteenth century, the given theory was replaced by the new assumption, which proposed, that the Salic "Salmannus" had been a predecessor of the "trust". The debates about the origin of this institution were fueled by the fact, that the English "use" (an initial form of the trust), the Roman "fideicommissum" and the Salic "Salmannus" had the same cause of emergence: they emerged as a "result of positive-law deficiencies and restrictions concerning the ownership and devolution of property"*[2] *during those times, when the land was the principle form of wealth. The given paper presents an attempt to highlight the existed theories about the origin of the "trust" and make new conclusions on the basis of in-depth terminological analysis. Synchronic and diachronic approaches initiate insights into the juridical and lingual developments.*

Keywords: *Fideicommissum, law, Salmannus, terminological analysis, trust.*

1. Introduction

The trust is usually treated as a "product" of equity, while "use" is considered as a forerunner of the trust. The latter was created in the 13th-14th centuries as a mode of the transference of property. The landholder/transferor of the property was denoted by the term "***feoffor***". He enfeoffed (transferred) "the legal estate in the land to a "***feoffee to use***" (the trustee) to hold it to the use of a "***cestui que use***" (the beneficiary). The right of the claimant was a right called a "use"[1]. The feoffees were almost always three in number. They held the land "in joint tenancy with right of survivorship. This arrangement made it very unlikely that the legal title would descend from a last surviving feoffee to that feoffee's heir and give the lord a potential wardship. It was very common for the feoffor to be the cestuy que use"[2].

It's worth mentioning, that in Common law jurisdiction ***feoffee to use*** was regarded as an absolute owner of the property (i.e. Common law did not recognize the interest of the ***cestui que use***). D. J. Seipp indicated in this respect: "Feoffees to uses had the full legal title to land, the right to sell or grant it, and the ability to sue and be sued in relation to the land… beneficiary or *cestuy que use* had no interest enforced by courts of common law and no remedy in courts of common law against feoffees who misbehaved"[3]. In 1535 the frequent employment of the "***use***" led to the enactment of the Statute of Uses, which tried to convert all equitable uses into legal estates by eliminating the ***feoffee to uses*** making the beneficiary the legal owner. Therefore, the ***feoffment to uses*** was regarded as a fiduciary relationship, which lay at the heart of the earliest attempts to divide the legal and beneficiary ownerships.

2. Content

There have been a lot of debates about the forerunners of the ***use***. Moreover, the question of its origin has raised controversy among many scholars. "It has been suggested that "Roman, Canon and Germanic laws (sources of the European *Ius-Commune* tradition) have provided elements of the law of [the English law of] trust"[4]. M. Lopio even indicated, that the English Chancellors "drew on a wealth of thirteenth- and fourteenth-century civil law authority in their development of the English trust… it was therefore not far-fetched to refer to these civil law institutions as being the "foundation" of the English trust"[5]. Till the 19th century it had been

[*] PhD Civil Law, Ivane Javakhishvili Tbilisi State University (e-mail: **irina.gvelesiani@tsu.ge**).

[1] Judith Bray, *A student's guide to Equity&Trusts*. (New York: Cambridge University Press, 2012), 7.

[2] David J. Seipp, "Trust and fiduciary duty in the early common law", *Boston University Law Review*, 91 (2011):2015, accessed November 22, 2015 http://www.bu.edu/law/central/jd/organizations/journals/bulr/documents/SEIPP.pdf

[3] David J. Seipp, "Trust and fiduciary duty in the early common law", *Boston University Law Review*, 91 (2011):2016, accessed November 22, 2015 http://www.bu.edu/law/central/jd/organizations/journals/bulr/documents/SEIPP.pdf

[4] Tamar Frankel, "Towards universal fiduciary principles," accessed November 20, 2015 http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2009365

[5] *The Oxford Handbook of comparative law*, ed. M. Reimann et al. (Oxford University Press, 2008), 1088.

strongly believed, that the Roman law (the legal institution ***fideicomissum***) had stipulated the creation of the common law "trust". It had also been assumed, that "there was a momentary contact between Roman law – medieval, not classical, Roman law – and the development of the English *use*. Englishman became familiar with an employment of the word *usus* which would make it stand for something"[6] that just was not, though looked exceedingly like *dominium* – a full ownership. In the general sense "***usus***" meant "the act of using thing"[7]. As a personal servitude, it denoted "the right to use (ius utendi) another's property, without a right to the produce (fructis) of the thing"[8]. The classical Roman "***usus***" rejected the exploitation of the property for the personal benefit. It's significant, that the Latin terms "***usuarius***" and "***usuary***" denoted a trusted person (trustee) who had the right of ***usus*** on another person's thing. S. Herman even believed "that the clerical usus could have put the English onto the idea of "feoffment to uses", later trust, because of duties of loyalty and a division of enjoyment and administration"[9]. T. Frankel made more convincing statement via indicating, that the "***use***" dated from the 9th century "and was influenced by the doctrine of *utilitas ecclesiae*"[10].

The strong belief in the Roman origin of the "***trust***" radically changed at the end of the 19th century. Moreover, the Roman theory was criticized via relying on the fact, that similarities between the **"*fideicomissum***" and "***use***" were superficial, for instance, the "use" rarely arose by means of a will, while "*fideicomissum*" was a testamentary bequest. Moreover, "for the "*fideicomissum*" the beneficiary (the fideicommissarius) was considered the real owner of the transferred property, while for the English use, the third party intermediary (the feoffee to uses) held legal title to the transferred property"[11]. It was even mentioned, that the English word "***use"*** had not derived from the Latin "***usus"***. Its appearance was connected to the Latin phrase "***ad opus***", which occurred as early as Merovingian times in France and was transmitted to England in the 9th century.

Therefore, at the end of the 19th century the origin of the "***trust***" was vividly called into question. This process was especially stipulated by the fact, that US Supreme Court judge, Justice Oliver Wendell Holmes, expressed his extremely convincing view on the given subject. Holmes stated, that the English "***trust***", like the German "***Salman"/"Treuhand***", had sprung from Germanic roots and the feoffee to uses of the early English law corresponded "point by point to the Salman of the early German law"[12]. The same idea was accepted by the well-known scholars of different centuries: T. Frankel, A.V. Venedictov, English legal historian F. Maitland, German researches R. Helmholz and R. Zimmermann (the creators of the book "*Itinera Fiduciae: Trust and Treuhand in Historical Perspective*") and others.

T. Frankel indicated, that "Salic law influenced [the] development of the use" in England. Under the sixth-century Salic law, a trusted person (***Salman*** or ***Treuhand***) could become a trustee by receiving "property from a grantor on behalf of beneficiaries. Usually grantors held on to their property until death and the Salman transferred the grantor's property after the grantor's death"[13].

A.V. Venedictov also stated that the German "***Treuhand***" and the English "***trust****"* sprung from the similar root – the Old German law. Moreover, he strongly believed, that "the reception of the Roman law in Germany impeded the development of this institution and it did not spread as widely as in England"[14]. F. Maitland made more precise description of his conception via indicating to the origin of the institution of "***use***": "the use appeared in Germanic sources in the records of the early Franks and Lombards, which was then Gallicized to "*al os*" and "*ues*" and as such made its entry into the *Domesday Book* and the Laws of William the Conqueror. From the Germanic sources the phrase was transformed into the Anglo-Saxon books of the ninth-century and evolved into the English term of use"[15]. T. Zartaloudis added some important details to this viewpoint. He believed, that: "the early use had as its primary meaning "benefit" and is said to be derived from *ad opus* (*ad opus meum, tuum, seum* meaning on my behalf, or yours, or his) which in old French became *oes, os* or *ues* and which was arguably then fused with the term "use". *Ad opus et ad usum* were, in fact, often seen as interchangeable,

[6] Thanos Zartaloudis, "Theories of origin as to the progenitor of the trust: the invention of the uses and the Franciscan influence in England", accessed November 30, 2015. http://www.academia.edu/3568421/On_the_Origin_of_the_Uses_and_Trusts

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[10] Tamar Frankel, *Fiduciary law,* (Oxford University Press, 2011), 95.

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written in the full formula of *ad opus et ad usum*"[16]. Domesday Book (1086) – a manuscript record of the "Great Survey" of English landholding – noted that the "lands said to have been held *ad usum* (to the use of) someone or other. These were probably lands put temporarily in the custody of others, such as when a landholder went off on a pilgrimage"[17].

During the investigation of the relationship between the "*trust*" and the "*Treuhand*"/"*Salman*"/"*Salmannus*", the greatest attention must be paid to the question of the origin and evolution of the latter.

The institution of "***Salman***" "dates back to the fifth-century legal code of the German tribe of the Salian Franks, the Lex Salica"[18]. O. W. Holmes stated in this respect: "In the Lex Salica – the law of Salian Franks - you find going back to the fifth century a very mysterious person, later named the Salmannus – the sale man – a third person who was called in to aid in completing the transfer of property in certain cases. The donor handed to him a symbolic staff which he in due season handed over in solemn form to the donee"[19].

Generally, the institution of "Salman"/"Salmannus "entailed the transfer of the transferor's property during his lifetime to a Salmannus, a person trusted to transfer the property to a designated beneficiary upon the death of the original transferor"[20]. The transaction could be done either *inter vivos* or *postmortem* i.e. after a transferor's death. It's a well-known fact, that the early Germanic law did not present testamentary transactions. Despite this fact, „***Treuhand mortis causa"*** could come into effect. In such cases a "special part of the estate, or even the entire estate, was transferred to a person or an institution in whom the transferor had confidence, under certain instructions about the final disposition of the property"[21]. Therefore, postmortem transactions authorized by the ***Salmannus*** replaced the process of inheritance. Moreover, "the use of the Salmannus permitted the transferor to adopt or appoint an heir"[22]. An adoption was named by the term "***affatomie***".

Chapter 46 of the Lex Salica gives a precise description of the process of "***affatomie*"**, which was divided into three major stages: initially, the adopter held the meeting *(mallus)*, where he "gave a stick *(festuca)* to a third person *(salmann)* (threw it into his lap). Simultaneously with the handover of the stick, the adopter expressed his wishes and handed over his property, or a part thereof, to the salmann. In the second stage, the salmann moved into the house of the adopter, that is, the property was transferred *(sessio triduana)*. He was required to stay in the house of the adopter for at least three days and receive at least three guests. The meeting certified such transfer of the property. In the closing stage, subsequently, but within twelve months, the salmann gave the stick to the heir at the meeting, in the presence of the king. As a result of the above procedure, the testator transferred his property to the adoptee"[23]. The given passage vividly reveals the details of the transaction, which considered the transference of the property to the salmann by the future testator via instructing him to pass it to third persons upon his death. Therefore, we can consider ***Salmannus*** as a person through whom an effect was given to a transfer and "hence, the anglicized 'saleman'"[24].

An in-depth study of the German law vividly depicts how the technique of "***affatomie***" gradually developed into the "***Vergabung von Todes Wegen****"* - "an inter-vivos transfer of a particular item of property in which the transferor reserved a life estate to himself"[25]. After the flow of time the scope of a transfer changed from a particular item of the ownership to a portion of an owner's entire property or the entire property itself. Moreover, "***Vergabung von Todes Wegen****"* started to consider the transference of the ownership after the owner's death. Therefore, the **Salman** had to deal with both *inter vivos* and *postmortem* transfers.

The scientific literature indicates to one more instance of the appearance of the concept of ***Salman***. In certain cases this person held the property for someone, who was temporarily away on a journey. G. P. Verbit indicated in this respect: "Someone going off on a journey might leave the property in

[16] Thanos Zartaloudis, "Theories of origin as to the progenitor of the trust: the invention of the uses and the Franciscan influence in England", accessed November 30, 2015. http://www.academia.edu/3568421/On_the_Origin_of_the_Uses_and_Trusts

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[19] *The essential Holmes selections from the letters, speeches, judicial opinions, and other writings of Oliver Wendell Holmes, Jr.*, ed. R. A. Posner, (The USA: The University of Chicago, 1992), 187.

[20] Charles E. Rounds, *Loring and Rounds: A Trustee's Handbook* (New York: Wolter Kluwer, 2012), 1182.

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[22] William S. Holdsworth, *A History of English Law* (3d ed. 1945), 410–411.

[23] Istvan Sándor, *A bizalmi vagyonkezelés és a trust,* (Budapest: hvgorac, 2014), 92.

[24] Monica M. Gaudiosi, "The Influence of the Islamic Law of Waqf on the Development of the Trust in England" 136, *U. Pa. L. Rev.* (1988): 1231, 1243.

[25] Gilbert Paul Verbit, *The origins of the trust,* (the USA, 2002), 98.

the hands of a Salman to be turned over to a third party in the event that the donor did not return"[26].

The diachronic study of the German law indicates, that the German documentary evidence cannot "discover a document that actually uses the term Salman before 1108 CE"[27]. Moreover, there are two major considerations about the origin of the terminological unit ***"Salman"/"Salmannus".*** According to W. Holdsworth's "A history of English law", "*Salmannus*" derived from the word "*sala*," which means "*to transfer*"[28]. R. Zimmermann urgues, that this term is etymologically related to "*sale*"[29], while I. Sandor directly indicates, that *salmann* appeared around 1108, meaning a quasi independent agent[30]. Controversial ideas are also met during the examination of the utilization the word ***Salmann.*** I. Sandor states, that it "is not found in Anglo-Saxon law"[31]. G. P. Verbit supports I. Sandor's idea and indicates, that "the term Salman has never been identified in any document originating in England"[32].

During the study of the utilization of the word "***Salman***" the greatest attention must be paid to Avini's statement. According to his words: "evidence of the use of the *Salmannus* in post mortem transfers of land in twelfth-century England provides the basis for the proposition, that the *Salmannus* developed into the feofee to uses"[33]. W. Holmes has expressed almost the same idea. He indicated, that "the English use originated in the eleventh century when during the Norman Conquest elements of teutonic Salic law were arguably imported by the Conqueror. Brown has suggested that the theory could also rely on the migrations of Germanic tribes to England more generally during the fifth century"[34].

All the above mentioned enables us to make some in-depth analysis of the relationship between ***"Salman"/ "Treuhand"*** and ***"use"/"trust".***

On the one hand, W. Holmes' theory of Germanic origin of "trust" seems quite acceptable even nowadays. "… The word "trust" is itself like a chameleon, changing its colors to fit its environment. The same comment might easily have been made about *fiducia* in Italy or France, or even the *Treuhand* in Germany"[35]. Many scholars argue, that during the expression of the assumptions about Germanic origin of "trust", W. Holmes has never offered a theory how the concept of the ***Salman*** managed to cross the Channel. He only suggested, that during the Norman Conquest the elements of teutonic Salic law were imported by the Conqueror and the frequent contacts between various parts of England and the Frankish legal system certainly provided the opportunity for borrowing the legal ideas.

On the other hand, all the scholars agree, that Normans' conquest of 1066 transformed the English language forever. For more than three hundred years French was the language of power, aristocracy and royalty. Thousands of French lexical units entered the vocabulary of the English language. There was one very significant fact - after the Norman Conquest the French language was introduced to the English court. The court proceedings started operating with three languages: French, Latin and English. "Legal expressions in all three languages were therefore used simultaneously, and it is not surprising that both Latin and French have had a lasting influence on legal English"[36]. Therefore, one can suppose that after the withdrawal of the Roman legions in the fifth century, Germanic tribes migrated to England, and the ***Salmannus*** was introduced with the Norman conquest of the eleventh century.

3. Conclusions

The given paper presents an in-depth analysis of the historical terms related to the common law „trust" and „trust-like" institutions. It deals with an innovative approach towards the investigation of juridical institutions via simultaneous presentation and research of linguistic and legal data. Therefore, the terminological- juridical analysis of the relationship between ***"Salman"/"Treuhand"*** and ***"use"/"trust"*** enables us to single out the following outcomes:

The major peculiarities of the *"**Treuhand***" apparently correspond to the main features of the "***trust":*** "a person, *Salmannus*, is charged with administering property in the interest of another person or for a designated purpose. He does not

[26] Gilbert Paul Verbit, *The origins of the trust,* (The USA, 2002), 104.
[27] Gilbert Paul Verbit, *The origins of the trust,* (The USA, 2002), 109.
[28] William S. Holdsworth, *A History of English Law,* (3d ed. 1945), 410.
[29] Richard Helmholz and Reinhard Zimmerman, "Views of Trust and Treuhand: An Introduction", *Itinera Fiduciae Trust and Treuhand in Historical Perspective,* ed. Richard Helmholz et al. (Berlin: Duncker&Humblot, 1998), 40.
[30] Istvan Sándor, *A bizalmi vagyonkezelés és a trust,* (Budapest: hvgorac, 2014), 95.
[31] Istvan Sándor, *A bizalmi vagyonkezelés és a trust,* (Budapest: hvgorac, 2014), 95.
[32] Gilbert Paul Verbit, *The origins of the trust,* (The USA, 2002), 104.
[33] Thanos Zartaloudis, „Theories of origin as to the progenitor of the trust: the invention of the uses and the Franciscan influence in England," accessed November 30, 2015. http://www.academia.edu/3568421/On_the_Origin_of_the_Uses_and_Trusts
[34] Thanos Zartaloudis, „Theories of origin as to the progenitor of the trust: the invention of the uses and the Franciscan influence in England," accessed November 30, 2015. http://www.academia.edu/3568421/On_the_Origin_of_the_Uses_and_Trusts
[35] Reinhard Zimmermann, "Heres fiduciarius?" *Itinera Fiduciae Trust and Treuhand in Historical Perspective,* ed. Richard Helmholz et al. (Berlin: Duncker&Humblot, 1998), 278.
[36] Vanessa Sims, *English law and terminology*, (Lingua Juris, Auflage, 2010), 17.

administer the property for his personal interest. The relationship between the *Salmannus* and the beneficiary is of a fiduciary nature. Furthermore, the Treuhand serves many of the purposes of the trust"[37];

Similarly to the "***Trust***", the "***Salman***" relied on confidence;

The "***Salman***" could develop into the "***feofee to uses***" (a predecessor of "trust"), because both of them were often used for the transfer of land after a grantor's death. Moreover, in both cases grantors were entitled to use the land before their death;

The similarity of the English and German practices can be revealed via the discussion of the usage of their institutions. The "***Salman***" had different forms of usage. It was often used in cases of longer travels or for financial reasons: "Someone going off on a journey might leave the property in the hands of a *Salman* to be turned over to a third party in the event that the donor did not return or a *Salman* who was a freeman might function as owner of property for fiscal purposes, where the beneficial ownership was in a person who could not hold property"[38]. Resting the title to property in the name of ***Salman*** was especially useful during the periods of political unrest. Among these forms of the usage of the institution of "***Salman***", a special attention must be paid to the transference of the property to ***Salman*** during an owner's longer travels, because this mode of transference shows a particular resemblance with the forerunner of the common law ***"trust"*** - the institution of ***"use"/"use of land***" - which was connected with the land ownership during the times of the Crusades. When a landowner (knight) left England to fight in the Crusades, he needed an "acting administrator" for his estate. The administrator (usually, a close friend of a transferor) was obliged to run the ownership and pay feudal dues. After an owner's return all legal rights on the estate had to be transferred back to him;

The similarity of the English and German practices can also be revealed via the discussion of the historical rituals. D. T. Smith directly indicated, that according to the Salic law "the Salmannus was handed a symbolic staff by the donor, which he, in due course, and with due solemnity, handed to the done. A virtually identical ritual took place in England until modern times with respect to the transfer of copyhold, whereby a staff was handed to the steward of the manor as a first step in conveying copyhold land to another, the surrender to the steward being an expression to the use of the done or purchaser"[39];

During the discussion of the English and German practices one should take into consideration, that the "***trust"*** is proprietary in nature, while the modern "***Treuhand"*** is contractual. However, we have to rely on the assumption of old English scholars, who "characterized the trust as depositum, focusing on the contractual character of the trust"[40]. In this case we can approximate it to the concept of ***Treuhand.***

Therefore, all the above given data enable us to suppose, that the "trust" may have Germanic roots. However, the further investigations are needed for making the final conclusions.

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[37] C.H. van Rhee, "Trusts, Trust-like Concepts and Ius Commune", *European Review of Private Law*, 3 (2000): 459.
[38] Gilbert Paul Verbit, *The origins of the trust*, (the USA, 2002), 103.
[39] David T. Smith, "The Statute of Uses: A Look at its Historical Evolution and Demise", *Western Reserve Law Review 18* (1966): 40-63.
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"TREUHAND" AND "FIDUCIE" (TERMINOLOGICAL PROBLEMATICS)

Irina GVELESIANI[*]

Abstract

Language and jurisprudence are deeply interconnected. The legal terminology of any language as well as the legal system itself is a result of "a historical evolution which did not happen on its own, as if in a vacuum, but in constant interchange with other legal languages and legal systems"[1].

Contemporary jurisprudence faces a lot of new opportunities and changes. Increasing globalization breaks down all the barriers via the "dédaublement du monde". It involves the reconstruction of all spheres of life. Within the framework of globalizing changes Europe is facing the tendency "to draw up a uniform law on the basis of work by experts in comparative law and to incorporate it in a multipartite treaty"[2]*.The creation of uniform legal system presupposes the change of terminological landscape. Therefore, the comparative study of juridical terms and suppositions regarding new translational tendencies acquire the greatest urgency.*

*The give paper deals with the study of the Swiss "trust-like mechanisms". The major emphasis is put on the actual problems emerged during the translation of terminological units related to such juridical institutions as the "**Fiducie**" and "**Treuhand**".*

Keywords: *fiducie, institution, Swiss, Treuhand, trust.*

1. Introduction

"Trust as a legal model developed by English courts over centuries and later refined in several jurisdictions based on the same legal tradition has been so successful that it serves both as an inspiration, a brand-name, and a benchmark"[1]. The "trust" considers the participation of three parties (a ***trustor***, a ***trustee***, a ***beneficiary***) and requires the separation of the ownership of property between two parties - a trustee receives a legal title, while a beneficiary acquires an equitable title.

The popularization of a trust instrument has been facilitated by its unique character stipulated by the duality of ownership inherent in the common law. The given duality "stems from a basic procedural dichotomy in Anglo-American law, between the bodies of common law and equity"[2]. The same dichotomy cannot be met in the civil law jurisdictions. However, majority of contemporary civil legal systems aspire to adopt entrusting regulations in order to "take away the labels" of non-trust jurisdictions. The given aspiration has been fuelled by certain conditions:

- the globalization of the legal practice has exhibited an overall tendency of unification and harmonization of legal systems of the world countries;
- "the dominance of U.S. and English law firms has promoted the use of trusts in complex transactions including non-trust jurisdictions and fuelled a broader worldwide circulation of Anglo-American legal concepts and instruments, increasing contacts of non-trust jurisdictions with trustees and trust assets"[3];
- the mass migration of the world population has stipulated the flow of trust property to the inhabitants of the non-trust states;
- the ratification of the Hague Convention on the Law Applicable to Trusts and on their Recognition by certain countries has increased the need of reconciliation of the Anglo-American trust with the principles of the civil law;
- "all mature legal systems have catered in various ways to the same needs that have promoted and informed the development of the common law trust: division between the economic value of assets and their holding and management; complex and flexible allocation of the economic value of assets among different beneficiaries or classes of beneficiaries; customization of the powers and duties of the managers to suit the purpose of the arrangement; etc."[4].

[*] Irina Gvelesiani, PhD, Faculty of Humanities, Ivane Javakhishvili Tbilisi State University (e-mail: **irina.gvelesiani@tsu.ge**).

[1] Mauro Bussani and Ugo Mattei, ed. *The Cambridge companion to comparative law*, (Cambridge: Cambridge University Press, 2012), 91.

[2] Konrad Zweigert and Hein Kötz, *An introduction to comparative law* (Oxford: Crarendon Press, 2011), 24.

[1] Luc Thévenoz, "Trusts: the rise of a global legal concept," in: *European private law: a handbook (volume II)*, ed. Bussani, Mauro et al. (Berne: Stämpfli, 2014), 34.

[2] Michael Milo, Jan Smits, "Trusts in mixed legal systems: a challenge to comparative trust law," *European Review of Private Law* 3 (2000), 421.

[3] Luc Thévenoz, "Trusts: the rise of a global legal concept," in: *European private law: a handbook (volume II)*, ed. Bussani, Mauro et al. (Berne: Stämpfli, 2014), 27-28.

[4] Luc Thévenoz, "Trusts: the rise of a global legal concept," in: *European private law: a handbook (volume II)*, ed. Bussani, Mauro et al. (Berne: Stämpfli, 2014), 35.

2.1. Swiss law

Switzerland is one of those European countries, which aspires to the implementation of the common law "trust". It's worth mentioning, that "Swiss courts have been dealing with trusts since 1874 and the Swiss government authorized the settling of foreign business trusts since 1957"[5]. However, the English term "trust", which existed in Swiss legal domain conveyed quite non-English meaning. It denoted "a monopolized concern having subsidiary companies, which abandoning their individual economic existence, are fused together with the parent company to such a unity that its centralised management has a monopolistic control of the market"[6]. Besides the English word "*trust*", Swiss juridical system used such terminological units as *Treuhand, fiducia, fiducie, Fiduzia*. These lexical units denoted fiduciary relationships and depicted the existence of three state languages in Switzerland. E. Huber – the author of the paper "*Trust and "Treuhand" in Swiss law*" – directly indicated: "if we wish to speak about "trust" in Switzerland in the Anglo-American sense we translate the word into German with Treuhand, in French with Fiducie, in Italian with Fiducia… Speaking of the Treuhand we distinguish between the Treugeber (in English settler, in French fiduciant, in Italian fiduciante), the Treuhänder (in English trustee, in French fiduciaire, in Italian fiduciario) and the Begünstigter (in English beneficiary, in French beneficiaire, in Italian beneficiario)"[7]. Can we share E. Huber's viewpoint and identify the common law "*trust*" with *Treuhand, Fiducie* and *Fiducia*? The given paper makes an attempt to answer this question via making certain juridical-linguistic analysis.

2.2. Swiss Treuhand

Initially, the Swiss ***Treuhand/fiducie*** was considered as a modernization of the ancient Roman "fiducia". This Roman legal institution comprised two distinct acts: "a disposal, using the formalistic procedure of *mancipatio*, whereby the creator transfers to the fiduciary the ownership of the fiduciary property; and a distinct agreement, the *pactum fiduciae*, whereby the fiduciary undertakes to restore this property to the creator under certain conditions"[8]. It's difficult to identify the origin of the Swiss "fiducie". However, we can watch over its development after the ratification of the Hague Convention.

It's a well-known fact, that in 2007 Switzerland ratified the Hague Convention on the Law Applicable to Trusts and on their Recognition of the 1st of July, 1985. The ratification of the Hague Convention has facilitated the introduction of certain significant provisions in the SPILA and SDCBA (*Swiss Private International Law Act* and *Swiss Debt Collection and Bankruptcy Act*). "In the latter legislation, a new provision specifies that trust assets constitute a separate fund independent from the trustee's own patrimony"[9]. The existence of a separate fund indicates to the notion of a segregated patrimony. However, despite this fact, the scholars express different ideas regarding the existence of *Trust law* in Switzerland. A. E. von Overbeck believes, that "there is no institution called "trust" in Swiss law, and until recently no other institution which could meet the conditions of the Principles"[10]. D.W. Wilson and C. L. Nagai express almost the same idea: "The Anglo-American trust has not (yet) found its way into the Swiss legislation: there is currently no Swiss substantial law on trust"[11]. Many scholars believe, that the Swiss "*fiducie (Treuhand)* is the nearest cousin of the trust"[12], while Hungarian scholar I. Sandor supposes that "in the laws of Switzerland, the Treuhand (*Fiduzia*) is the unique equivalent of the trust"[13]. Moreover, I. Sandor presents more precise description of Swiss fiduciary relationships:

"In case of the Treuhand, the settler (*Fiduziant, Treugeber*) transfers the property (*Treugut*) to the trustee (*Fiduziar, Treuhänder*). The Fiduziar acquires legal title to the property and undertakes a contractual obligation to use the property for the benefit of the settler or third parties, as instructed by the settler"[14].

According to the given definition, the major participants of Swiss entrusting relationships are:

[5] David W. Wilson and Caroline L. Nagai, "Country report: Switzerland." *The Columbia Journal of European Law Online* 18 (2012): 26, accessed November 30, 2015 http://www.cjel.net/wp-content/uploads/2012/08/CJEL-Trust-Law-Final1.pdf

[6] Erich Huber, "Trust and Treuhand in Swiss law," *The International and Comparative Law Quarterly* 1 (1952): 64.

[7] Erich Huber, "Trust and Treuhand in Swiss law," *The International and Comparative Law Quarterly* 1 (1952): 64.

[8] Luc Thévenoz and Jean-Philippe Dunand, "The Swiss fiducie: a subtle conceptual blend of contract and property," in: *Madeleine Cantin Cumyn. Fiducie face au trust dans les rapports d'affaires.* (Bruxelles: E. Bruylant, 1999), 326.

[9] David W. Wilson and Caroline L. Nagai, "Country report: Switzerland." *The Columbia Journal of European Law Online* 18 (2012): 27, accessed November 30, 2015 http://www.cjel.net/wp-content/uploads/2012/08/CJEL-Trust-Law-Final1.pdf

[10] A.E. von Overbeck, "National report from Switzerland," in: *Principles of European trust law, Law of business and finance*, ed. D.J. Hayton et al. (Kluwer Law International, 1999), 105.

[11] David W. Wilson and Caroline L. Nagai, "Country report: Switzerland." *The Columbia Journal of European Law Online* 18 (2012): 26, accessed November 30, 2015 http://www.cjel.net/wp-content/uploads/2012/08/CJEL-Trust-Law-Final1.pdf

[12] Luc Thévenoz, "Trusts: the rise of a global legal concept," in: *European private law: a handbook (volume II)*, ed. Bussani, Mauro et al. (Berne: Stämpfli, 2014), 33.

[13] István Sándor, *Fiduciary property management and the trust (Historical and comparative law analysis)*, (Bucharest: HVG-ORAC Publishing Ltd., 2015), 302.

[14] István Sándor, *Fiduciary property management and the trust (Historical and comparative law analysis)*, (Bucharest: HVG-ORAC Publishing Ltd., 2015), 302.

Fiduziant/Treugeber - a transferor;

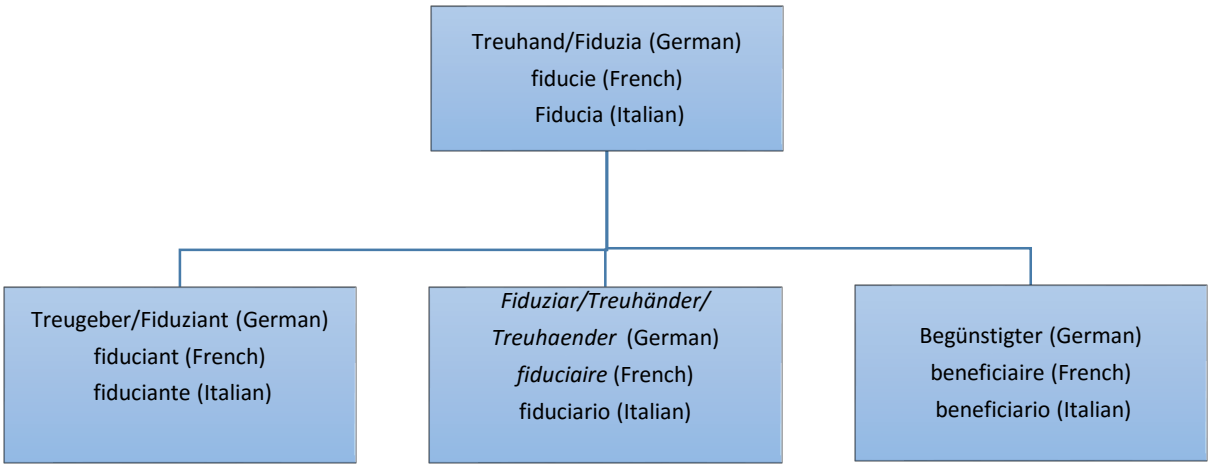
Fiduziar/ Treuhänder - a transferee;

Begünstigter – a beneficiary, who is presented by a settler or third parties.

It's worth mentioning, that H. Meyer uses the German term "*Treuhaender"* for denoting a "transferee". He states that the "*Treuhaender"* in Switzerland can never be in the same position as a trustee in England or in the United States. He is either more or less… For that reason *"Treuhaender"* should never be translated as *"trustee",* but rather as *"fiduciary"…*[15]. In certain cases, the given German terminological units can be substituted by their French equivalents, which are presented in Rapp's following definition:

"*Contrat par lequel une personne, le fiduciant, transfère un droit à une autre, le fiduciaire, qui s'oblige à en user selon les indications du fiduciant, en général à le retransférer dans certaines conditions*"[16].

Therefore, *Fiduziant/Treugeber* can be presented by the French term *fiduciant*, while *Fiduziar/Treuhänder* can be substituted by *fiduciaire*. Even the Treuhand is often designated by *fiducie* (*acte fiduciaire)* or *Fiduzia*. The given terminological equivalency can be presented in the following way:



The major disadvantage of the Swiss entrusting relationships lies in the fact, that:

- the *Treuhand* is based on the rules of mandate (mandat, Auftrag);
- in contrast to the common law trustee (transferee) the Swiss *Fiduziar/Treuhänder* acquires the full legal title on the transferred property;
- there is the lacking of the separation of the *Treuhander*'s own property;
- as a result of the *pactum fiduciae*, the *Fiduziant/Treugeber* becomes less protected and in cases of the insolvency "the beneficiary is not ranked above the other creditors"[17];
- "the fiduciant can give the fiduciary any instructions at any time, while normally the settler cannot interfere with the management or disposition of the trustee"[18].

These facts directly indicate that the Swiss entrusting relationships differ from the Anglo-American "*trust*". However, there is the possibility of the establishment of the original "*trust*" in those cases when a settler chooses the foreign law as a governing one.

2.3. Swiss foundation (fondation, Stiftung)

Some scholars believe, that the Swiss foundation (*Fondation, Stiftung*) can be regarded as an analogue of the common law "*trust*". Foundations (except ecclesiastical and family foundations) are usually registered in the "*register du commerce*". The so-called "*family foundations*" can be constituted by dedicating a patrimony to a particular family. According to Articles 355 ff. of the Swiss Civil Code:

"The family foundation which is a legal person and has the potential to continue indefinitely, allows the creation of a mass of property dedicated to the

[15] Hermine Herta Meyer, "Trusts in Swiss law," *The International and Comparative Law Quarterly* 1 (1952):318.

[16] A.E. von Overbeck, "National report from Switzerland," in: *Principles of European trust law, Law of business and finance*, ed. D.J. Hayton et al. (Kluwer Law International, 1999), 105.

[17] István Sándor, *Fiduciary property management and the trust (Historical and comparative law analysis)*, (Bucharest: HVG-ORAC Publishing Ltd., 2015), 303.

[18] A.E. von Overbeck, "National report from Switzerland," in: *Principles of European trust law, Law of business and finance*, ed. D.J. Hayton et al. (Kluwer Law International, 1999), 110.

payment of the costs involved in educating and setting up in life the members of a family, or providing them with subsistence"[19].

The Swiss foundations are mostly used for charitable, cultural or similar purposes, for instance, they comprise the dedication of the property to such specific intentions as the "maintenance of a building, the commemoration of an event, or the establishment of a profit-sharing plan for the employees of an enterprise", etc.[20]. Therefore, foundations function almost similarly to the Anglo-American "*charitable trusts*". However, they cannot be created for the benefit of a specified person. Moreover, "the foundation cannot easily be used for beneficiaries in the manner in which this is done by trust law. Swiss law has its own brand of rule against perpetuities. *Fidéicommis de famille* may not ne constituted (Article 335, 2 CC) and *substitution fidéicommisaire* is limited to one reversionary heir (Article 488 CCS)[21].

2.4. Terminological insights

A profound study of the contemporary Swiss ***Treuhand/fiducie*** and foundation (***Fondation, Stiftung)*** enables us to treat these institutions as the modern "*trust-like devices*", which do not represent the analogues of the Anglo-American "*trust*". In this case the scholars and especially, the linguists have to deal with a serious problem raised "by the need to name and discuss in English a number of legal transactions or institutions that are redolent of trust (e.g. "fiducia", "Treuhand"), but are governed by Austrian, Italian, German, Spanish law, etc. Could these transactions be described as "trusts", even though the concepts employed to analyse them had nothing or little in common with the building blocks of the law of trusts in common law jurisdiction?"[22].

Answering this urgent question demands the investigation of terminological units related to the modern European "trust-like devices". In case of the Swiss law the major emphasis must be put on the term "***Treuhand***", which is often significantly misinterpreted, for instance, "Routledge German Dictionary of Business, Commerce, and Finance" presents the following English equivalents of the German lexical units related to the "***Treuhand***":

"Treuhand – Trust;

Treuhänder – Trustee, fiduciary;

Treugeber – settlor, transferor, trustor (AmE)"[23].

It is also significant to pay attention to the equivalences, which are presented in the contemporary multilingual dictionaries. L. D. Egbert's "Multilingual Law Dictionary" (English-French-Spanish-German) comprises the following German counterparts of the English terms denoting the legal institution of *"trust"* and participants of the entrusting relationships:

"**trust**

Kartell (m); Trust (m); Treuhandverhältnis (n); Vertrauen (n).

trustee

Vermögensverwalter (m); Treuhänder (m)"[24].

"**beneficiary**

Begünstigter (m) (aus einem Versicherungsvertrag);

Empfänger (m) einer Erbschaft (f)"[25].

The existence of almost all the above mentioned equivalents makes obscure the essence of *„**Treuhand**"* and equalizes it with the Anglo-American *"trust"*. Some scholars have thoroughly discussed this question, for instance, Sh. A. Stark directly indicated, that the term *„**Treuhand**"* has a purely German origin: "the German word "*treu*" means true and implies faithful"[26]. Despite this fact "the word *Treuhand* is not a clear term in German, it cannot be exclusively described as a trust in English either"[27]. According to J. Rehahn and A. Grimm the term *„**Treuhand**"* must be translated as *„**German trust**"*[28]. We share the given scholars' ideas and believe, that according to the Swiss legal reality, the term *„**Treuhand***" must be translated as *"**Swiss trust**"*, while the English term *"trust"* can be equalized only with the German term *"trust*", which is presented in L. D. Egbert's "Multilingual Law Dictionary". Moreover, it is recommended to

[19] Lionel Smith, ed., *Re-imagining the trust: trusts in civil law*, (UK: Cambridge University Press, 2012), 17.

[20] Lionel Smith, ed., *Re-imagining the trust: trusts in civil law*, (UK: Cambridge University Press, 2012), 17.

[21] A.E. von Overbeck, "National report from Switzerland," in: *Principles of European trust law*, *Law of business and finance*, ed. D.J. Hayton et al. (Kluwer Law International, 1999), 109.

[22] Michele Graziadei, Ugo Mattei and lionel Smith, *Commercial trusts in European private law*, (Cambridge: Cambridge University Press, 2005), 53.

[23] *Routledge German Dictionary of Business, Commerce, and Finance: German-English/English-German*, (Psychology Press, 1997).

[24] Lawrence Deems Egbert and Fernando Morules-Macedo, *Multilingual Law Dictionary*, (Baden-Baden: A.W. Sijthoff-Alphen Aan Den Rijn Oceana Publications, 1979), 260.

[25] Lawrence Deems Egbert and Fernando Morules-Macedo, *Multilingual Law Dictionary*, (Baden-Baden: A.W. Sijthoff-Alphen Aan Den Rijn Oceana Publications, 1979), 37.

[26] Shelley A. Stark, *Hidden Treuhand: how corporations and individuals hide assets and money*, (Florida: Universal-Publishers Boca Raton, 2009), 1.

[27] Shelley A. Stark, *Hidden Treuhand: how corporations and individuals hide assets and money*, (Florida: Universal-Publishers Boca Raton, 2009), 3.

[28] Johannes Rehahn and Alexander Grimm, "Country report: Germany," *The Columbia Journal of European Law Online* 18 (2012), p. 94, accessed November 22, 2015 http://www.cjel.net/wp-content/uploads/2012/08/CJEL-Trust-Law-Final1.pdf

translate the "***Treugeber***" as the "*Swiss trustor/settlor*" and nominate the "***Begünstigter*** " as the "*Swiss beneficiary*".

The similar problems of interpretation occur in cases of the French terminological units, for instance, L. D. Egbert's "Multilingual Law Dictionary" presents the following French equivalents of the English terms denoting the legal institution "*trust*" and participants of entrusting relationships:

"trust

cartel (m); confiance (f); trust (m); fidéicommis (m)"[29];

"**beneficiary**

bénéficiaire (m)"[30].

The existence of almost all the above mentioned equivalents makes obscure the essence of "***fiducie***". However, we believe, that the equalization of the English term *"trust"* with the French word *"trust*" is the best way of the maintenance of the essence of the Anglo-American entrusting relationships. Moreover, it is preferable to denote the French term "***bénéficiaire***" with the word-combination **"***Swiss beneficiary***".**

3. Conclusions

Therefore, the juridical-economic study of the contemporary Swiss reality vividly reveals, that it has no single institution which performs all the functions performed by the common law "*trust"*. Even the "***Treuhand"*** - a prime example of fiduciary arrangements - is irreconcilable with the ***"trust",*** especially, in the following aspects:

- the lacking of the separation of the *Treuhander*'s own property;
- the acquisition of the full legal title on the transferred property by the *Fiduziar/Treuhänder*;
- the lacking of the full protection of the *Fiduziant/Treugeber* (as a result of the *pactum fiduciae*);
- the *fiduciant*'s right of giving the fiduciary any instructions at any time.

All the above mentioned directly indicates to the following prominent fact: the Swiss ***Treuhand/fiducie*** cannot be equalized with the Anglo-American "***trust"*** neither juridically, nor linguistically. Therefore, significant changes must be done in the terminological sphere in order to reflect the difference between the common law "***trust***" and Swiss "***Treuhand/fiducie***". We believe, that the term *„**Treuhand***" must be translated as *"**Swiss trust**",* while the English term *"**trust**"* can be equalized only with the German term *"trust*". Moreover, it is recommended to translate the "***Treugeber***" as the "*Swiss trustor/settlor*" and nominate the "***Begünstigter*** " as the "*Swiss beneficiary*". In case of the French terminological units the equalization of the English term *"**trust**"* with the French word *"trust*" is the best way of the maintenance of the essence of the Anglo-American entrusting relationships. It's also recommended to denote the French term "***bénéficiaire***" with the word-combination **"***Swiss beneficiary***".**

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MORAL DAMAGES IN ACCIDENT INSURANCE (RCA INSURANCE) ARE THERE SUFFICIENT CRITERIA?

Anca-Iulia HÂNC[*]

Abstract

The objective of this study is a synhtetical discussion of the Romanian judicial practice regarding the moral damages in accident insurance(RCA insurance or civil liabilty for cars insurance), with a focus on the objective determination of the prejudice for the affected parts in Court decisions.This effort is motivated by the limitations of the Romanian legislation:arguably, the current judicial practice is not unitary, even within the same Court of Appeal.Judges' interpretation of the same normative acts and laws in this domain are often different,as well as imprecise.The aim of this study is therefore to identify the common points of view among the various decisions of the Corts of Appeal in Romania regarding moral damages as a result of a car accident, in the cases when cars are being insured with an RCA Policy). The study also aims to determine if different sums of money should be established according to different types of moral prejudicee.g. judicial errors, unlawful privacy of liberty etc.Finally, the study proposes that future accident insurance legislation should include more thorough and concrete enactment of the moral damages aspects.

Keywords: *Accident insurance, criteria of prejudice, determination of moral damages, Romanian and EU legislation, uneven practice ,future enactment.*

1. Introduction

The purpose of this study is to critically discuss the various court decisions that - in the absence of a unified legislation - establish different damages for the same *de facto* and *de jure* situations in accident insurance in Romania.This is why because,in my day to day practice I found various Court solutions in most similar cases,Court solutions that are not always very well motivated.The study is mostly a regard on Romanian various jurisprudence in this field of law more than a thorough scientificall view on these legal aspects.

Arguably, both the injured party and the insurance companies are confused by the various court decisions, so their claims may often be unrealistic. Furthermore,insurance companies do not meet the plaintiff's demands before getting to court (in the amiable procedure) because a court decision may establish a much lower sum of money than the one demanded by the injured parties. Moreover, the duration of a court trial can be two or even three years, thus itmay often be more profitable to 'wait and see' what the judge will decide in this matter.

There are two main types of moral insurance damages regarding the accident insurance:

- The injured parties who suffered damages - physical and /or moral- in an accident;
- The injured parties are the inheriters/the affected persons of the victim of the accident.

Arguaby, this field of law is not governed by any general and objective legislative criteria, which leads to the existence of an uneven judicial practice. As the European Union (EU) legislation merely offers general guidelines, member countries (such as Romania) are in need of developing specific legislation.

The aim of this study istherefore to explore this gap of knowledge and to proposepossible directions towards the quantification of the moral damages, based on the analysis of the current judicial practice in Romania.

2. Content

2.1. Motivation

Given the intense road traffic conditions,car accidents are a considerable problem in Romania: there are many automobiles, and drivers' behavior – such as wreckless driving or consumption of alcohol contribute to the high number of car crashes.By law, every car must have its own insurance policy that covers any risks deriving from accidents: this is called the RCA policy, which covers civil liabilty for cars.

2.2. RCA policies

RCA is a contract with a mandatory character derived from the 136/1995 law[1], signed by both the insured person and the insurer company.According to Vasile Nemes[2]:"*The two parts can not negociate the content of the contract,the rights and obligations of the parts are stricly reglemented*". The insurer company cannot be forced by law to sign the insurance policy unless it had previously obtained

[*] Lawyer, Bucharest Bar (e-mail: **hancavocat@gmail.com**).

[1] *Law No. 136/1995on insurance and reinsurance in Romania*, Official Gazette of Romania („Monitorul Oficial al României"), Part I, No. 303 of 30 December 1995, in force since 01/02/1996; last sanction 19/01/2015, in force since 27/02/2015.

[2] Nemes, Vasile, *Insurance Law* (4th edition),Hamangiu Publishers, 2012, page 290.

this right from the Financial Supervisory Authority (ASF).

The insured person must also sign this insurance policy but can sign it at any insurance company that was authorised by ASF-as specified by Irina Sferdian[3] in „*Insurance.Special regard upon the insurance contract form the Civil code point of view*". Furthermore,the level of the insurance premium is different: the *bonus-malus* clause,the seriousity and the rapidity of covering damages can be the reasons why a certain insurance company may be preferred.

As previously shown, there are two types of car accidents:

- the ones in which both the driver and/or the passengers of the car suffer injuries;
- the ones in which the driver and/or the passengers die.

An important observation arises: this study solely refersto risks covered by a *valid policy*; asshown by Bradgate and Savage[4], the insured must establishthey have suffered a loss caused by the risks covered by the policy,in order to make any claims.

The insurance policy covers a variety of risks, however the limits within which the insurance companies must pay damages after such an unfortunate event are very flexible and often ambiguous. The main issue, both for the injured parties and for the insurance companies, is thus to be realistic: the two partiesvery rarely (if ever) reach an agreement before a court decision. Thus,it is the judge's mission to rule and establish the proper amount of money to compensate the trauma and results of the car accident for the injuried parties.

Moreover, these sums of money must not act as injust punitive measures against the insurance company, as specified by the Romanian High Court of Cassation and Justice's Decision No, 1179/2011[5].This decision is of great importance - although not generally binding- because it stipulates that, when moral damages are concerned, neither the national or ECHR framework operate with pre-established criteria, but instead decisions should be made in equity, by subjectively appreciating the different circumstances of every case.

2.3 Specific legislation and authorities

The specific legislation in this domain can be found in the 136/1995Law[6] regarding insurances; the articles 49 and 50 specify that „the insurance company offers compensations within the insurance contract for the prejudicies done by the insured persons to third parties that are injured in car crashes". Furthermore,The High Court of Cassation and Justice,in its nr. 1/2005[7]Rule statuates that the insurance companies must be summoned in trial only as insurer because the legal relationship between these companies and the insured ones are on the basis of solidarity.Thus,the persons injured in the car crashes can claim compensations from the persons that are responsible for the crash and also form the RCA insurance company.

Recently,the High Court of Cassation and Justice - via Decision 1/2016[8]regarding the RCA insurance policies in the case of car accidents- stated that the insurance company is a civil responsible part in the trial and bears the obligation to compensate the prejudice alone, within the limits of the insurance contract and the legal dispozitions regarding the RCA.

Furthermore, the relevant article from the Civil Code ruling (article 1391[9]) stipulates that if the integrity of a person is damaged, a sum of money can be offered.This sum of money can be offered for the inheritants of the deceased person and for any person that could prove that a certain prejudice exists.

However, although under Romanian legislation it is mandatory for all cars to be insured, it is not uncommon for cars that are not insured to be subject of accidentsin which persons are injured or deceased. In such cases, according to nr. 3/2010 decision of the High Court of Cassation and Justice [10], given as appeal on a certain point of law matter, The Street Victim Protection Fund will be a part in such civil /penal cases, instead of the insurance company.

2.4. Financial Supervisory Authority (FSA) and EU regulations

The limits of the insurance are established anually by the norms of the Financial Supervisory

[3] Sferdian, Irina, *Insurance. Special regard upon the insurance contract form the Civil code point of view*, C.H.Beck Publishers, 2013.

[4] Bradgate, Robert and Savage, Nigel,*Commercial Law*, Butterworths, London,Dublin,Edinburgh, 1991.

[5] High Court of Cassation and Justice – Section for civil and intellectual property, *Decision No. 1179/2011*, file 5129/62/2009, public session of 11/02/2011 (unpublished).

[6] Law No. 136/1995 on insurance and reinsurance in Romania, op. cit., page 12-13.

[7] High Court of Cassation and Justice – United Sections, *Decision No. 1/2005* on the provisions of Article 54, paragraph 4 and Article 57 of Law No. 136/1995 on insurance and reinsurance in Romania, Official Gazette of Romania, Part I, No. 503 of 14/06/2005, in force since 14/06/2005.

[8] High Court of Cassation and Justice – Panel jurisdiction to hear the appeal on points of, *Decision No. 1/2016*, public session of 15/02/2016 (unpublished).

[9] Moroșanu, Vasile (ed.), The New Civil Code – Republished in Official Gazette No. 505 from 15/07/2011, Bucharest: Moroșan and Pedro Publishers, 2011, page 286.

[10] High Court of Cassation and Justice – Panel jurisdiction to hear the appeal on points of law, *Decision 3/2010* on establishing the standing of the Street Victims Protection Fund (Art. 25 paragraph 1) of Law No. 32/2000 on insurance and insurance supervision, as amended and supplemented) and the possibility of coercing them in criminal proceedings in civil damages to people injured in vehicle crashes liability for uninsured, Official Gazette of Romania, no. 866/2010.

Authority (ASF) which was established as an autonomous, specialized, with legal status, independent, self-financed administrative authority, exercising its duties by taking over and reorganizing all duties and powers of the National Securities Commission (CNVM), the Insurance Supervisory Commission (CSA) and the Private Pension System Supervisory Commission (CSSPP).

The ASF is the national authority competent to enforce and monitor the observation of the directly applicable regulatory acts issued by the European Union, in the fields provided by this regulation, and for the transposition into the national legislation of the provisions issued by the EU Council, EU Parliament, European Commission and by other European authorities.Annually,the ASF gives orders(norms) with rules regarding the provisions for the RCA insurance policy as well as its minimal and maximal limits.

For instance, the 2016 upper limits within which the insurance companies pay damages are:1.000.000 euro for property damages and 5.000.000 euros for personal injuries and deceased persons (for an accident involving one car, no matter the number of the injured/deceased persons)[11].This is the only specific regulation that the judges have, regarding such cases.

In the absence of more specific guidelines, some court decisions give even 1.000.000 euros for one person (severelly injured in a car crash).Other courts consider 5.000.000 euros as a maximal sum of money and decide that for a person who suffered the same number of health care days, the sum of 100.000 lei(aproximatively 22.500 euros) is adequate. Therefore, one cannot help wondering which decision is most justified and what exactly constitutes good practice.

2.5. Examples of moral damages

Examples gathered through the author's experience as a practicing lawyer suggested the decision making process of settling moral damages is usually not straightforward. A number of uneven judicial practice cases were observed. Specifically, in thecase of the deceased persons, some courts gave low sums of money and others, millions of euros for the inheritans.The criteria that justified these court decisions often included: the age of the deceased;the psychological impact upon the inheritans' future life;the relations between the deceased and other persons beyond the inheritans themselves. However, in a number of cases experienced by the author in her professional activity, court decisions were ambiguousin motivating why a certain amount of money was given to the relatives of the deceased.

As often shown by theBucharest Court of Appeal regarding cases when the plaintiffs specified they were affected by the decease of their relative (e.g. son or nephew), this was rarely supported by psychological affective evaluations; documentation also often omitted documents that would prove the alteration of the financial resources, suggesting a future imbalance between the current plaintiffs' life style and the one following the unfortunate event, or the alteration of the professional standards of the plaintiffs. Court decisions thus stipulate that it will not simply approve what the plaintiffs are *saying* – the moral prejudice can not be proved but only ascertained. Following its judicial control role,the Court requested that the plaintiffs indicate evaluation criteria supported by the appropriate evidence included in the documentation; as shown before, thesecriteria are not prescribed by the law, thus a considerable degree of variation might follow.In order to decide in this matter the Court must compare between similar cases and the solutions from those cases.

In this context the „Guide for resolving moral damage"[12]may possibly be a useful resource. Yet,the High Court of Cassation and Justice from Romaniaoften suggests that this Guide is limited only for 'amiable litigation' when the two parts wish to settle the dispute outside the court[13].

Within the court,the judge must apply the law.This is why the High Court of Cassation and Justice established that when ruling again, the judge must obey the legal framework regarding moral claims,the national and conventional law principles that impose the whole reparation of moral prejudice represented by the negativeconsequences (both physical and moral)taking into account the importance of damaged values,when they were affected.

Dorina Zeca[14] cites an important decision of the Bucharest Court of Appeal (Dec 110/2013 unpublished), whichstipulated that in establishing the adequate amountto be paid in moral damage cases, the court may take into consideration the amount given by juridical practice in similar cases.The judge may take into account the continuos creation of the juridical practice: when determining theaverage sum of money for similar cases,the principle of *equality of partiesbefore the law* applies, as well as the *non discrimination principle*which also represents an equitable and equidistant

[11] Insurance Supervisory Commission, Order No. 14/2011 to implement the Norms concerning compulsory civil deraspundere for damages caused by vehicle accidents, Official Gazette of Romania, Part I, No. 858/2011.

[12] Greceanu, Sorin and Necrelescu, Mihai, *Guide to resolving moral damage: study on national and European practice in the matter, synthesis and recommendations to solve the moral damage suffered due to health and bodily injury or death to persons caused by car accidents*, Bucharest: UNSICAR, 2012.

[13] Based on the author's direct professional experience as a lawyer.

[14] Zeca, Dorina, *Moral damages in civil and criminal litigation: Recent judicial practice,* Hamagiu Publishers, 2016.

parameter.This parameter could be considered incontestable.

According to Article 1 from Law No. 136/1995[15],the prejudice is the negative effect suffered by the injured person as a result of a production of a risk covered by the public liability contract.

2.6. Plaintiffs' motivations and claims

In most cases, the plaintiffs are distraught when one or more members of their family (e.g. husband,daughter,father,sister etc.) die in an accident.Based on these feeling of loss, the plaintiffsoften believe that the insurance company should be obliged by the judge to a pay them a large sume of money to 'compensate' for these negative feelings.However, as shown before, in many cases the plaintiffs' documentationfolder includes no evidence to indicate that the relationship with the deceased relativeswasparticularly strong or their standard of living hadbeen very high before the unfortunate event.

Another point that has different interpretations in Courts decisions refers to guilt. For instance, when the husband drives a car and causes an accident by wreckless driving (e.g. he falls asleep), and the infant dies being kept in his moher's lap (instead of a baby chair),some judges consider that the parents(or mother) areentitled to a substantial sum of money as moral damage.Yet, recently the High Court of Romania[16]stipulated that the husband's (or wife's) right for damages in reation to the infant's death (or the death of other persons raised by the driver of the car, at faultfor the accident)should be limited to their own injuries as direct victims of the car accident.

2.7. Difficulties in evaluating moral damages

Nevertheless,guilt is a serios criteria for the judges in establishing the sums of money as moral damages. There are multiple scenarios that involve guilt and the subsequent ethical resonings – for plaintiffs, insurance companies and judges alike – are often complicated. For instance, in the case of passengers who accept to be driven by a clearly inebriated person, and who subsequently crashes the car, a variety of questions arise:

- Is the passenger at fault for not stopping the driver from drinking?
- Can the passenger claim substantial damages if he or she is injured in the accident?
- What if the passenger is a minor?

In such cases, some courts argue that the insurance company must pay whatever sum was asked for – even if some of the parties involved could have been moreresponsible and, in fact, prevented the accident. Yet, such a decision may contradict the overarching principle that everyone must obey the law. Furthermore, one may wonder if it is fair to give different sums of money to different persons taking into account that their life styles are different,that some live in the country side and other in a capital (thus substantially different living costs)although they both loose a close relative. In the absence of a clear and objective legal framework, court decisions can – and, often, do – embrace very different ethical standpoints and the legal and financial outcomes may often seem arbitrary.

Some may argue it should notbe expected fromthe insurance companies to pay large sums of money only because the plaintiff *declares*a close relationship with the deceased one: perhaps, the actual relations were in fact very tense. In such cases – which are often hard to prove or disprove – perhaps it is unethical to draw major financial benefits just for being related to a person deceased in a car accident. The courts' decisions are very different in their rulling and legislative clear criteria should be enforced by appropriate laws in the future.

Let us now suppose a different scenario: a car crash with one deceased person. Their spouse and one of their sonsclaim and obtain sums of money(as moral damage) under a final court decision. After a while, two more of the couple'schildren start a trial against the insurance company, at a different court, obtaining much larger sums of money. One may wonder how will the first decision influence or inform the second court rulling - does and should it have *res judicata*?

This refers to Article 28 from the Criminal Procedure Code[17] that stipulates that the definitive decision of the crimnal court is *res judicata* before the civil court that judge the civil action in the matter of the existence of the criminal deed,and the person who is responsible for it.If by any chance both the first court sentence and the final decision (usually from the Court of Appeal) are not thouroughly motivated,the case might be brought to the High Court of Cassation and Justice. If both rullings are superficial,and the relevant legislation is neither specific nor clear, there may be sufficient legal reasoning to attack those decisions because they were given „with the violation or wrongful application of the law", as stated in the New Code for Civil Procedure[18].

Another issue that may be of interest is the comparison of moral damages, specifically how can

[15] *Law No. 136/1995*, op.cit..

[16] High Court of Cassation and Justice – Panel jurisdiction to hear the appeal on points of law, Decision 23/2015 on interpretation of Article 50 paragraph 3 of Law No. 136/1995, public session of 26/10/2015 (unpublished).

[17] Law No. 255/2013 for the implementation of Law no. 135/2010 on the Criminal Procedure Code and amending and completing certain normative acts with criminal procedure dispositions, Official Gazette of Romania, Part I, No. 515/2013;

[18] Moroșanu, Vasile, Moroșanu, Raul and Moroșanu, Petre, The New Code for Civil Procedure: Law No. 134/2010 republished in Official Gazette of Romania, No. 545/2012, Bucharest: Moroșan and Pedro Publishers, 2012, page 193.

they be measured,quantified,taken into account etc. It is often hard to tell what is more important for a person's wellbeing and how can these moral damages compensate a loss,an injury,a personal restriction of private life or rights. Considering all of these delicate aspects of life, a crucial role can (and*should*) be played by the judicial system,by the courts in their rullings.

The wrongful arrest of a person; the restricion of liberty; the duration of these measures, the detention conditions; the stopping of mail in prison, the separation from one's family; the lengh of the criminal case in court - all of these may be elements that produce physical and mental trauma, which determin a moral prejudice that must be repaired.The purpose of moral damages repair beingto obtain a moral satisfaction of the same order, in a particular example[19], the High Court statuated that a sum (e.g. 55.000 euro) was capable to act as a correct satisfaction for the wrongfull arrest for 8 months and a half, and to offer an equitabile satisfaction for the plaintiff taking into account the principle of proportionality between the judicial error and its consequences.The same ideea is stressed by another High Court decision[20].

Thus,the ECHR jurisprudency doesn't offer a specific rule in the determination of these moral damages.The principle that can be extracted from its jurisprundecy is the statuation in equity on moral damages regarding the particular differences of each case.Also,the sum of money must be reasonable,equitable and proportioned with the plaintiffs prejudice as a result of the arrest measures that were imposed for him. Still, this leaves many room for interpretation and unfair judicial practice.

4. Conclusions

Unsurprinsingly, it may be very difficult to establish objective criteria in determination of moral damages. As stated before, the relevant legislation doesn't contain any strict standards.Furthermore, the specific insurance norms given by the Financial Supervisory Authority (ASF) are also lacunary: Article 49 paragraph 1 point f and paragraph 2 point d from the 14/2011 ASF Norm both say that the moral damages will be paid: "according with the legislation and the jurisprudency from Romania"[21].

In the absence of coherent criteria regarding moral damages compensations, Romanian courts are forced to make decisionssupported by different assumptions and motivations. The compensation of moral damages through sums of money rises the difficult problem of the modality and the criteria of appreciation of moral prejudicies.In apreciation of the importance of the moral prejudice, one must envisage the repercussions of the moral prejudice on the general state of mind, the possibilites of social and professionalachievments etc. As no objective criteriaof determination of prejudice are provided by the current law, the judges ultimately have the power to appreciate these compensations taking into account the specific datas of each case - the moral damages are determined in appreciation.

The judges must consider the negative physical and psychological consequences,the importance of the damaged values and the measure in which these values were damaged.All these criteria are subordinated to reasonable and equitable standards because the sums of money resulted from moral damages must not be a burden for the insurance company.

The European jurispudence established that the equlibrium between the injured parties and what the insurance companies can and will pay, should be *de lege ferenda* incorporated in some agreements with maximal sums of money which can be paid regarding different types of injuries/damages.This is how,on one hand the insurance companies can determine the level of the insurance premiumsmore accurately, and, on the other, the injured persons can ask for a resonable sum of money that should compensate their loss.

Future work on this topic could includea unique guide for all insurance companies from Romania, whichwould be useful for the courts in their appreciaion of moral damages as no strict and objective criteria exist now.

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[19] Based on the author's experience.

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THE DIRECTIVE 85/374/EEC ON DEFECTIVE PRODUCTS: ITS INTERPRETATION BY THE EUROPEAN COURT OF JUSTICE

Inmaculada HERBOSA MARTÍNEZ*

Abstract

This paper focuses on the interpretation of the European Court of Justice concerning substantive aspects of the Directive 85/374/ECC of July25, 1985, on liability for defective products. Therefore, this work will deal with the interpretation of some aspects regarding the essence of products liability: The concept of defect and the extent of damage covered by this liability. In addition, a number of issues needing of interpretation are analysed, such as: The meaning of putting a product into circulation, the right to information of the consumer in order to prove the causation of damage, and finally the problems that arise in cases where the producer is exempt from liability.

Keywords: *Liability, product liability, strict liability, producer liability, defective products.*

1. Introduction. Principle of complete harmonization

As it is known, products liability is governed by the Directive 85/374/EEC of July 25, 1985, on the approximation of the laws, regulations, and administrative provisions of the Member States concerning liability for defective product. In essence, this Directive concerns liability of the producer for the damage caused by defective products. It imposes "strict liability"[1], without fault, on the liable subject the producer, where a defective product causes injuries to a person or damage to property.

It is settled case-law that Directive 85/374 seeks to achieve, in the matters regulated by it, completed harmonization of the laws, regulations and administrative provisions of the Member States[2]. To this respect, the European Court of Justice (ECJ) has held that reference in Article 13 to the rights which an injured person may rely on under the rules of the law of contractual or non-contractual liability cannot be interpreted as giving the Member States the possibility of maintaining a general system of product liability different from that provided for in the Directive[3]. Differently, it must be interpreted as meaning that the system of producer liability put in place by the Directive does not preclude the application of other systems of contractual or non-contractual liability based on other grounds, such as fault or a warranty in respect of latent defects, or the application[4]. Likewise the reference in Article 13 to the rights conferred to an injured person under a "special liability system" existing at the time when the Directive was notified must be construed, as referring to a specific scheme limited to a given sector of production[5].

Nevertheless, as is apparent from the 18th recital in the preamble, it is also settled case-law that it does not seek exhaustively to harmonize the field of liability for defective products beyond those matters[6]. In accordance with this statement, has ruled that the Under this principle, the ECJ has ruled that Directive 85/37 brings about complete harmonization only so far as the producer's liability and damages covered by the Directive, among other aspects, are concerned [7].

* Professor PhD, Deusto University, (e-mail: **inmaculada.herbosa@deusto.es**).

[1] As it noted by the ECJ, that is expressly stated in the second recital in the preamble to the Directive. It is also apparent from the enumeration of the matters to be proved by the injured person in article 4 and from the cases in which the producer's liability is excluded in article 7 (see Case C 402/03 *Skov Æg v Bilka Lavprisvarehus A/S and Bilka Lavprisvarehus A/S v Jette Mikkelsen and Michael Due Nielsen* [2006], paragraph 19).

[2] See Case C 52/00 *Commission v France* [2002], paragraph 24; Case C 154/00 *Commission v Greece* [2002], paragraph 20; Case C 183/00 María *Victoria González Sánchez v Medicina Asturiana SA* [2002], paragraphs 24-29 and *Skov and Bilka*, paragraph 23. Concerning the intention to harmonize completely at Community level article 11 of the Directive, see Case 358/08, *Aventis Pasteur SA v OB* [2009], paragraph 37.

[3] *Commission v France*, paragraph 21, *Commission v Gree*ce, paragraph 17, *González Sánchez*, paragraph 30 and *Skov and Bilka*, paragraph 39.

[4] See *Commission v France*, paragraph 22, *Commission v Greece*, paragraph 18, González *Sánchez*, paragraph 31, and *Skov and Bilka*, paragraph 47.

[5] See *González Sánchez,* paragraph 32, and Case C-310/13 *Novo Nordisk Pharma GmbH v. S.* [2014], paragraphs 20 and 21.

[6] See Case C 285/08 *Moteurs Leroy Somer v Société Dalkia France, Société Ace Europe* [2009], paragraphs 24 and 25; Case C 495/10 *Centre hospitalier universitaire de Besançon v Thomas Dutrueux, Caisse primaire d'assurance maladie du Jura* [2011], paragraph 21.

[7] See *Centre hospitalier universitaire de Besançon,* paragraphs 26-30 and *Moteurs Leroy Somer*, paragraphs *30-32*, respectively. In addition, regarding the consumer's right to obtain information on the adverse effects of the defective product, see *Novo Nordisk Pharma GmbH*, paragraphs 24 and 25.

2. Interpretation concerning the elements that determine liability product

After the promulgation of the Directive 85/374, the ECJ has ruled on several issues concerning its interpretation. Some of them, in recent days, concerning the scope of the Directive, such as the class of liable person, concept of defect and the damage covered by it.

2.1. Concept of liable person

Article 1 of this Directive imposes the defective product liability on the producer of the product in question, as it has been defined in Article 3. The reasons why it appeared appropriate to hold the producer liable have been summarized by the ECJ. So, it is recalled that the choice of allocating liability to producers in the legal system established by the Directive was made after weighing up the parts played by the various economic operators involved in the production and distribution process. To this respect, it was considered that the fact of imposing liability on the supplier, although would make it simpler for an injured person to bring proceedings, first, there would oblige those subjects to insure such liability, resulting in products significantly more expensive. Second, it would lead to a multiplicity of actions brought by the suppliers, back up the chain as far as the producer. All, while in the great majority of cases the supplier does no influence the quality of the products it sells[8].

Since this Directive, as it has been said before, seeks a complete harmonization in the matters covered by it, the determination in Article 1 and 3 of the class of persons which can be considered liable must be considered as exhaustive[9]. Therefore, in *Skov and Milka* the ECJ holds that the Directive precludes a national rule which transfer to the supplier the liability imposed by its regulation on the producer, beyond the cases listed exhaustively in Article 3(3) [10]. Reversely, in the same judgment it is recalled that the Directive allows a national rule under which the supplier is answerable for the fault-based liability of the producer for a defective product, since Article 13 of the Directive does not preclude the application of other systems of contractual or non-contractual liability based on other grounds, such as fault[11].

Likewise, since the Directive brings about complete harmonization only so far as the producer's liability for defective product is concern, Member States are allowed to establish a system of strict liability for suppliers different from that laid down under the Directive, only on condition that it does not adversely affect the system established by the latest[12].

It follows that the liability regulated by the Directive only may be imposed on the producer, as is defined in Article 3 (1): The manufacturer of a finished product, the producer of any raw material or the manufacturer of a component part. And it is only in the cases exhaustively listed in this Article 3 that other persons can be considered as a producer: Any person who, by putting his name, trade mark or other distinguishing feature on the product presents himself as its producer (Article 3(1), any person who imports into the Community (Article 3 (2) and, where the producer or the importer cannot be identified, the supplier who does not inform the injured person of the identity of the producer or of the person who supplied him with the product (Article (3)[13].

In the context of determining the liable person under the Directive, the question of the substitution of the defendant when this is not the producer becomes significant. This question involved two separate references to ECJ as to the same case in the main proceedings. To this respect, in *O'Byrne,* the ECJ rules that it is for national law to determine the conditions in accordance with which one party may be substituted for another when an action is brought against a company mistakenly considered to be the producer. However, in light of considerations made above, the national court which examines the conditions governing such a substitution "must ensure that due regards is had to the personal scope of the directive, as established by Article 1 and 3 thereof"[14]. It follows that the subject who substitutes the defendant must be a producer as defined by this Article.

In *Aventis Pasteur*, as to the same case where the victim mistakenly brought an action against a defendant who is not the producer, the ECJ, having regard to the fact that the defendant is the supplier of the defective product, recalls that where the producer cannot be identified, the supplier of the product is treated as the producer, unless he informs the injured person, within a reasonable time, of the identity of the producer or of his own supplier according to Article 3 (3)[15].

As was pointed out by this Court, this latest provision should be understood as referring to the

[8] See *Skov and Bilka*, paragraphs 27-29.
[9] See *Skov and Bilka*, paragraph 33 and Case C 127/04, *Declan O'Byrne v Sanofi Pasteur MSD Ltd and Sanofi Pasteur SA* [2006], paragraph 35.
[10] See *Skov and Bilka*, paragraph 37 and 45.
[11] See *Skov and Bilka*, paragraphs 47 and 48.
[12] See *Centre hospitalier universitaire de Besançon,* paragraphs 26-30
[13] See *O'Byrne*, paragraphs 36 and 37.
[14] See *O'Byrne, paragraphs* 34, 38 and 39.
[15] *See Aventis Pasteur*, paragraph 54.

situation in which, taking into account the specific circumstances of the case, the victim "could not reasonably have identified the producer of that product before exercising his rights against its supplier". To this respect, it was stated that the mere fact that the supplier of a product denies being its producer does not suffice for that supplier to be treated as having informed the injured person of the identity of the producer or its own supplier. On the other hand, the condition relating to the supply of such information within "a reasonable time" involves that the supplier informs the injured person, "on its own initiative and promptly, of the facts referred to above. In any case, it is for national court to determine if the supplier fulfills these requirements[16].

2.2. Concept of defect

The definition of defect is given by Article 6 of the Directive, according to which a product is defective "when it does not provide the safety which a person is entitled to expect". With this purpose, all circumstances must be taken into account, including: (a) The presentation of the product (b) its reasonably expected use; and (c) the time when the product was put into circulation.

Recently, the ECJ has ruled on the circumstances under which a product can be considered as defective in Joined Cases *Boston Scientific Medizintechnik GmbH v AOK Sachsen-Anhalt and others*[17]. The question referred to the court was, in essence, whether Article 6(1) allows to classify as defective certain products, belonging to the same group or forming part of the same production series and having all of them a potential defect, without any need to establish that the product in question has such a defect. In this concrete judgment, the Court rules on two related cases concerning implanted medical devices, such a as a pacemaker and a cardioverter defibrillator. As we will see, the specific nature of the defective products, medical devices implanted in the human body, was relevant for its ruling.

In deciding this question, the ECJ considered the concept of defect by reference to the Directive itself and, therefore, gave guidance on the parameters to consider a product as defective. The Court, making reference to definition of defective product (Article 6 of the Directive) and to the sixth recital of the preamble, states that the effect of that recital was that the "assessment must be carried out having regard to the reasonable expectations of the public at large". This expectations, according the Court, must be assed taking into account a number of factors, inter alia, "the intended purpose, the objective characteristics and properties of the product in question and the specific requirements of the group of users for whom the product is intended".

For products such as those at issue in the main proceedings, implanted medical devices, the ECJ noted that, given its function and the particularly vulnerable situations of patients using them, the safety requirements which those patients were entitled to expect were "particularly high". Moreover, taking into account of these factors, the Court understood that in the cases at issue, where it is found that such products belonging to the same group or forming part of the same production series have a potential defect, it is possible to classify all products in that group or production series as defective, without the need to show that the any specific product was defective.

As it has been said above, in adopting this decision the Court seems to have taken into account the specific nature of these products, implantable medical devices, and the specific risks arising from them. However, the Court does not limit its decision to these particular products. Therefore, **the same solution can be applied, under the same circumstances, to other products, other than implanted medical devices.**

2.3. Recoverable damages

As it is noted by the ECJ, unlike the terms "product", "producer" and "'defective product'", for which the Directive provides express definitions (Article 2, 3 and 6 respectively), the term "'damage'" is not defined in the Directive. Neither Article 9 nor Article 1 of the Directive, to which Article 9 refers, contains any explicit definition of the term 'damage'[18].

Therefore, Article 9 only indicates the various heads of damage covered by the Directive. Under this Article, those damages are limited to:

Damage caused by death or by personal injuries;

Damage to, or destruction of, any property other than the defective product itself, with a lower threshold of €500[19], provided that the property is ordinarily intended for private use or consumption, and was used by the injured person mainly for his or her private use or consumption.

In *Henning Veedfald v Århus Amtskommune*, given the difficulty in specifying the nature of the damage in the case at issue, the national court referred the question whether the Community Law imposes any requirement as to define the

[16] *See Aventis Pasteur***,** paragraphs 55-59.

[17] See Joined Cases C-503/13 and C-504/13, *Boston Scientific Medizintechnik GmbH v AOK Sachsen-Anhalt and others* [2015].

[18] See Case 203/99, *Henning Veedfald v Århus Amtskommune* [2001], paragraph 25.

[19] According to the principle of full harmonization imposed by the Directive 85/374, Member States cannot decide against the minimum threshold of €500 (see Commission *v France* [2002] and *Commission v Greece* [2002].

expressions '"damage caused by death or by personal injurie" and "'damage to, or destruction of, any item of property other than the defective product itself" provided for in Article 9 of the Directive[20].

The Court held that it is for Member States to determine the precise content of those two heads of damage. Nevertheless, full and proper compensation for persons injured by a defective product must be available for both kind of damages referred in the preceding paragraph, since it is settled case law that application of national rules may not impair the effectiveness of the Directive[21]. In essence, that means that it is for Member States to define these two heads of damages in order to determine if in a particular case there a damage is resulting from death or personal injury or damage to property. But a Member State may not restrict the material damages which are recoverable under these two heads of damages in accordance with Article 9 of the Directive[22].

In recent days, the ECJ has provided guidance on the damages which constitutes "damage caused by death of by personal injuries" according to Article 9 of the Directive. The particular question referred to the Court was whether the costs of an operation to remove and replace the defective medical device, in the specific circumstances of the joined cases *Boston Scientific* above mentioned. The ECJ has adopted a broad interpretation of the concept of this head of damage, stating that it relates "all that is necessary to eliminate harmful consequences and to restore the level of safety which a person is entitled to expect". This interpretation is based both on the objective of protecting consumer health and safety pursued by this Directive in accordance with the first and sixth recitals of the Preamble, and the causal relationship between the defect and the damage suffered.

It means that costs for replacing defective medical devices only constitute damage caused by personal injuries covered by the Directive as long as the replacement is necessary to restore the safety the injured person is entitled to expect. In other case, the compensation for this head of damage will cover only those costs which are necessary to overcome the defect. In any case, it is for national courts to determine what measure is necessary in a particular case, "bearing in mind the abnormal risk of damage to which it subjects the patients concerned".

Therefore, in the concrete cases at issue, as to the defective pacemaker, the Court finds that the costs for the replacement of such device, including the costs of the surgical operations, constitute damage caused by personal injuries covered by the Directive. But this Court holds that finding may be different in the case of the defective cardioverter defibrillators, since it was apparent that the magnetic switch of those medical devices should simply be deactivated. In any case, as it was said above, it is for national court to decide if deactivation of the magnetic switch is sufficient for the purpose of overcoming the defect.

Finally, as it has been said above, since the Directive 85/374 does not seek to harmonize products liability beyond the matters regulated by it, the harmonization does not cover compensation for damage excluded from its scope. That is the case, *inter alia*, of compensation for damage to an item of property intended for professional use and employed for that purpose. In *Société Moteurs Leroy Somer v Société Dalkia France and Others*, the national court asks, in essence, if this Directive precludes the interpretation of domestic law according to which the injured person can seek compensation for this type of damage under a system of strict liability corresponding to that established by its regulation [23]. After stating that compensation for this type of damage is not one of the matters regulated by this Directive and therefore is not covered by its scope, the Court held that nothing in its wording leads to the conclusion that Community Law deprive Member States of the power to provide a system of liability which corresponds to that established by that Directive[24].

3. Other issues needed of interpretation

Beyond those elements which determine the scope of the Directive 85/374, there are other provisions interpreted by the ECJ which complete a general approach in respect of product liability across the EU.

3.1. Limitation in time of the right of compensation

Article 11 of the Directive states that Member States must provide in their legislation that the

[20] See *Henning Veedfald*, paragraph 11. In this case, the damage consisted of the loss of a kidney that had been removed from a donor for transplantation. The kidney was prepared by the hospital through flushing with a perfusion fluid designed for that purpose. This fluid proved to be defective, making the kidney unusable for any transplant.

[21] See *Henning Veedfald*, paragraph 27.

[22] See Henning *Veedfald*, paragraps 28-29.

[23] See *Société Moteurs Leroy Somer*, paragraph 14. In the case at issue, a generator installed in a hospital in Lyon caught fire due to the fact that the alternator manufactured and put into circulation by "Moteurs Leroy Somer" overheated. Dalkia France, which was responsible for the maintenance of this installation, and its insurer, paid compensation for the material damage caused to hospital by that accident and then brought an action against Moteurs Leroy Somer, to obtain reimbursement of the payment made by them.

[24] See *Société Moteurs Leroy Somer*, paragraphs 27-31.

rights conferred under its regulation shall be extinguished after a period of 10 years from the date on which the producer put into the circulation the defective product. This 10 years period only can be interrupted when he injured person has instituted proceedings against the producer. To this respect, the 10th recital in the preamble to the Directive states that "a uniform period of limitation for the bringing of action for compensation is in the interests both of the injured person and of the producer".

As it is noted by the ECJ, the purpose of this Article is to place a time-limit on the rights conferred by the Directive on the victim and, it is apparent from its Preamble, to satisfy the requirements of legal certainty in the interests of the parties involved. Therefore, as we will see later when examining the putting into the circulation of the product as the starting date of that period, the establishment of the time-limits within which the action for compensation must be brought must satisfy objective criteria[25].

According to the ECJ, this harmonization contributes, first, to the general aim expressed in the preamble of the Directive, consisting of putting an end to the divergences between Member States which entail differences in the degree of protection of consumers. Second, seeks to limit the liability of the producer to a reasonable length of time, taking into account a number of factors, such as, the gradual aging of products, the increasing strictness of safety standards and the constant progressions in the state of science and technology. In addition, bringing up the opinion of the Advocate General, the Court invokes the need not to restrict technical progress and to maintain the possibility of insuring against risks connected with this specific liability, given the burden this liability represents for the producer[26].

In a context in which the action laid down by the Directive must be brought within the 10-year period, the issue related to the substitution of one defendant for another after the expiration of that period becomes relevant. In *Aventis Pasteur* the question referred by the national court was whether the Directive allowed this substitution although the person named as a defendant in the first place did not fall within the scope of the Directive. Bearing in mind the *rationale* for limiting in time the right of compensation, the ECJ hold that Article 11 precludes the application of a rule of national law, which allows the substitution of one defendant for another during proceedings, in a way which "a producer", as defined by the Directive, is sued after the expiry of the period prescribed by that Article[27].

According to the court, an outcome to the contrary would involve, first, to accept that this period could be interrupted for a reason other than the institution of proceedings against the producer as it is prescribed by Article 11. And, second, a lengthening of the limitation period with regard to such a producer. The latter would be inconsistent with the harmonization intended by the Directive and with the legal certainty this Article seeks to grant this subject in the context of the liability established by that Directive. To this respect, the Court recalls the important of the principle of legal certainty in rules that entail financial *consequences*, in order that those concerned may know precisely the extent of their obligations[28].

In addition, the ECJ gave clarifications to guide the referring court in giving judgment in the main proceedings of reference where the person named as a defendant before the expiration of the 10 years period was a wholly-owned subsidiary of the producer. To this respect, this Court appoints that it is for the national court to assess whether the product was put into circulation by the producer. So, where the national court notes that fact, first, that Article 11 does not preclude national court from holding that the parent company, "producer" as defined by the Directive, can be substituted for that subsidiary. Second, having regard to the same fact, that the supplier of the product can be treated as the producer, in particular for the purposes of Article 11, where the latest cannot be identified, unless he informs the injured person, within a reasonable time, of the identity of the producer of his own supplier in accordance with Article 3(3) [29]. Where the conditions provided for in this provision are met, the supplier should treated as a "producer" and, therefore, the proceedings instituted against him will interrupted the limitation period laid down in Article 11[30].

3. 2. Meaning of "putting the product into circulation"

The Directive does not define the concept of 'put into circulation', which is referred to in several provisions of the Directive 85/374. Primarily, in Article 7(a) dealing with the circumstances where the producer will be exempt from liability and Article 11, which places a time-limit on the exercise of the rights conferred by this Directive on the injured person. Secondarily, this term is also used in other provisions: In Article 6.1 (c) dealing with the circumstances to assess the safety

[25] See *O'Byrne,* paragraph 26.
[26] See *Aventis Pasteur*, paragraphs 40-43.
[27] See Aventis Pasteur, paragraphs 43-44
[28] See Aventis Pasteur, paragraphs 45-47.
[29] See Aventis Pasteur, paragraphs 50-54.
[30] See. Aventis Pasteur, paragraph 60. As to the conditions for the application of article 3 (3), see 1.1. Concept of liable persons.

expectations of the products to be considered defective and in Article 17, as the reference date for determining the temporal scope of application of the Directive.

As to the concept of "putting into circulation" referred to in Article 7 of the Directive, in *Henning Veedfald* the ECJ has held that the producer may himself exempt from liability because the product has not been put into circulation, primarily, in cases "in which a person other than the producer has caused the product to leave the process of manufacture". In accordance with this approach, the Court considered that this exception also covers the use of a product contrary to the producer's intention (where the manufacturing process is not yet complete) and use for private purposes. In this context, regarding the concept referred in the Article 7, the Court considered that the cases exhaustively listed by this Article, by which the producer may exempt himself from liability, "are to be interpreted strictly" in order to protect the interests of the victims[31].

In the case at issue, the producer of the defective product , a hospital, produces and uses the product in the course of provinding a medical service. Bearing in mind this situation, the Court held that a defective product is put into circulation when "it is used during the provision of a specific medical service" , although the product did not leave the sphere of control of the service provider [32]. This case is different from that on which a service provider, in the course of providing a service, uses defective equipment or product of which it is not the producer. [33] In the latter case, as it is apparent from ECJ case law, damage to the recipient of the services does not fall within the scope of the Directive 85/374. Therefore this Directive does not prevent a Member State from applying rules which impose strict liability on a service provider, provided that it does not adversely affect the system established by Directive 85/374[34].

The concept of "putting into circulation" referred to in Article 11 was interpreted in *O'Byrne v. Sanofi Pasteur*. In this context, taking into account the purpose and the aim of this Article explained above, the Court held that a product is put into circulation "when it leaves the production process operated by the producer and enters a marketing process in the form in which it is offered to the public in order to be used or consumed". The ECJ considered that, generally, it is not important in that regard that the product is sold directly by the producer to the user or to the consumer or that the sale is carried out as part of a distribution process involving one or more operators, as Article 3 (3) of the Directive makes apparent [35].

It must be noticed that in the case of reference in the main proceeding, one of the links in the distribution chain was closely connected to the producer, since the distributor of the defective product was a wholly-owned subsidiary of the latter[36]. To this respect, the Could considered that it is necessary to determine whether the subsidiary entity was in reality involved in the manufacturing process of the product or it acts simply as a distributor of depository for the product manufactured by the parent company. In any case, it is for the national courts to establish this aspect, having regard to the circumstances of each case and the factual situation of the matter before them[37].

3.3. Exemption of liability

Since the Directive imposes a system of "strict liability" on the producer, this subject cannot avoid that liability by the mere fact of proving he has acted without fault. Nevertheless, in accordance with the principle of a fair apportionment of risk between the injured person and the producer laid down in the seventh recital in the preamble, Article 7 sets out a number of facts exonerating him from liability[38].

The case law of the ECJ has interpreted some of these circumstances, in addition to that which allows the producer to be exempt from liability when he did not put the product into circulation, analyzed before. So, this Court has ruled on the exonerating circumstances laid down in Article 7, paragraphs (c) and (e).

Article 7 (c) of the Directive exempts the producer from liability when the producer proves

[31] Cf. *Henning Veedfald*, paragraphs 24 and 25.

[32] In this case, as it was mentioned before, a kidney, previously removed from the donor from transplantation was, rendered unsable for any transplant due to that kidney was prepared through "flushing" with a fluid designed by the hospital for this purpose with proved defective. The defendant hospital denied liability on the grounds that the product had not been put into circulation.

[33] See *Centre hospitalier universitaire de Besançon.* In the case at issue in the main proceedings, a patient suffered burns during surgery carried out in public hospital. The burns were caused by a defect in the temperature-control mechanism of a heated mattress on which he had been laid. The defendant claimed that the Directive 85/374 prevented application of the principle deriving from the case-law, whereby a public hospital is liable even without fault for damage caused to users as a result of the failure of products or equipment used in connection with their treatment.

[34] See *Centre hospitalier universitaire de Besançon,* paragraphs 27, 30 and 39.

[35] See *O'Byrne v. Sanofi Pasteur,* paragraphs 26 and 27. See also paragraph 32.

[36] In the case of reference, the producer of the defective product, an antihaemophilus vaccine, had sent it to a distributor, which was a wholly-owned subsidiary of the producer. Then, the vaccine was sold by this distributor to the Department of Health of United Kingdom and delivered directly to a hospital nominated by the Department of Health.

[37] See *O'Byrne v. Sanofi Pasteur,* paragraphs 29 and 30.

[38] See Case C 300/95, *Commission of the European Communities v. United Kingdom of Great Britain and Northern Ireland* [1997], paragraph 24.

that "the product was neither manufactured by him for sale or any form of distribution for economic purpose nor manufactured or distributed by him in the course of his business". As to the exemption from liability where an activity has no economic or business purpose, the ECJ has ruled that it does not extend to the case of a defective product which has been manufactured and used in the course of a providing a service (in the case of reference, a medical service) which is entirely financed from public funds and for which the user is not required to pay any consideration. To this respect, this Court appoints that this activity "is not a charitable one" which could therefore be covered by the exemption from liability provided for in this provision[39].

On the other hand, Article 7 (e), in connection with Article 15.1 (b), allows Member States to decide whether in its legislation the producer can be exempt from liability when "the state of scientific and technical knowledge at the time when he put the product into circulation was not such as to enable the existence of the defect to be discovered" (the so called, "development risks"). The ECJ makes several observations as to the wording of this provision. The Court states, first, that this Article does not refer to the practices and safety standards in use in the industrial sector in which the producer is operating, but "at the state of scientific and technical knowledge, including the most advanced level of such knowledge at the time when the product in question was put into circulation". Second, that it does not contemplate the subjective knowledge of a producer but "the objective state of knowledge of which the producer is presumed to have been informed". Finally, it is considered implicit that the relevant knowledge must have been accessible at the time when the product in question was put into circulation[40].

3.4. Proof concerning the causation of damage

As it is known, Article 4 of the Directive places the burden of proof on the victim or injured party as to the damage, the defect, and the causal relationship between these two elements.

Although the Directive does not define the standard of proof and how evidence is gathered, some Member States have imposed on the producer the obligation to provide useful documentation and information related to the defective product to the victim. The question is if the principle of complete harmonization brought by the Directive would prevent Member States from adopting this provision.

According to the ECJ, it should be noted that, as a matter of principle, the consumer's right to obtain information on the adverse effects of a product provided for by national legislation is excluded from the scope of the Directive 85/374 and, therefore, it would not affected by the principle of complete harmonization of the matters covered by it. But, as it is noted by this Court, in reaching a decision, it would be necessary to ascertain if this provision would be capable of undermining the allocation of the burden of proof as delimited in Article 4. To this regard, the Court holds that it does not bring about a reversal of the proof as delimited by the Directive and does not introduce any change in the circumstances listed in Article 7 under which the producer can be exempt from liability. It follows that the Directive does not preclude national legislation under which the consumer has a right to require the producer to provide him with such an information41.

In the case at issue, the Court avoids the question referred by the national court for preliminary ruling concerning the interpretation of Article 13 of the Directive, as that question becomes irrelevant once found that the right to information is outside the scope of it.

4. Conclusions

Ever since the Directive 85/374 concerning liability for defective products was adopted, the ECJ has been called on to deliver a number of judgments on its interpretation. ECJ case law provides a catalogue of cases on product liability, a number of them in recent days in the field of medicine (pharmaceutical products and medical devices). Certainly, the case law of this Court does not put an end to all the questions arising from the application of the Directive but it decisively contributes to clarifying and elaborating the basic principles of product liability across the European Union.

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- Case C-154/00, Commission v Greece [2002] ECR 2002 I-03879;

[39] See *Veedfald*, paragrpahs 21 and 22.
[40] See *Commission v United Kingdom*, paragraphs 25-29.
[41] See *Novo Nordisk Pharma GmbH*, paragraphs 25 -31.

- Case C-183/00, María Victoria González Sánchez v Medicina Asturiana SA [2002] ECR 2002 I-03901;
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CONTROVERSIAL LAW ISSUES IN THE ENFORCEMENT OF THE NEW LEGAL PROVISIONS IN FAMILY LAW

Dan LUPAȘCU[*]

Abstract

The relatively short period of the new Romainian Civil Code implementation highlights the existence of some controversial law issues regarding the legal provisions contained in Book II, entitled "About family".

Apart from the theoretical disputes, there are also court decisions that contain different solutions in the enforcement of the same legal provisions.

Controversy exists not only in relation to the newly introduced institutions in our legal landscape, but also regarding the ones taken over from the old regulation, institutions that have undergone some changes.

The examples are most varied and they do not bypass almost any matter. Thus, we signal the presence of different interpretations of regulations regarding: engagement, marriage, divorce, parentage, adoption, the legal duty to maintain, the parental authority, etc.

The present study highlights such controversy's by presenting the views expressed and the arguments invoked in their support and also some propositions of Ferenda Law.

Keywords: *Romainian Civil Code, controversial law issues, engagement, divorce, filiation.*

1. Introduction

Conducted during a relatively short time period, the considerable effort of *"modernizing"* romanian legislation and aligning with the international regulatory developments is somewhat *"shadowed"* by the existence of some legislative solutions susceptible of different interpretations or by the absence of provision.

Thus, reffering only to the provisions of the Civil Code regarding family relationships, we find that there are numerous discrepancies in the speciality literature and/or judicial practice. Their existence can be easily noticed from the critical content analysis in terms of legal logic of the various regulations. At the same time, in the process of law enforcement, in many cases, the guardianship courts have ruled differently over the same law issues. In fine, the specialized literature of almost 5 years of implementing the Civil Code revealed different views over the same law issues.

And we could say that this is just the beginning…

The present study highlights only a part of these controversies in matters, such as: engagement, nullity and dissolution of marriage, filiation and legal duty to maintain. Their presentation shows not only theoretical interest, but also significant practical consquences, because from the meaning of a legal provision depends the outcome of a specific case, or in the event of a litigation, or in any other assumptions of enforcing a legal rule.

In the contents of the material are criticaly filtered expressed opinions, arguments invoked in their support and also, solutions that we share.

Likewise, regarding certain aspects, there are formulated *law ferenda* proposals designed to lead to the elimination of gaps or, where appropriate, equivocal formulations and the adoption of some clear legislative solutions, that are able to meet the requirements imposed by the specific family relations and the principles that govern this field.

2. Content

2.1. Controversies on the legal nature of engament, engagement effects and legal nature of the liability in the event engagement breakage

Legal institution having a considerable age (being mentioned in the Old Testament – where it was designated through the Hebrew term *"aras"* – present in the Roman law, Byzantine law, etc.), in essence, engagement represents the solemn covenant of two persons of the opposite sex to marry each other in the future.

Also regulated by the old statues, but omitted by the Romanian Civil Code of 1864, engagement was reintroduced in our law through the new Civil Code, a legislative intervention that has sparked conflicting reactions among specialists in family law. The analysis of this institution also generated ample discussions in doctrine. For example, regarding its legal nature, some authors qualify engagement as a legal act[1], a convention[2], others are

[*] PhD, Faculty of Law, "Nicolae Titulescu" University of Bucharest (e-mail: **prof.danlupascu@gmail.com**).

[1] E. Florian-Considerații asupra logodnei reglementată de noul Cod civil,Curierul judiciar nr.11/2009, p.632; C.C.Hageanu-Dreptul familiei și actele de stare civilă, Ed. Hamangiu,București, 2012, p.15.

[2] I.D. Romoșan-Dreptul familiei, Ed. Universul Juridic, București, 2012, p.30.

letting to believe that it would be about such an act[3], while another author believes that engagement is a *"simple legal fact"*[4].

As far as we are concerned, we maintain our opinion[5] of being in the presence of a legal act, more precisely a legal *sui generis* family law act, a qualification that results primarily from the legal definition of engagement, definition contained by art. 266 paragraph 1 Civil Code. Secondly, the membership of engagement in the category of legal acts is deducted from the implementation of the sanction of nullity in the case of failure to comply with the basis conditions. Thirdly, the fact that the legislator prohibits the insertion of a Criminal law clause leads to a *a contrario* interpretation according to which any other clauses, that are compatible with this institution, are allowed. Finally, it should be noted that engagement does not fall within the legal category of juridical deeds regulated by the Civil Code.

Another controversy was generated by the fact that the law does not indicate the effects of engagement, but confines only to regulate the patrimonial consequences of breaking the engagement. From here it leads to the conclusion that engagement does not give rise to any statute for the engaged persons, thus the analogy with the institution of marriage is not permitted, only the appearance of some *"pseudo-effects at the breaking of the engagement"*. So, basically engagement is a legal act deprived of legal effects[6], the only ones being born at the moment of her tempestuous breakage[7].

We do not share this opinion and we also consider that it is unacceptable that the legislator should be concerned by an institution that lacks any legal effects. If some effects were not expressly provided then it does not mean that they are nonexisting. Also, sanctioning the abusive breaking of engagement or of the culpable determination of the other fiancé to break the engagement presupposes personal relationships conducted in good faith and loyalty between the two fiancés. Even though it does not give rise to a marital action – in order not to affect the matrimonial freedom – engagement generates the juridical condition of engaged persons, thus arising moral as well as legal consequences.

The relations between fiancés fall within the definition of private life, and they are enjoying the legal protection offered, a fact also confirmed by a decision of the former European Commission[8]. From the circumstance that the law penalizes improper conduct of breakage or the determination of the engagement breakage, it is inferred that between the fiancés there are a number of personal rights and duties, similar in principle to those of marriage. Without equalizing the two legal institutions, we can not ignore that both of them are based on the friendship and affection between a man and a woman. That's why we believe that it is not exaggerated to support the existence of some mutual obligations (respect, loyalty, moral support). At the same time, fiancés may agree to live and eventually to take care of the household together, a situation in which engagement can overlap over the state of concubinage.

If children were born from the relationship of the engaged couple, then the couple cohabitation in the legal time period of the conception makes the presumption of filiation against the alleged father applicable. Fiances can choose the matrimonial regime (such an agreement shall take effect from the date of marriage), they can exchange gifts or they can receive them from third parties, they may agree to provide material support for each other, they can aquire assets under common ownership etc.

Reaching a conclusion over these issues, we support that engagement produces both patrimonial and non-property effects, whose legal consequences extent is determined by taking into consideration of the actual content of the agreement between the sides.

In order to remove any doubt about the effects of engagement, we propose the completion of the statutory provisions as specified above.

The legal nature of the liability in the event of a breakage of engagement is not safe from criticism either, under debate being the contractual liability and the tort liability. Under the empire of the current Civil Code, the dominant view is the incidence of liability in tort[9]. In our case, we will remind that in the case of contractual liability, the breached obligation is a concrete one, from those established through contract. So, as we mentioned above, engagement is not a contract, in the common law meaning of the term, but a *suis generis* family law juridical act.

The promise of marriage can not be executed in kind, through the coercive force of the state. Therefore, the contractual nature of the liability is excluded. In the case of tort liability, the breached obligation is a legal obligation, with a general nature that we all share, consisting in the violation of a conduct rule which the law or the local custom imposes or by an infringement brought to the legitimate rights and interests of others. In the matters of engagement we can not speak of a

[3] M. Avram-Drept civil.Familia, Ed. Hamangiu, București, 2013, p.31-32.
[4] A.Gherghe-Noul Cod civil, Studii și comentarii, colectiv coordonat de Marilena Uliescu, vol.I, Ed.Universul Juridic, București, 2012, p.609.
[5] Dan Lupașcu,Cristiana Mihaela Crăciunescu-Dreptul familiei, Ed. Universul Juridic, București, 2012, p.47.
[6] Emese Florian, Considerații..., op.cit., p.633.
[7] S. P. Gavrilă-Instituții de dreptul familiei în reglementarea noului Cod civil, Ed. Hamangiu, 2012, p.12.
[8] C.J.C.E,Cauza Wakefield contra Regatului Unit, 1 octombrie 1990 (Jurnalul Oficial al Uniunii Europene, C189/27).
[9] E. Florian-Dreptul familiei, Ediția 5, Ed. C.H.Beck, 2016, p.29.

violation of a general obligation or a rights infringement or also legitimate interests in the sense mentioned above. Moreover, the person has the right to break off her engagement, without being obliged to marry. The pecuniary sanction only intervenes under the assumption of the abusive exercise of this right, which draws incidence in article 15 conjuncted with art.1353 Civil Code.

Therefore, we are reluctant to qualify as pure tort such a liability, thus sustaining the thesis of liability for the abusive exercise of a recognized legal right.

2.2. Controversies concerning nullity and dissolution of marriage

Towards the fact that the provisions of art.13 para.1 in the Civil Code were not taken over from the Family Code it has been sustained that the failing to display the marriage statement is no longer sanctioned with nullity[10]. It is true that breaching the provisions of art.283 Civil Code is not mentioned among the cases of absolute or relative nullity of marriage, however it must not be ignored that these cases relate to the express nullities, and , outside them, there are virtual non entities, the provisions of the art.1253 Civil Code being applied by analogy.

In our opinion the breach of advertising marriage, regardless of whether it takes the form of denying public access at the celebration of the marriage or not displaying the marriage declaration, attracts the absolute nullity sanction of that clandestine marriage. In support of this opinion we invoke, firstly, the provisions of Article 1, paragraph 1 of the Convention relating consent to marriage, minimum age for marriage and registration of marriages, ratified by Romania by Law no. 116 / 1992, according to which: *"No marriage shall be legally entered into without the full and free consent of both parties, such consent to be expressed by them in person after due publicity and in the presence of the authority competent to solemnize the marriage and of witnesses, as prescribed by law."* Secondly, the mandatory wording of the provisions of Civil Code art. 283 maintains the solution of applying the absolute nullity so that the purpose of the violated legal provision to be achieved.

De lege ferenda we propose the completion with this nullity case of the provisions in Article 293, paragraph 1 Civil Code.

Regarding the possibility of granting compensation pursuant to Article 388 Civil Code, in the case of putative marriage, there are two orientations shaped in the specialty literature. Thus, some authors[11] consider that both spouses are subject to the provisions of divorce in regards of patrimonial relations, including the right to damages, regardless of whether both or only one of them was of good faith at the conclusion of marriage. In what concerns us, we share the view that *"both compensatory benefit or the right to damages are specific effects of divorce"*[12], a situation where you can not apply the provisions of art. 388 Civil Code. The husband of good faith can only claim damages under the common law (of civil liability under tort)[13].

In the matter of culpable divorce for solid grounds, if the claimant spouse dies during the process, art.380 para. 1 Civil Code provides for the possibility of the spouses heirs to continue divorce proceedings. The meaning of the *"heirs"* notion in this law text is the subject of a doctrinal dispute. Specifically, an opinion[14] claims that, in the event of vacant succession, the divorce proceedings can be continued by the village, town or, where appropriate, the municipality on whose territorial area the goods were located at the opening date of the inheritance. We do not share this point of view, believing that the territorial administrative unit is not entitled as the legal heir and can not continue the divorce proceedings[15]. We base our view on a text argument. Thus, art. 963 para. (1) and (2) Civil Code limitingly mentions the categories of legal heirs and the next paragraph provides that, in the absence of legal or testamentary heirs, patrimony of the deceased is transmitted to the administrative-territorial unit.

Given the special practical consequences, we believe that legislative intervention is required in this regard.

2.3. Controversy regarding filiation

The fact that the condition in the contents of Article 53 paragraph 2 of the Family Code has not been taken over in the Civil Code – respectively child birth which took place before the mother remarried, has led to different interpretations concerning the solution of the paternity dispute. Opinions are to the effect that art. 414 para 1 Civil Code is unclear, allowing different interpretations[16], for example that it should enforce *"the priority presumption established by the law or by court"*[17], *"that the problem of double paternity will be settled through legal action in the denying paternity*

[10] M. Avram-Drept civil.Familia, op.cit., p.91-92; C.C.Hageanu-Dreptul familiei..., op.cit., p.39.
[11] T.Bodoașcă, A.Drăghici, I.Puie-Dreptul familiei, Ed.Universul Juridic, 2012, p.163.
[12] M.Avram - Drept civil.Familia, op.cit., p.105.
[13] This solution is also sustained in the french doctrine. See, for example: F.Debove,R.Salomon,T.Janville-Droit de la famille,8 e edition, Ed.Vuibert,Paris, 2012, p.153.
[14] M.Avram-Drept civil.Familia, op.cit., p.133.
[15] In the same meaning: M.Tăbârcă, Drept procesual civil, vol.II, Ed.Universul Juridic, 2012, p.669.
[16] S.Guțan-Reproducerea umană asistată medical și filiația, Ed.Hamangiu,2011, p.69.
[17] C.C.Hageanu-Dreptul familiei..., op.cit., p.193.

action"[18], endeavor whereof has been observed, with good reason, that *"it can be foiled by invoking the lack of interest exception*". Case in which, the court or adversary can appreciate that not the attacked presumption is operant, but the other one"[19]. By comparing the provisions of art. 53 para. 1 Family Code (according to: *"A child born during the marriage has as a father the husband of his mother"*) with those of the art. 414 para. 1 Civil Code (according to*:"A child born or conceived during the marriage has as a father the husband of his mother"*), we remark the content difference, namely that the new regulation aims also on conception, not only child birth. Furthermore the conception is placed in the text after birth, which means, in our opinion, on the one hand that it has been desired to also cover the hypothesis of the child's conception before marriage, and on the other hand to enforce an order of preference thus consecrating the solution for the paternity conflict. Therefore, we are not in the presence of a evolutionary legislative change.

An intervention from the legislator would be welcomed to end this dispute in the sense of the full takeover of the old reglementation.

2.4. Controversy regarding the legal duty to maintain

The Article 527 para.2 Civil Code, in accordance with the expressed oppinions found in the specialty literature and with the judicial solutions pronounced in the application of the Family Code, foresaw that the determination of the debtors means of maintenance will be taken into account not only by his income and assets, but also by the possibilities of achieving them.

Therefore, the one who has no income or assets, but it is able to work, can be compelled to the legal duty to maintain, the connecting factor being the minimum wage of the national economy. In the hypothesis in which the debtor resides abroad and has no income even though he is fit to work (in practice were different solutions pronounced). Thereby some courts have established the alimony by taking into account the national minimum wage in the country concerned[20], while others have taken into account the minimum wage of the national economy of Romania[21]. At the first glance, it could be argued that the superior interest of the child demands the alimony that would ensure a higher amount of mainteinance, thus implying a comparison of official data set by the laws in those respective states. Only that this higher interest has a complex content, a content that involves the child should have parents who are enjoying a good reputation in terms of criminal law.

That is why we believe that the solution must be determined concretely, on a case by case basis, also taking into consideration all the relevant elements (the nature of the abroad stay, the time period, the concrete possibilities for earning legal incomes in that country, etc.).

A legislative clarification of this law issue or utilising a unification mechanism of judicial practice from the ones stated in the Civil Procedure Code would also be welcomed in this case.

3. Conclusions

The present material captures some of the doctrinal and jurisprudential divergences that are appearing from the application of the new legal provisions in the family law field.

The approach is complex, being made not only from a theoretical perspective, but also from a largely applicative one. As consequence, the purpose pursued and the result obtained are not only about fully and correctly discerning the complete meaning of the analyzed legislation, but also to avoid the wrong solutions in the process of applying them.

The diversity and polyvalence of regulations, the unique character of the legal rules, the problem of adherence to the national realities of legal provisions inspired by other legal systems, but mostly the question of the adequacy of the current law to the rapidly transforming social needs undoubtedly requires broadening and deepening scientific research.

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[18] M.Avram-Drept civil. Familia, op.cit., p.376.

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HARMONIZATION OF THE CONSUMER CONTRACT DISPOSITIONS WITH THE GENERAL CONTRACT RULES

Alexandru MATEESCU*

Abstract

This work contains and mainly tackles the contract of consumption, its differences and similitudes to a general contract, manners of applying it, and the way in which the former can be better coordinated and correlated to the general contracting terms, established by the civil law. Along the years, the consumption contract has undergone several addenda and it has come to represent an instrument of both refference and regulation for the socio-economical relations between two parties who have a commercial agreement. The general law frame has had a great influence in the development of the consumption contract, as well as on its applicability conditions and its manner of deployment. Through the development of the judicial law concerning the contract of concumption, this type of agreement has influenced, through its human and social nature, both the general contract, and the specific frame it relates to.

The relationship between the two types of contract is one of interdependence, which is determined by the need of judicial regulation in the Romanian and European economy. The ceaselees development of interhuman relations pushes society towards maintaining a continuous study of the advancement of specific legislation and judicial regulation.

The main purpose of this work is analyzing the general judicial frame and the way in which the differences between the general contract and the consumption one may represent a benefic and mutual influence on protecting the citizens' rights, which in the case of the consumption contract encompasses the protection of consumers' rights. Also, it will analyze the aspects that determine the manner of application and the the differences that can be surmounted in order to achieve a better cohesion between these types of contracts.

Keywords: *consumption contract, contract, consumer, european legislation, civil law.*

1. General aspects of contracts

By definition, a contract represents a written agreement, concluded through the free will of two or more parties. Its main purpose is to apply and to carry out an action that had been conjunctly established by the involved parties. According to the civil law, the contract represents a legal form by means of which two or more parties determine a general frame to accomplish certain objectives and desiderata they have previously concluded on. Through its nature, a contract requires the free will of its subscribers, as well as their full awareness and comprehension of the terms, obligation, benefits and repercussions enssuing from their adherence to this interpersonal judicial regulation form.

1.1. Types of contracts

Contracts may have a simple nature, also known as consensual, which only requires the parties' acceptance, which is a solmn form that requires respecting a certain manner and legal form to carry out the contract, as well as a real form that implies the need of the object of the contract for a physical realization of the mentioned agreement.

A conract is a legal manner through which an entity relates to the legal frame in the society where it carries on its daily activity. This instrument represents a legal form which is the entity's choice as a way to protect, by means of rights ensurance law, its goods and dignity.

A contract is an instrument of will, it is an agreement and it requires the complete consciousness of all the involved parties. Under all its legal forms, comprised by the law, all the consequences that result from the application and completion of this contract are to be accepted and obeyed by all involved parties. [1]

1.2. The consumption contract as an instrument of comercial and judicial regulation

As a counterbalance to the general contract, the consumption contract shows a nature that specializes in the economical and commercial side of a company. The contract has as a main objective the protection and regulation of certain economical principles that intervene between the contracting parties in such situations. The argument and detailed analysis of the condistion in which the agreement is applicable becomes extended. This is the way in which the law intervenes in supporting, supervising and ensuring the completion of the voluntary agreement between the parties, in a manner that is reasonable for all those involved. The law guarantees free access to information and a full understanding of the contract, in order to avoid certain abusive forms that might impair one of the parties, as well as for ensuring a balance of the contract and equality between the parties.

Through its detailed nature, the contract of consumption exerts a pressure in changing the general contracting terms, which leads to the introduction of new terms and regulations, at a

* PhD Student, Faculty of Law, "Nicolae Titulescu" University of Bucharest (e-mail: **mateescu_alexander@yahoo.com**).

general level. This is a desirable aspect, but it is hard to apply, due to the general nature of the contract, which has been conceived mainly as a manner of legal regulation, and not as a specific instrument for determining economic relations between certain parties. In-depth analysis of legal relations between parties presents certain difficulties in relating the general civil frame to the specific one, which is oriented towards commercial relationships. Such commercial relations may sometimes present a view that is somehow against the general terms of civil law. Any particularization of the legal relations between two or more parties presents a dilemma not only regarding implementation and application, but also in grading the way in which they interact with the legislator.

The specific clauses and provisions of the consumption contract, which are ment to pretect citizens against a potential abuse, cannot be automatically applied to the civil contracts, but the way in which such provisions help and lead to avoiding certain abuses on any party is notable. Inevitably, one of the parties will have acces to fewer resources in defending its own interests. According to the theory of the contract balance, this is the reason why many of the consumption contract provisions can be seen as an example of protecting a weaker part involved in a contract and of ensuring a climate of balance and equity. [2]

2. Differences, similarities and the relation between the general and consumption contracts

Through its nature, the general contract presents a wide frame, defined by the law, which tackles the totality of civil agreements between two or more elements. By contrast, the consumption contract deals with the commercial aspect and it attempts to ensure an as equitable and correct climate as possible. The comsumption contract mainly addresses the rehabilitation of a balance of forces between the parties. This is a balance that, for many reasons, one of them would not have the power to support, and protect its own rights with the same resources that the other party involved in such a contract would.

2.1. Differences and critics about the influence on the general contract frame

Based on these very differences, many points of view assert that the two types of contracts represent two separate instruments, which are completely different and are to be tackeld as such. The consumption contract is supposed to represent a special case and it cannot be integrated in a comparative study, together with the general contract and the way in which it relates to the latter.

The circumstances to which the concumption contract is submitted, the references it makes to different provisions and its manner of implementation in the comsummer's protection are aspects that cannot be included and compared to the general contract terms.

Many of the specific norm for consumption conracts present nothing more but an economic aspect that is specific to and applicable only for those contract that have a aommercial character. Some of these aspects are regarded as limitations for the civil law and they cannot be completely passed to a general level, as they have an explicit predisposition for they are of consumerism.

Some of the critic and concerned views come to presents the ways in which some supraregulations stand against free initiative and fringe the parties' rights in the contract conclusion procedure. Formalizing some regulations that only make it harder for an tie the contracting parties to preconceived situations in which they can do nothing but accept them, and they cannot negotiate for themselves the best solutions for each party. By taking such a formalization of some norms of right to a general level, we increase the risk of fringing the citizens' rights regarding the form of agreement they choose and that they can assume, in relation to other parties they eant to conclude a contract with. [3]

This approach is highly criticized as it is considered to be an obstacle for the contracting parties to decide on certain provisions individually, as well as on some provisions they may want to use or not. In such cases, many of the specific aspects become mandatory for those involved in the contract, as they do not have a voluntary and assumed character. The contract is, by definition, an instrument ment to ensure balance, equity and correctness, but in this case its power over the parties becomes unbalanced.

From a legal point of view, the critics focus on the prefabricated and static form of the contract, so that it blocks the liberty of the parties to establish the best requests and benefits, according to their own interests. Some provisions come against the liberty of decision.

2.2. Similarities and benefic influences on the general contract

Even by taking into account the major differences that occur between the two types of contract, one can say that the majority of changes that were brought on the general contracting frame arose from the influence of the consumption contract. The majority of the addenda are maily of an ecomic nature and the involuntarily influence the entirety of the general provisions and the way in which the law relates to them. The socian and human relations between people, institutions and entities present an unequalled influence on the Romanian and European legal frame.

As seen, the majority of influences in the economic are come to represent both problems and

solutions, not only for the commercial or consumption contracts, but also for general agreements.

By the adjustment of the civil law, one can note that the influence is becoming bidirectional and we cannot completely limit it to only one area of the law. The intertwining of legal provisons comprises the etire legal spectre and they begin to represent actual legal norms. Evem if the consumption contract is based on protetcing the consumer's rights; it becomes overgeneralised and transposed to a wider frame as the protection the citizens' rights regarding the regulations of general contracts. The majority of changes are made based on the commercial cases and experience. This is the one area where one can find, more often tha not, differences in interpretation and regulation, which are insufficiently defined, in order to present a lack of ambiguity in deploying the existing legal norms.

The consumption contract's principles do not imply only protecting one of the parties, but it tries to determine all those involved to agree on some conditions, in order for all of them to be able to comply with their contractual obligations. This is a norm and way of thinking that is brought about, or at least encouraged to be applied in other types of agreement as well. The specificity of consumnption contracts is presented through the provisions it is trying to fight against and the insuring measures it is trying to impose on the general contract, in order to ensure a balanced and honest deployment af an agreement between two or more parties.

As many of the general contracts represent reference footage for the consumption contracts, it can be said that the latter aplly all the principles of the former. Under certain precise circumstances, the rules and regulations of the general contract will completely be applied to the consumption contracts. [4]

3. European and national legal space

As a result of Romania's adherence to the European Union, the issue of regulating general and consumption contract has become a national problem, at a European level, and, at the same time, and European problem which needs to be adjusted and harmonized with the national regulations. A fair adjustment and a unitary regulation represent an objective of coherence, so that the national law must not be altered, or loose its internal character and specific. The European provisions have a tendency to ensure the European citizen concerning the process of justice and the legal manner in which his interests are represented and protected.

As one cannot avoid different lacks in legislation, and many unclarified situations may occur, which may represent the inexistence of one regulation concerning a fair solution, the application of a European law is utterly necessary, and this needs some adjustments regarding its members. The socio-economic frame is in a continuous change, which triggers the need for perpetual adjustment of the specific legislation. The European law comes to cover any gaps that may exist in any national law of its members. [5]

3.1. General national frame

At present, the national legislation makes a very clear difference in defining the general and consumption contracts. The consumption contract is is to obey some specific norms, which are not valid at a general level, so far. The form of the contract, that between a consumer and a professional, the one-sided cancellation and the consequences, the contracting parties' obligations and the specific rules concerning any abusive clause that may be imposed on the consumer are constitutive parts of such a contract. The internal legislation makes a clear difference between the two types of contract, but there is no concrete boundary, as there is in some other European cpuntries. For example, in France, the contract regulations are made by means of the civil law, while the consumption contract belongs exclusively to the economic area and is mainly present by means of commercial contracts and reports. This difference is ment to keep a distance between judicial relations, and those that may include any possible economic interests. [6]

Nowadays, in Romania, the legislation is undergoing some times of change and adjustment reporting to the European law, as well as to the internal frame, as it has not yet decided whoch approach to take, regarding contracts and the differentiation between them. At present, difficulties are also caused by the possible implementation and practicality of these changes in the national legislation. These changes may cause some issues in the system, and this may ultimately reduce the effectiveness of applying such a harmonization of judicial legislation.

The differences and anbiguities of Romanian legislation also occur when it comes to the role of the consumption contract. In the specific frame, this contract is considered to be fundamental interment for protecting the rights and interest of the consumership. It can be said that the contract of consumption also defends the citizens, in certain circumstances and in any cases when his interest determine him to conclude a commercial agreement. At the same time, according to the national law, the fundamental rights are to be protected by means of the civil law and, subsequently, by means of the general contract. Thus we can allege that the economic and commercial interests are protected by means of specific contracting instruments, but the contractual law regulation defends the rights and liberties of the citizenship in any legal agreements the latter may conclude. In this case, the

consumption contract is the mere defendant of services and goods a cosummer may be entitled to by contract. [7]

3.2. The European judicial frame

The European legislation in this area mainly tackles the manner of application and deployment of the European directives regarding the consumer's rights, especially 97 / 7 / CEE and 2011 / 83 / CEE. The purpose of the European directives is to ensure the legal frame upon which the member states are to adjust and improve their own internal legislations.

This frame has to offer a climate of transparency for the European citizens ti rest assured that their rights are guaranteed and protected. The application of law regulations regarding the consumers' rights has a lengthening effect on the general contracting frame. This effect consists of offering an intensified reglementation and to ensure an appropriate procedure whenever the gaps in the legislation may lead to ambiguities that can be exploited to the disadvantage of the citizen and his intesrests. [8]

Common practice admits that not all the provisions must be harmonized to the general contarcting frame. By their judicial nature and the differences between the two concepts, we cannot suppose that the two cases are based on the same situations. Even so, the pressure and influence exercised by the European law brings addenda to the national legislations, especially in those areas that were not yet determined and regulated by the national legislations.

The European law also seems to be a liant between the citizens and the member states and it embodies a period of adaptation to the sosio-economic European space, by which the member states are encouraged to find their own solutions and methods of adjusting to the European climate. The civil frame of the European Union regulates and esures the principal rights of its citizens. Besides this, the most frequent issues that occur between citizens and the member states are of a commercial and economic nature. [9]

The manner of gradual deployment in the form of recommendations has as a main purpose the preparation of the member states for any future adjustments. It can be said that the actual legislaition encourages a harmonization of the rights ment to protect the consumer, as an example for the legal provisions regarding any civil contracts. One of the priorities of the European Union is the protection of the civic rights and liberties of all of its citizens. [10]

4. Future perspective

One can say that the future of Romanian legislation, as well as the European law, with its addenda and completions, regarding the consumption contract, will be directly influences by the general forms provided by the civil law. The evolution and development of commercial relations will offer us a completely new series of cases, where the actual regulations will not be able to deal with the many different economic domains the citizens will take on. It can already be noted that the contract for utilities and the on-line commerce bring uo new situations, which have not yet been regulated, and which are still weakly exemplified and determined. These are sutautions in which the cosumer's rights can be broken, but issues may also occur in the case of general contracts, cases when the citizen may be prevented from acting and making full use of his liberties and contracting rights.

In the future, we'll present a clear analysis of the distinction between contracts and consumption contracts, based on the Romanian law, and the approach will be chosen as to make a distinction between the two, or to lead to a better understanding. The consumer's protection, which is provided by the consumtion contract, may be seen as both an example and a manner of deployment and protection of certain rights of a commercial and financial nature.

At the same time, one cannot say that this consumption contract does not have any impact on other social, juman and judicial aspects. More often tha not this type of contract has a major impct on the moral and economic dignity of one person. Taking this into account, one can conclude that such a contract, with such repercussion at both individual and collective levels is an example that should be taken into consideration for the wider specter of general contracts. Many of the consumption contracts' provisions can be declared as ensuring emasures for protecting the citizens' rights, not only economically, but also from a moral and judicial point of view.

One appropriate solution for the future might be the adjustment and improving of European law, based on the existing provisions regarding the consumers' right, from the actual civil law. This way, all future recommendations and European directives can be easily adapted and applied inside the national legislations.

At the same sime, a more explicit European law, regarding the area of general contracts, could bring and additional boost to the member states' will of synchronizing and harmonizing their national laws.

As a final conclusion, we can say that, sooner or later, the continuous development of the European socio-economic climate will lead to a tighter coordination relation between the European law, the legal form of contracts, and the specific provisions regarding the protection of consumers' rights and the consumption contracts. One cannot yet sau which are the details that will be requested by the law-giver, but we can say that the legal form is boung to undergo substantial changes based on the ones that have occurred in the general European

climate. These changes will be brought by the social, economic and judicial demands that exist inside the European community and the European nations.

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ADAPTATION OF CONTRACT IN CASE OF VICE OF CONSENT BY ERROR. APPLICATION BEFORE THE COURT OF ARTICLE 1213 CIV. C.

Emilian-Constantin MEIU*

Abstract

We propose further brief analysis of the substantive conditions that should be met in order to be covered by the contract adaptation regulated by the Romanian Civil Code art. 1213 Civ. C. By virtue of the novelty of this institution in the Romanian legislation could be some practical difficulties before the court that we briefly consider in our work and propose possible solutions.

Keywords: *error, nullity, contract adaptation, consent.*

1. Introduction

In regulating the error as vice of consent the Civil Code introduced by art. 1213 a new institution, namely adaptation of contract, as an alternative for voidability.

Usually, violation of a condition provided by law for the validity of the document is sanctioned by nullity. But nullity, although limited the application of the principle of contractual freedom, it must be exceptional, so it shall not work unless the law provides another remedy to cover the deficiencies underlying the regulated condition that is not observed by the parties. Also, in case that the nullity protects a private interest, the protected person may cover it.[1]

Contract adaptation provided by art. 1213 of Civil Code seems to have its origins in the Italian Civil Code[2], but is very similar with the suitable regulation of the UNIDROIT[3] Principles. The new institution is part of the modern orientation expressed by the phrase *favor contractus*, according to which nullity shall not operate to the extent that there is the legitimate interest of one of the parties under the contract as it was understood by the mistaken party[4].

The contract adaptation in case of error occurs by exercising a right of potestative of errans' contractual party to deliver the declaration of performance of the contract or to simply execute the contract as it was understood by the errans. The mechanism of this institution does not involve a process of renegotiation of the contract, but rather, that the contractual party adheres to how the errans has represented the contractual relationship at the time of its conclusion, in order to protect the free consent form.[5]

Given the novelty of the institution of contract adaptation governed by art. 1213 of the Civil Code, we propose below a detailed examination of how the adaptation of the contract may operate, focusing on the procedural means by which the court hearing an action for annulment for error could follow the will of the defendant to adapt the contract as it was understood by the party who is entitled to invoke the nullity.

2. Content

From the regulation provided by art. 1213 Civil Code results that to adapt the contract in case of error vice of consent is required to meet the following conditions:

a) to be fullfiled the conditions of error vice of consent for one of the party. There is no requirement that the error must be common[6]. Regarding the conditions of error as vice of consent, these are the following: the error must be essential; the error must

* Emilian-Constantin Meiu, PhD Candidate, Faculty of Law, „Nicolae Titulescu" University of Bucharest (e-mail: **meiuemilian@yahoo.com**).

[1] G.A. Ilie, Considerații asupra posibilității aplicării adaptării contractului în cazul dolului în lucrarea *In honorem Cornliu Bârsan,* Editura Hamangiu, 2013, p. 244-245.

[2] "Art. 1432, Mantenimento del contratto rettificato, La parte in errore non può domandare l'annullamento del contratto se, prima che ad essa possa derivarne pregiudizio, l'altra offre di eseguirlo in modo conforme al contenuto e alle modalità del contratto che quella intendeva concludere."

[3] "Article 3.2.10 (Loss of right to avoid) (1) If a party is entitled to avoid the contract for mistake but the other party declares itself willing to perform or performs the contract as it was understood by the party entitled to avoidance, the contract is considered to have been concluded as the latter party understood it. The other party must make such a declaration or render such performance promptly after having been informed of the manner in which the party entitled to avoidance had understood the contract and before that party has reasonably acted in reliance on a notice of avoidance. (2) After such a declaration or performance the right to avoidance is lost and any earlier notice of avoidance is ineffective."

[4] M.W. Hesselink, G.J.P, Principles of European Contract Law, Ed. Kluwer, Deventer, 2001, p. 91.

[5] C. Zamșa, în Noul Cod Civil.Comentariu pe articole, Fl.A. Baias, E. Chelaru, R. Constantinovici, I. Macovei (coordonatori), Ediția a II-a, Ed. C.H. Beck, 2014, p. 1281.

[6] Idem.

be excusable; the element on which bears the false representation to have been decisive for the conclusion of the legal document, so if it had known the reality the party would not have contracted; for the onerous bilateral or plurilateral legal documents, it is necessary that the contractual party to have known or should have known that the misrepresented item was crucial for the conclusion of the respective civil act[7].

The question is what happens if one of these conditions is not met or is not considered met by the contracting party that even so understand to declare that it agrees to perform the contract as it was understood by the mistaken party. According to grammatical interpretation of the expression of art. 1213 Civil Code. "If a party is entitled to invoke voidability of contract for error" results that in order to follow the request of the defendant contractor of errans, to the adaptation of contract, the court must prior consider whether the requirements consent vice error are met. It would follow that the court shall examine in substance the action for annulment and thus to administer the necessary evidence, and finally to establish the conditions to take note of the adaptation of the contract in the sense that it was understood by the errans[8].

It must also be established which shall be the solution of the court if the evidence applied results that there are not satisfied the rules in order that the error be vice of consent. It shall reject as unfounded the action for annulment and it shall find out that there are not met the requirements to ascertain adaptation of the contract under art. 1213 Civil Code? We are inclined to this solution, and if the defendant intends to execute the parties may eventually sign a new contract.

Besides logical and grammatical interpretation, a justification for analyzing the error conditions as vice consent is that by adapting the contract is aimed at maintaining a vitiated consent agreement affected by error and not a contract modification unaffected by this vice consent.

b) The contract has not been executed yet. This condition appears to result from the first paragraph of Article 1213 Civil Code. But it is not explicitly mentioned. Thus, in the event that one party has understood that it has completed a sale of a property with usufruct life contingency, and the other party a maintenance contract, if the Party shall notify the contractor of error in which it is, it may give its consent to adapt contract.

It is essential for this condition that the mistaken party has not accepted its contractual partner's execution. The mere fulfillment of contractual obligations does not prevent the adaptation of the contract. The final moment of this view is that in which the errans accepts the contractual obligations of the contractual party. In the given example above contractual execution time of acceptance of the contractual party would be the payment of the price that is subject to the sale[9]. After that, it would be a new contract accompanied by any resolution or termination of the first.

We also believe that in order to perform the contract adaptation is necessary only that the counterparty of the errans not to have executed its contractual obligations. The errans can execute at any time its own benefit while it is assumed to have vitiated consent and performs the contract as it was understood, so in the form that it could be adapted.

It was stated in the doctrine[10], that failure to execute the contract, involves the necessity of lack of any damage caused by spontaneous errans' error. Does it refer to damage caused to it's contractual partner or to errans or both? If it comes to a damage caused to the errans contractual party, it can declare that it doesn`t want the adaptation. Instead if we discuss about the damage suffered by the errans, the situation is different. Our Code does not provide such a condition, although it appears in similar institutions existing in the Italian and the Dutch[11]

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[7] For a detailed analysis of these conditions please see Gabriel Boroi, Carla Alexandra Anghelescu, Curs de drept civil. Partea generală, Editura Hamangiu, Bucureşti, 2012, p. 147.

[8] But what happens if the adaptation of the contract under Art. 1213 Civil Code occurs without court intervention, if the contracting party of the errans is notified by the latter and not later than 3 months it says it agrees with contract execution or executed without delay, as it was understood by the mistaken party? If the requirements for error as vice of consent are not met it shall not intervene the adaptment of the contract, but possibly it might be concluded a new contract or could be a novation by change of object, of course, subject to the conditions provided by law for signing of a new contract or for novation.

[9] But even if it receives the price, if it is much lower than the price of the property, it is alleged that the errans accepts it only on the basis that the difference shall be covered by the maintenance provided by the contractor. In such situation, the errans receives the price much lower than the value of the property, just because it is convinced that it signed a mainenance contract and not a sale contract. For a detailed delimitation of the maintenance contract to the sale contract please see Fr. Deak, Tratat de drept civil. Contracte speciale. Ediția a III-a, Ed. Universul Juridic, București, 2001, p. 536.

[10] C. Zamșa, op.cit., p. 1281.

[11] The Dutch Civil Code: "Article 6:228 Fundamental mistake

1. An agreement which has been entered into under the influence of a mistake with regard to the facts or legal rights and which would not have been concluded by the mistaken party if he would have had a correct view of the situation, is voidable:

a. if the mistake is caused by information given by the opposite party, unless this party could assume that the agreement would be concluded even without this information;

b. if the opposite party, in view of what he knew or ought to have known about this mistake, should have informed the mistaken party about his error;

c. if the opposite party, at the moment on which the agreement was entered into, had the same incorrect assumption as the mistaken party, unless he could have believed that the mistaken party, if this party had known the mistake, still would have entered into the agreement.

Civil Code. We may consider implicit that requirement? It is also the question of how shall proceed the court within the action for annulment the defendant declares that he is willing to execute the contract as it was understood by the errans instead the latter declares that the execution would not be useful as it is too late to prevent occurrence of the damage or the damage has already occurred.

May the court continue the trial of the action for annulment or it is obliged to take account of the defendant agreement regardless of the existence or imminent damage in errans` patrimony and ascertain adaptation of the contract, and errans would be directed against the other contracting party with an action for damages?

In this respect, in the Italian[12] doctrine it was shown that if the elapsed time or the circumstances caused the mistaken party a damage, not necessarily patrimonial, in the presence of which it can be assumed that the party would not be interested in adapting the contract, it can not be held .

We believe that in the absence of such a provision in the regulation of Romanian Civil Code, the court may not refuse to declare adaptation of the contract fot this reason that the time elapsed between the moment of signing the contract and agreement of the errans co-contractor occurred a damage or the circumstances have changed such that the mistaken party would not be able to gain from the signing of the contract the benefits that it would be gained if the contract had been signed from the beginning as it was understood by the errans.

In this regard, the only condition that the court is obliged to review is that the agreement on adaptation to have occurred within the three months stipulated in art.1213 par. (2) Civil Code, the co-contractor`s agreement of errans having a potestative character.

c) A final condition for adapting the contract is provided by par. (2) art. 1213. The errans is obliged to inform the contractual partner about the way he understood the contract. Depending on how it is carried the notification we may have two situations: informing takes place before bringing an action for annulment or informing by even the notice of the writ of summons.

From this moment the law provides a respite of 3 months in which the contracting party has the option either to declare that he agrees with the execution of the contract actually in the way that it was understood by the mistaken party. Where the notification occurs through notice of the writ of summons it also occurs the additional default condition that within 3 months it won`t be resolved the action for annulment. If the action for annulment was resolved, then the contract adaptation can no longer take place.

If the conditions listed above are accomplished, the contract adaptation shall result in considering the contract as being signed retrospectively as it was understood by the mistaken party. On the other hand, the errans' right to obtain the cancellation of the contract is extinguished by adapting the contract, as required by art. 1213 par. (3) Civil Code.

We shall further analyze how the court shall proceed to adapt the contract and possible practical problems which may arise in implementing judicial mechanism to adapt the contract provided by art. 1213 Civil Code.

If there is already an action for annulment of the contract for error and the agreement comes after communication to contractor within no more than three months, there may be two situations: the opposing party agrees with execution or executes without delay the contract as it was understood by the mistaken party. According to par. (3) art. 1213 Civil Code. in both cases the right to obtain the cancellation is extinguished.

From a procedural standpoint, when we are dealing with the effective execution of the contract in the form understood by the errans, the court shall regard the opposing party to submit evidence of obligation fulfillment (eg payment receipt price, the official report of hand over- take over.).

In case of the mere execution, it could take place even during the hearing, in which case it shall be recorded in the minutes of the hearing or outside

2. A nullification on the ground of a fundamental mistake cannot be based on a mistake which is exclusively related to a fact that, at the moment on which the agreement was entered into, still had to happen (fact in future) or that should remain for account of the mistaken party in view of the nature of the agreement, the general principles of society (common opinion) or the circumstances of the case.

Article 6:229 Agreement based on a non-existent legal relationship

An agreement which necessarily implicates to elaborate on an already existing legal relationship between parties, is voidable if this legal relationship does not exist, unless the nature of the agreement, the general principles of society (common opinion) or the circumstances of the case imply that the non-existence of that legal relationship should remain for account of the person who appeals to its non-existence.

Article 6:230 Right of nullification ends when the disadvantageous effects of the voidable agreement are removed

- 1. The right to nullify a voidable agreement on the basis of Article 6:228 or 6:229 ceases to exist when the opposite party timely makes a proposal to change the effects of the voidable agreement in such a way that the loss, which otherwise would be suffered by the party with the right of nullification, is sufficiently removed.

- 2. Upon the request of one of the parties, the court may furthermore, instead of nullifying the voidable agreement, change its effects in order to remove the loss which otherwise would be suffered by the party with the right of nullification."

Italian Civil Code: "Art. 1432 Mantenimento del contratto rettificato, La parte in errore non può domandare l'annullamento del contratto se, prima che ad essa possa derivarne pregiudizio, l'altra offre di eseguirlo in modo conforme al contenuto e alle modalità del contratto che quella intendeva concludere."

[12] Cesare Ruperto, La giurisprudenza sul codice civile.Coordinata con la dottrina. Libro IV - (artt. 1754-1822) Delle obbligazioni, Milano, Dott. A. Giuffre Editore, 2012, p. 116.

the procedural framework, when the defendant from the action for annulment shall have to submit the document evidencing the agreement[13].

In both cases described above, whether when obtaining the consent or when it is proven the effective execution of the contract as it was understood by mistaken party, the court shall have to ascertain the extinguishes right to request cancellation of the contract for error under art. 1213 par. (3) Civil Code.

Another problem is knowing when there are producing the effects of adaptation of the contract under Art. 1213 Civil Code: retroactively from the date of signing or rather from the date on which the contractor performs or states that it agrees to perform the contract as it was understood by the mistaken party? By the wording of the last sentence in par. (1) of the text of the law cited above, results that the effects of adaptation are retroactive, since the text speaks of the contract, which is deemed to have been concluded as it was understood by the mistaken party. So there is no reference to a subsequent legal act, but to the initial contract that is changed by potestative agreement of the contracting party in the form understood by the errans.

Another important aspect is the mentions that the court must make in the recitals and in dispositive fact regarding the adaptation of the contract? Since the adaptation of the contract takes place before the court it is mandatory to examine the institution conditions of art. 1213 as it was listed in the preceding, and then in the dispositive fact to ascertain the adaptation of the contract in the sense that it was understood by the mistaken party.[14]

3. Conclusions

The case of adapting the contract provided by art. 1213 Civil Code. is different from other situations of adapting the contract, in that the court only notes the potestative right of the opposing party to that who fell into error to execute or declare that executes the contract as it was understood by the errans.

For example, in case of lesion, according to art. 1222 par. (1) Civil Code. the adaptation may be undertaken by the party whose consent was vitiated by reducing its obligations to the amount of damages to which it was entitled or according to par. (3) the court may uphold the contract if the other party provides equitably, a reduction of its own claims or, where applicable an increase in its obligations. Also, in case of unpredictability, court may, pursuant to art. 1271 par. (2) Civil Code, dispose the contract adaptation if execution has become excessively onerous because of an exceptional change of circumstances which would obviously unjust the debtor to comply with the duty. According to para. (3) thereof, in order to be adapted the contract it must be cumulatively met a number of conditions.

When during a litigation occurs adaptation of the contract for error it requires that the court must verify certain conditions: to be executed the conditions of error vice of consent for one of the party; the contract not to have been executed yet;

Compliance with the protocol of information/ acceptance provided by par. (2) of art. 1213, manely that within 3 months of receipt of writ of summons the contractual party declare that it agrees to contract execution or execute effectively the contract in the manner in which it was understood by the mistaken party. If these conditions are met, the court shall ascertain the contract adaptation and the right to request cancellation of the contract for error has been extinguished.

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[13] In case that the consent was verbal out of the litigation framework, this consent shall be reiterated before the court and recorded during the minutes of hearing.

[14] For example to ascertain that it operated the adaptment of the contract signed between the parties in the sense that it is a maintenance contract and not a sale contract.

THE LEGAL REGIME OF THE UNILATERAL PROMISE REGARDING THE SALE CONTRACT

Livia MOCANU[*]

Abstract

The conclusion of a sale contract is often preceded by several agreements or temporary contracts taking several forms in the Romanian contemporary law, such as: the preference pact, the option pact, the unilateral and bilateral promise of sale. The current study regards the unilateral promise of sale/purchase which will be analyzed in the context of its legal acknowledgement by means of the Civil Code. The originality of this institution resides in its constitution elements, evolution and purpose, all of them composing an autonomous mechanism, completely different from the sale contract and the other contract meant to shape the latter.

Keywords: *unilateral promise of sale, bilateral promise of sale, option pact, promissor, beneficiary.*

1. Introduction

The field subject to analysis in the present work regards the unilateral promise of sale/purchase, an institution clearly regulated by the provisions of the new Romanian Civil Code. The importance of this institution has been pointed out by both the legal literature and practice and has gone through a progressive transformation, from a contract with no name, subject to a regime fiercely debated in the legal literature, to an autonomous contract, already having a legal regime and effects clearly regulated by the lawmaker. The unilateral promise regarding a sale contract is among the contracts preparing the final ultimate sale, which most of the times is not concluded instantaneously or almost instantaneously, being often preceded by several provisory agreements or contracts. The economic and legal realities have led to the multiplication and diversification of these acts preceding the sale contract, a fact which caused the lawmaker to step in, as a process which is absolutely necessary for establishing the legal regime of the pre-contracts in the sales field.

In terms of the legal institution subject to analysis, the present study shall determine the original elements of the unilateral promise to sell/purchase, comprising its definition, delimitation and purpose. In order to underline precisely the autonomy of this institution, we shall proceed to delimiting it from both some pre-contractual mechanisms with enforcement in the sales field, like the offer to enter a contract, the preference pact, the option pact and the bilateral promise of sale, and from the sale contract or a variety of the latter, namely the sale based on tasting.

The objectives mentioned above shall be accomplished by analyzing the legal provisions in the field, in order to render the changes and the novelty elements brought to the institution subject to analysis by the entry in force of the new Civil Code. The presentation of this contractual mechanism shall be based also on the specialized literature and legal practice – admittedly more reduced in the absence of a legislative acknowledgement (until the entry in force of the Civil Code). Nonetheless, the unilateral promise regarding the sale contract has already drawn the attention of the specialists, due to the issues which it raises when interpreting the legal norms applying to it.

2. Presentation

2.1. Definition

Traditionally, the birth of a contract was the result of the spontaneous instantaneous encounter between an offer and its acceptance. According to article 1182 paragraph (1) of the Civil Code, "A contract is concluded together with its negotiation by the parties or the acceptance without reservation of the offer to enter that contract". The text of the current Civil Code expresses in its turn the idea according to which the conclusion of a contract can take place spontaneously, without determining any potential pre-contractual phase, or in a complex manner, marked by negotiations, due to the object of the contract or the interests of the parties. As specialized literature also points out, in these situations "…the more complex is the object of the future contract, the bigger is the intensity of the negotiations preceding it"[1].

Precisely in the context of the constant evolution and change of the legal-economic reality, several pre-contractual agreements aiming to prepare the final contract emerged. When it comes

[*] Reader Ph.D, "Valahia" University from Târgoviște, Faculty of Law and Administrative Sciences (e-mail: **mocanulivia@yahoo. com**).

[1] V. Pop, *Contractul,* p. 203 and the following, apud Liviu Pop, Ionuț – Florian Popa, Stelian Ioan Vidu, *Curs de drept civil.Obligațiile,* Universul Juridic Publ. House, Bucharest, 2015, p. 53.

particularly to the conclusion of some contracts between professionals, the parties resort to broad negotiations regarding the elements of the definitive contract, which take the form of some complex procedures involving previous agreements between the parties[2].

The existence of several phases in the process for concluding a contract has led to the theory of the progressive constitution of contracts[3]. Either that they regard the constitution of the consent, or the object of the future contract, pre-contractual operations are based on contractual freedom and good faith[4], the parties approving the clauses of the operations in agreement with their interests and the concrete circumstances in which they are[5].

As for the unilateral promise to enter a contract, although it can be encountered in several categories of contracts, it is more of the times present in the sales field, having a well-defined role, in terms of both the gradual constitution of the consent and the progressive elaboration of the object of the final contract. Irrespective of the form which it takes, the unilateral promise to enter a contract has been defined by the legal literature as the convention by means of which one of the parties – called *promissory party* – takes in respect of the other party – called *beneficiary* – the duty to conclude in the future, upon his request, a certain contract, whose essential content is for the moment determined by the promise to enter a contract[6]. From the perspective of the validity conditions, it is necessary for the unilateral promise to enter the contract to contain all the essential elements of the promised contract.

When it comes to the unilateral promise of sale/purchase, we are speaking of a contract by means of which a person called *promissory party* takes in regard to another person called *beneficiary* the duty to sell/purchase a certain asset, at a determined/determinable price, within a certain term, while the beneficiary of the promise has the freedom to choose whether he wants to sell/purchase the asset[7]. The exclusive promise of sale (or only of purchase) is a unilateral contract, as it creates duties belonging only to one of the parties - the promissory party. As a result of the conclusion of a unilateral promise, together with the duty taken by the promissory party, the right to express an option emerges in the patrimony of the beneficiary, as a result of which he can choose to accept or deny buying the asset promised by his debtor[8].

As it results from the definition above, the unilateral promise of sale/purchase is based on an agreement of wills which determines the offer of the promissory party and his firm commitment to conclude a contract, while the consent of the beneficiary only refers to expressing his choice of selling/purchasing. The most encountered in practice is the unilateral promise of sale, which is typical to real estate sales, which have considerably developed since the beginning of the 20th century.

Before the entry in force of the new Civil Code[9], the institution of the unilateral promise of sale has been acknowledged and recognized by both the legal literature and practice, but there has not been any clear regulation of it. Although a legal regulation was missing, the conclusion of the pre-contract was deducted from the principle of contractual freedom[10],whereas the decision ruled to have the role of a sale purchase act was legally based on the provisions of articles of 1073 and 1077 of the 1864 Civil Code[11].Moreover, through article 5 paragraph (2) of Title X of Law No. 247/2005 on the reform in the field of property and justice, but also some secondary measures[12], the lawmaker clearly acknowledged the possibility of courts to give a sentence having the role of sale-purchase act, if one of the parties did not use the pre-contract. We would also like to mention the regulations with a special character referring to the leasing contract and operations included in the G.O. No. 51/1997 on the leasing operations and firms[13]. Article 16 of the Ordinance above basically presents the sanction applied when the promissory party does not respect the right of the dweller/user of buying or not the asset, clearly underlining that courts have the possibility to give a sentence which can replace the sale-purchase contract.

The unilateral promise of sale is currently subject to a regulated legal regime, which the current

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[2] For more details, seeGheorghe Piperea, *Introducere in dreptul contractelor profesionale*,C.H.Beck Publ. House, Bucharest, 2011, pp.83 – 94.

[3] Juanita Goicovici, *Formarea progresivă a contractelor – noţiune şi sfera de aplicare,* in Dreptul Magazine No. 7/2008, p. 27.

[4] The good-faith duty is a legal duty clearly provided for by article 1183 paragraph (2) of the Civil Code, according to which "The party entering a negotiation is bound to respect the good faith requirements. The parties cannot agree to limit or to exclude this duty".

[5] Ioana Ionescu,*Antecontractul de vânzare-cumpărar,*Hamangiu Publ. House, Bucharest, 2012, p. 98.

[6] Monna – Lisa Belu Magdo, *Contractul de vânzare în noul Cod civil,* Hamangiu Publ. House, Bucharest, 2014, p. 102.

[7] P. 100.

[8] Ioana Ionescu, *quoted works*, p.156.

[9] Law. No. 287/2009 on the Civil Code, republished in the Official Gazette No. 505 from 15th July 2011.

[10] Doina Anghel, *Comentariile Codului civil. Contractul de vânzare şi contractul de schimb,* Hamangiu Publ. House, Bucharest, 2012, p.49.

[11] Pavel Perju, *Practic judiciară civilă. Comentată şi adnotată,* Continent XXI Publ. House, Bucharest, 1999, pp. 138 – 151, Alina Gabriela Ţambulea, *Vânzarea. Hotărâri care ţin loc de contract. Comentarii şi jurisprudenţă,* Hamangiu Publ. House, Bucharest, 2013, pp. 50 – 55.

[12] Published in the Official Gazette No. 653 from 22nd July 2005. The text is currently abrogated by Law on the enforcement of the Civil Code No. 71/2011.

[13] Published in the Official Gazette No. 224 from 30th August 1997 and republished with the subsequent changes and completions in the Official Gazette No. 9 from 12th January 2000.

Civil Code in force acknowledges at Book V – On duties, Title IX – Various special contracts, Chapter I – The sale contract, Section I – General provisions, point 4 – The option pact regarding a sale contract and the sale promise.

2.2. Differences from other similar institutions

Taking into account the consent of the parties and the similarity degree between pre-contractual conventions with the contract itself which will be concluded, the unilateral promise of sale presents similarities and differences withother similar legal institutions, as it will be shown below.

2.2.1. The difference from the offer to enter a contract

The offer, regulated by articles 1187-1195 of the Civil Code, is defined as a unilateral statement of will, addressed by one person to another, by means of which the first expresses his intention to consider himself bound, if the other party accepts[14].According to article 1188 of the Civil Code, in order to produce the desired effects, the offer to enter a contract must meet three conditions:

- it must contain a proposal to conclude a contract
- it must represent the manifestation of the will to conclude the contract
- it must contain the conditions desired for concluding the contract.

The legal requirements mentioned above characterize the offer to enter a contract as a firm proposal to conclude a determined contract, in certain conditions, which are also determined. It represents a unilateral legal act, by means of which the issuer announces his will to enter a contract to third parties, but also the essential conditions of the contract. In fact, the Civil Code in force pays a particular attention to the unilateral legal act, which is a source of civil obligations, and dedicates a quite thorough regulation to the phase when the contract is constituted.

According to law, the proposal to enter a contract does not give rise to a contract as long as it is not accepted, since it can be revoked up to that point. It is the unilateral statement of its author's will which represents the base of the compulsory character of the offer to enter a contract.

While the offer to enter a contract constitutes a unilateral manifestation of will, the unilateral promise of sale is an agreement of wills, a genuine contract aiming to the firm commitment of the promissory party to sale/purchase an asset, in the conditions clearly established herein. It is why the offer must not be mistaken with the promise to enter a contract, which is a contract itself, as it results from the agreement of wills, from the encounter of the promise and the acceptance of the beneficiary. Being a contract, the unilateral promise of sale/purchase is not subject to unilateral revocation, while the non-observance of the promise shall trigger a contractual liability[15].

2.2.2. The difference from the preference pact

The preference pact is also a variety of preparatory contract, defined as the promise which the owner of an asset makes that, if he decides to sell that asset, he shall give priority to a certain person (beneficiary) when making the offer to enter the contract, at the same price[16].This contractual mechanism is regulated in the sales field: the convention which gives raise to the pre-emption right referred to by article 1730 and the following of the Civil Code is particularly a preference pact, having a sale contract as object. In the context of the preference pact, the promissory party – seller (or buyer) does not make the promise to enter a contract but only that, if he shall decide to enter the contract, he shall prefer the beneficiary. Consequently, when a preference pact is concluded, the promissory party does not issue a consent regarding the conclusion of the future contract, while the beneficiary is only the owner of *a priority right* in front of third interested parties, and not of an option right, as it happens with the option pact.

The preference pact represents a valid promise, as it is affected only by a simple potestative condition which does not only depend on the will of the promissory party, but also on external circumstances, which would determine him to conclude the sale[17]. Precisely on the base of the arguments above, most of the legal literature has considered the preference pact as a variety of the unilateral promise which, due to its features, has a narrow application, only in the field of the sales and renting contracts[18].Another singular opinion states that the preference pact is different from the unilateral promise to sale, by being a particular convention, which affects the eventuality of an asset to be sold, subordinated to the beneficiary's option[19]. Taking into account all the differences which exist between the two pre-contractual institutions, we

[14] E. Gaudemet, *Theorié générales des obligations,* Sirey Publ. House, Paris, 1973, p. 34, V. Flour/Aubert/Lavaux, *L'acte juridique,*p.111, No. 132, apud, Liviu Pop, Ionuț – Florian Popa, Stelian Ioan Vidu, *quoted works*, p. 68.

[15] Ion Turcu, *Noul Cod civil republicat, Cartea a V-a. Despre obligații art. 1164 – 1649,* 2nd edition, C.H.Beck Publ. House, Bucharest, 2011, pp. 157-158.

[16] Francisc Deak, *Tratat de drept civil. Contracte speciale,* ACTAMI Publ. House, Bucharest, 1999, p. 22.

[17] Liviu Stănciulescu, Vasile Nemeș,*Dreptul contractelor civile și comerciale în reglementarea noului Cod civil,* Hamangiu Publ. House, Bucharest, 2013, p. 82.

[18] Monna – Lisa Belu Magdo, *quoted works*, p. 113.

[19] D.Chirică, *Drept civil.Contracte special,* Lumina Lex Publ. House, Bucharest, 1997, p.22.

agree to the majority, according to which the role of the unilateral promise of sale in preparing a final contract is superior, while the preference pact is used rather in particular circumstances[20].

2.2.3. The distinction from the option pact

Specialized literature defines the option pact as a contract by means of which a person, called promissory party, promises to another, called beneficiary, to sell (or to purchase) an asset for a certain price (determined or determinable), if the beneficiary decides to buy (or to sell) within a certain term[21].

The option pact is a new institution, clearly defined in the general party of duties, particularly at article 1278 paragraph (1) of the Civil Code, which must be corroborated with the provisions of article 1668 in the sales field. Just like the unilateral promise, the option pact must contain all the essential elements of the contract which the parties aim to conclude. This makes so that the conclusion of the final contract is done by the simple acceptance of the beneficiary of the option.

In the sales field, the option pact is the legal act by means of which a party promises to the acquirer to maintain an irrevocable sale offer put at his disposal. The option pact is a contract, since the parties agree that it is compulsory for each to express his will and the conditions in which the acceptance must be done. From the perspective of the effects which it produces, the option pact is in principle a unilateral contract, which gives rise to obligations only for the promissory party, while the beneficiary has no obligation. Concretely speaking, the promissory party must not conclude with third parties a contract with an identical object than the one in the pact. In the sales field, the option pact generates a genuine impossibility of legal alienation, deducted as taking place within the option term [article 627 paragraph (4) of the Civil Code]. By exception, the option pact is a bilateral contract if the beneficiary offers a certain performance – the payment of an amount of money – in the exchange of the offer maintenance (*immobilization indemnity*)[22].

As seen before, the option pact has the features of a variety of a unilateral promise of sale; yet, the two pre-contractual institutions evince differences in terms of their legal regime, as long as the option pact is qualified as giving rise to a potestative right, whereas the unilateral promise of sale gives rise to a debt right[23].Thus, the unilateral promise of sale, since it does not have the effect of transferring a property right towards the beneficiary, nor the creation of an obligation to give, generates a personal right in the patrimony of the beneficiary, which is a debt one, and not a real right. It is a particular debt right, different from other debt rights, because it is exerted upon a determined asset from the patrimony of the debtor, namely the promised asset, upon which the beneficiary has a certain exclusivity. From this perspective, it has been stated the opinion that "the right coming from a unilateral promise of sale is in reality a real estate debt right"[24].

On the other hand, with the conclusion of an option pact, the beneficiary is interested in the promissory party, although remaining the owner of the asset, not using the promised asset within a certain period of time. This situation generates a potestative right[25] – neither real, nor a debt one – aiming to allow the conclusion of the future sale contract by means of a unilateral manifestation of will. The option pact generates an option right which is a specific one, preventing the promissory party to give up on his promise, and leaving all the freedom to the beneficiary in terms of his choice.

2.2.4. The distinction from the bilateral promise of sale-purchase

According to legal literature, the bilateral promise of sale, also called pre-contract or sale pre-contract, is the convention by means of which both parties firmly commit to conclude a sale contract in the future, whose essential elements they have already agreed[26].Unlike the unilateral promise of sale-purchase, in respect of which only the promissory party promises to sell or to purchase, when it comes to the bilateral promise, both partiespromise to conclude a certain sale contract in the future. This time, the obligation to do, consisting in the conclusion of a contract in the future, is taken by both parties. It is a firm mutual obligation, while the pre-contract contains all the essential elements of the future contract, including the conclusion date. When one of the parties of the pre-contract of sale-purchase refuses without a good reason to conclude the promised contract, the other party can demand

[20] For more details, see Ioana Ionescu, *quoted works*, pp. 129-133.
[21] G.Boroi, L. Stănciulescu, *quoted works*, p.338.
[22] For more details regarding the immobilization indemnity, see Ioana Ionescu, *quoted works*, pp. 164 – 169.
[23] Regarding the distinctions between the two institutions, see Paul Vasilescu, *Drept civil. Obligații, în reglementarea noului Cod civil,* Hamangiu Publ. House, Bucharest, 2012, pp. 283 – 284, Bogdan Dumitrache, *Pactul de opțiune, între deziderat și soluție disponibilă pentru practicieni,* in the proceedings*Liber Amicorum Liviu Pop. Reforma dreptului privat român în contextul federalismului juridic European,* Editors Dan Andrei Popescu, Ionuț-Florin Popa, Universul Juridic Publ. House, Bucharest, 2015, p.221 – 222.
[24] Ioana Ionescu, *quoted works*, p. 157.
[25] Regarding its definition, see Valeriu Stoica, *Drept civil. Drepturile reale principale,* 2 edition, C.H.Beck Publ. House, Bucharest, 2013, pp. 48 – 50.
[26] Ioana Ionescu, *quoted works*, p. 133.

for a decision to be ruled and replace the contract, if all the other validity conditions are met[27].

The duties of the parties resulting from the bilateral promise of sale-purchase are mutual and interdependent, as even if the promise does not have the value of a sale act, it generates for the parties the obligation to comply with all the duties necessary for concluding the promised contract. The content of the unilateral promise of sale is missing the two essential and necessary clauses for any bilateral promise, namely the one referring to the mutual character of the promise to conclude the contract in the future and the one according to which each of the parties must commit to the duty to do something. When it comes to the unilateral promise, the beneficiary does not commit himself to buying something in the future, nor does he take any legal duty, having he freedom to decide by the date agreed with the promissory party whether he will buy the promised asset. Hence, if the beneficiary of the unilateral promise does not promise to buy, but reserves his right to decide whether we will do this, the promissory acquirer of the bilateral promise takes upon himself the firm duty to buy the asset in the future, exactly in the conditions established by the pre-contract.

The similarity between the two institutions in question is that both the bilateral promise of sale-purchase and the unilateral one represent contracts, basically pre-contracts, which give rise to some debt rights. The frequency of the bilateral promise of sale-purchase in practice has led to it being named a *pre-contract of sale-purchase*. Before the entry in force of the Civil Code, both institutions were contracts without a name, lacking a legal name and a particular regulation. Taking the definitions from the legal literature and the acknowledgement within the legal practice, the current Civil Code regulates the promise to enter a contract, the promise to sell and the promise to buy, as well as the possibility for a court to give a sentence replacing the contract – articles 1279 and 1669 of the Civil Code.

Just like the unilateral promise of sale-purchase, the bilateral one has, as a rule, a consensual character, even when the promised contract is subject to some formal requirements for it to be valid. From this aspect, the Civil Code makes no mention neither in its general part – article 1279 – not in its special one – article 1669, as it can be encountered at article 1278 regarding the option pact.

2.2.5. The distinction from the sale-purchase contract

The unilateral promise and the sale contract are different both in terms of their validity conditions and the legal effects which they produce.

As mentioned before, the unilateral promise comprises all the essential elements for the conclusion of a final contract: the capacity to enter a contract, the consent, the object and the cause. From these, some elements are completely different from those a sale contract, which will eventually follow afterwards, while others will be common for both contracts.

Regarding the differences between the two institutions, we are speaking of the capacity to enter a contract. When it comes of the unilateral promise of sale, the beneficiary must have the capacity to make provisions when the option is expressed and not when it is contracted, while the capacity of the buyer is analyzed at the conclusion of the sale contract. Moreover, the cause of the obligations of the contracting parties is different, as the ground of the advantage agreed upon by the promissory party consists in receiving a immobilization indemnity or another performance assessed as equivalent and satisfactory for him.

The capacity to enter a contract also represents a common element of the two contracts, as the promissory party must have the full capacity to make provisions for the promised asset, from the moment the unilateral promise of sale is concluded. Moreover, from the moment a unilateral promise of sale is concluded, the object, work and price must be determined or determinable.

All the clauses of the final contract must be found within the content of the unilateral promise, since they were taken into account by the promissory party when giving his consent, so that any modification of the conditions initially established necessarily triggers a new manifestation of will from his part, while the sale contract cannot be concluded only as a result of the acceptance of the beneficiary.

Moreover, the two legal acts are also different when it comes to their objects. While the unilateral promise of sale is aimed at establishing the offer, the sale contract is aimed at the property transfer[28].Thus, the promissory party promises to maintain his offer and to conclude the sale contract with the beneficiary in the future, while the seller, with the conclusion of the sale contract, has the obligation to send the property upon the asset. The obligation of the promissory party emerging from the unilateral promise is different from that of the seller, so that the right emerging from this contract is a distinct one – the option right – totally different from the one created by the sale contract.

In its turn, the beneficiary of the unilateral promise of sale does not take the obligation to buy and not even the obligation to conclude a sale contract in the future, but only reserves his right to

[27] Alina Gabriela Țambulea, *quoted works*, p. 41 and the following.

[28] The transfer of the property right regards only the nature of the sale contract, as the sale can also transfer another right, like: another real right, a debt right, an intellectual property right or succession rights.

take a decision within a certain term whether he will buy the asset promised by the promissory party.

Since the unilateral promise of sale is not a convention of property transfer, it can be deducted that, only when it comes to the sale contract, the effects typical to the property transfer shall take place.

The essential distinction between the two legal acts consists in the fact that the unilateral promise of sale is missing an important element, which is the consent of the beneficiary to buy, who has precisely the possibility to decide in the future whether he will conclude the contract.

2.2.6. The distinction from the sale based on tasting

The text of article 1682 of the Civil Code regulates the sale based on tasting, maintaining the rule according to which, in this case, the sale contract is considered concluded only in the existence of the clear consent of the buyer, meaning that the asset is according to his taste. Specialized literature considers that this variety of sale contract is rather similar to a unilateral promise of sale, given that the future of the sale based on tasting exclusively depends on the fact that the potential buyer found the asset according to his taste after tasting it. In this case, he can also refuse the asset on the simple reason that he does not like it. The sale contract exists only when the buyer declares that the asset is according to his tastes; we cannot speak here of a sale under the suspensive condition, as it happens with the sale based on sampling[29].

2.3. The effects of the unilateral promise of sale

2.3.1. The effects until the option is exerted

2.3.1.1. The rights and duties of the promissory party until the option ends

The unilateral promise of sale provides to the promissory party the duty to do, namely that of maintaining his sale offer throughout the entire term of the option right. In all this time, the beneficiary becomes the creditor of the option right related to the conclusion of the promised contract. The duty to maintain his consent at the sale also triggers for the promissory party a duty of not to do, consisting in his duty of not taking back his promise within the option term and of not selling the promised asset to a third party.

Consequently, the main duty of the promissory party consists in maintain his consent at the sale moment, at the disposal of the beneficiary, refraining from any behavior which could compromise the moment when the option ends.

From the perspective above, it should be noticed a progress made by the current Civil Code which, in order to provide a special protection to the contract in question and to save the beneficiary from a potential conflict with a third acquirer, provides for the duty to make public the unilateral promise of sale, unlike the former regulations which only provided for the possibility to mark it in the real estate book.

If during the option term the promissory party communicates to the beneficiary that he withdraws his sale offer and, with this, his consent as well at the final sale, this manifestation would not be deprived of legal effects. For this matter, we refer to the provisions of article 1669 of the Civil Code, according to which, when the promissory party who concluded a unilateral promise of sale refuses without any reason to conclude the promised contract, the other party – the beneficiary – can ask for a decision to be ruled, which can replace the contract, if all the other validity conditions are met. These provisions are completed by those of article 1278 of the Civil Code and by those of article 1191 paragraph (2) of the Civil Code, all of them expressing the autonomous character of the unilateral promise to sale which, by being first of all a contract, contains an offer which cannot be retracted in a unilateral manner. As a consequence, any revocation of the offer by the promissory party does not have efficiency, while the expression at term of the option by the beneficiary constitutes the sale contract, despite all the opposition of the promissory party.

There is also the possibility for the promissory party to alienate the promised asset, before the option term expires. In this case, by not having any real right on the promised asset, opposable *erga omnes*, the beneficiary cannot claim the asset from the third party acquiring itand cannot demand either, except for certain conditions, the annulment of the contract concluded between the promissory party and the third party. In principle, the third acquirer becomes the owner of the asset and is protected by any action taken by the beneficiary, except for the case when he concluded the contract with the promissory party in bad faith, by knowing of the existence of the unilateral promise to sell the asset and hence transgressing the alienation interdiction, but also the case when he got the asset for free. In this situation, since he can no longer comply with his duty in kind, the promissory party can be forced to pay compensation damage, according to the provisions of article 1530 of the Civil Code, since he caused a prejudice to the beneficiary.

When the promissory party alienates the promised asset, the beneficiary can demand the annulment of the sale concluded between the promissory party with the third party or he can file

[29] Ioana Ionescu, *quoted works*, pp. 139 – 140.

an application for declaring the lack of validity this sale[30].

Before the option term expires, the promissory party can also conclude other legal acts, having the promised asset as object and potentially causing a prejudice to the beneficiary. As it happens with the sale of the promised asset to a third party, the promissory party might just as well exchange or donate the asset, conclude any other convention having the effect of a property right transfer or constitute a mortgage; in the last case, the expression of the option made by the beneficiary remains possible, while the property right sent when the option is expressed is reduced only from an economical point of view.

The term for exerting the option is established by the parties; in the contrary case, the promissory party can address the court for establishing an acceptance term, which will rule in the form of a presidential ordinance, summoning the parties. This course of action is in agreement with the provisions of article 1278 paragraph (2) of the Civil Code.

Until the sale is concluded, the promissory party remains the owner of the promised asset; he maintains its use and has the right of free administration upon it. As a result, the asset can be rented, except for the case in which such action is clearly forbidden for the promissory party.

Moreover, the asset remains in the risk and peril of the promissory party, so that its loss or destruction triggers the nullity of the promise.

3.1.2. The rights and duties of the beneficiary before his option right ends

As it results from the legal regulations, the beneficiary of the unilateral promise does not have a corresponding duty as the one of the promissory party - to maintain his sale offer. Therefore, the beneficiary does not promise to buy the asset in the future; he maintains unaltered his contractual freedom to make a choice, in a positive or negative manner, when his option term ends. Even in the exceptional case in which the beneficiary takes upon himself the duty to pay a certain amount of money as a price for the option, the unilateral promise acquires a synallagmatic character, without becoming nonetheless a bilateral promise of sale. The promissory party can demand the payment of a certain amount of money as long as the beneficiary enjoys the advantage of the asset's immobilization, an amount of money which rests completely in the possession of the promissory party, even if the sale does not take place. Specialized literature considers that the beneficiary could ask for a partial restitution of the indemnity, if this is established in relation to the actual period during which the asset is immobilized, while its value should be reduced if the beneficiary gave up in advance to his option right[31].

As seen before, when a unilateral promise of sale is concluded, the beneficiary does not give his consent to buy. He has an option right which must be exerted within a certain term. If the promise is accepted within the option term, the sale ends in that specific moment[32], except for the cases in which the nature of the asset representing the object of the promise imposes the compliance with the authentic form for the validity of the contract.

The option right enjoyed by the beneficiary is a subjective right, subject to the statute of limitations, having a restricted existence and a legal prerogative meant to change the situation emerged with the convention of the parties[33].

If the beneficiary will decide to purchase the asset but the promissory party will refuse the sale, also transgressing his obligation taken, the contract shall not take place, while the beneficiary will be entitled to compensation damage, according to the rules applying to the duty to do.

2.3.1.2. The effects of the promise when the option ends

The end of the option represents the manifestation of the beneficiary's will, made within the option term, to buy the asset. As an effect of the end of the option, the unilateral promise of sale produces full effects; the non-retractable will of the promissory party to sell meets the will of the beneficiary to buy, constituting the valid sale contract. The end of the option represents the consent for the sale contract, having the effect of perfecting the projected sale. As a consequence, when the beneficiary expresses his option, the property right transfer upon the promised asset takes place, except for the situations in which the parties postpone the transfer until a subsequent moment. In most of the cases, this situation is determined by the need to comply with the formalities required by law as a condition itself for concluding the contract; yet, an incomplete payment of the price can also lead to the postponement of the property right transfer, the promissory party being directly interested in receiving the price at the value established by the parties convention.

For a contract to be validly concluded, when the option ends, the beneficiary needs to have full power of exercise, but not also the promissory party, who had the capacity to make provisions when the promise was made, date at which he also agreed to the sale.

[30] For more details, see Ioana Ionescu, *quoted works*, pp. 179 – 188.
[31] Ioana Ionescu, *quoted works*, p. 190.
[32] D. Chirică,*Contracte speciale civile şi comerciale. Vânzarea. I,*Rosetti Publ. House, Bucharest, 2005, p.20
[33] Ioana Ionescu, *quoted works*, p. 191.

The projected sale shall be concluded only if the option is expressed within the option term established within the unilateral promise of sale; the expiry of this term shall impose a new agreement to the parties for this matter.

The end of the option must be pure and simple, not affected by other manners, capable to express a firm and precise will to conclude the sale exactly in the terms and conditions provided for by the promise.

The option can be ended personally by the beneficiary or by his legal representative, after which it shall be notified to the promissory party, or to his legal representative, according to the case.

Having a consensual character, the end of the option is not conditioned by a particular form, except for the cases in which the parties established otherwise or the law imposes such a requirement for the validity of the contract. Consequently, the acceptance of the promise can be both clear and tacit, resulting from certain acts which clearly express the manifestation of will, for purchasing the asset. In this case are applied as well the provisions of article 1196 paragraph (2) of the Civil Code, according to which: "The silence or inaction of the receiver does not mean acceptance unless when it results from the law, from the parties agreement, from the practices established between these, from customs or from other circumstances".

The tacit acceptance does not produce effects when the law demands a written form for the final contract, as it results from the provisions of article 1668 corroborated with art. 1278 paragraph (5) of the Civil Code, which impose for the acceptance statement to be concluded in the form provided for by law for the contract projected to be concluded.

Moreover, if according to law the authentic form *ad validitatem* is required for the valid alienation of the promised asset (as it happens with fields and constructions), article 1278 paragraph (5) of the Civil Code clearly stipulates that both the option pact and the acceptance statement must be concluded in the form requested by law for the final contract. Consequently, in these situations the end of the option must take a solemn form, meaning the authentic one.

When the consent of the parties is not given in the form requested by law for the validity of the projected contract, is applied the rule regarding the conversion of the legal act and, in the absence of a contrary stipulation, the ending of the option by the beneficiary will not have the conclusion of the sale as effect, but will represent, together with the manifestation of will by the promissory party, a bilateral promise of sale. In fact, the legal literature preceding the new Civil Code, treated conversion as a legal rule, which removed the enforcement of the principle *quod nullum est, nulum producit efectum*[34].

3. Conclusions

Initially acknowledged only by the legal literature and practice, the unilateral promise of sale/purchase is recently acknowledged also in the legislative field. It appears as a result of an agreement of wills, but must not be mistaken with the actual sale. The unilateral promise of sale/purchase is a unilateral contract, an autonomous institution, with a power recognized by the lawmaker as being the same as the bilateral promise, since both can be subject to forced execution in identical conditions. The current scientific work has been elaborated in principal on the basis of the new legislative texts which define an original institution, totally different from the sale contract and other contractual techniques meant to shape it. The current work does not go through all the theoretical and practical aspects regarding the unilateral promise in the field of sales contract, but we have tried to present a couple of novelty elements which the Civil Code provides to this institution.

Taking into account the legislative provisions, but also the opinions stated in the legal literature, we can conclude that the unilateral promise of sale/purchase represents a genuine contractual technique which favors the circulation of assets and economic activity.

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BRIEF CONSIDERATIONS REGARDING THE PROPERTY TRANSFERRING OR ENGENDERING OF OBLIGATIONS CHARACTER OF THE SALES CONTRACT

Vlad-Victor OCHEA*

Abstract

I herein want to emphasize the main aspects regarding the property/real estate transferring or engendering of obligations character of the sales contract governed by the Romanian Civil Code of 2009.

Keywords: *Sales contract, Real estate, Property, Real Estate Register.*

1. Introduction

Art. 1650 par. 1 of the Romanian Civil Code (hereinafter referred to as the Civil Code) defines the sale contract as being *the contract whereby the Seller conveys or, as the case may be, undertakes to convey to the Buyer the property of a good in exchange of a price which the buyer undertakes to pay*. The definition provided by the Legislator may generate confusion in connection to the property transferring or, on the contrary, engendering of obligations character of the sales contract. The correlation of this legal text with other legal provision, as well as the observation of some novelty aspects in the sales matter are likely to clarify the perspective of Legislator as far as the definition of the Sales Contract goes.

2. Content

Apart from art. 1650 par. 1 of the Civil Code, we must also consider art. 1672 which, unlike the previous art. 1313 of the 1864 Civil Code from, includes, among the Seller's obligations, the obligation to convey the property of a good or, as the case may be, the sold right. Article 1674 of the Civil Code apparently comes in contradiction to Art. 1672 of the Civil Code which, similar to art. 1295 par. 1 of the 1864 Civil Code, provides that, *except of the cases expressly provided by law or if from the Parties' will does not result the contrary, the property transmits to the Buyer at the time of conclusion of the contract, even if the good was not given or the price was not paid yet*. The Seller's obligation of transmitting the property of the good or, as the case may be, of the sold right arises only in certain cases, explicitly or implicitly determined by law or by the Parties' agreement, namely in some cases when the property does not transmit de jure, and the Sales Contract is an engendering of obligation contract. In all other cases, the Sales contract characteristic as being a property transferring contract prevails. Such a conclusion is also entitled by the provisions of art. 1273 of the Civil Code which, in the first paragraph, provides that *the real estate rights are established and transmitted by the Parties' agreement, even if the goods were not given, if the Parties agreed on some specific goods or, if the goods were individualized, on some gender goods*. According to par. 3 of the above-mentioned article, *the legal provisions in the real estate matter and also the special provisions regarding the transfer of some categories of movable goods remain applicable*.

Art. 1650 par. 1 second thesis of the Civil Code – *the Seller* (…) *undertakes to convey to the Buyer* (…) – must be linked with art. 1674 first thesis which clearly shows that, in some cases, provided by law or agreed upon by the Parties, the property is not a direct effect of the Sales contract, but an obligation undertaken by the Seller which follows, even if for a moment, the moment of the conclusion of the contract.

Art. 1650 par. 1 second thesis of the Civil Code does not comprise the Option Agreement and the Promise to Sell or the Promise to Buy. The Option Agreement provided by art. 1278 and 1668 of the Civil Code, turns into a genuine Sales Agreement at the time of exercising the option by the Beneficiary (the future Buyer), the latter being the owner of a potestative right. Once the option is exercised, the beneficiary's will meets the Promissory's will – which is an irrevocable offer– and thus the Sales Contract is concluded and it has a transferring of property character.

The Promise to Sell determines in the Beneficiary's patrimony a right of claim (personal right) as an equivalent of the Promissory's obligation (Seller) to conclude the contract, as an assortment of the compliance obligation (*facere*). Once this obligation is performed, the Sales Contract will be concluded which, in principle, has a transferring of property or constitutive of rights character.

* PhD Candidate, Faculty of Law, "Nicolae Titulescu" University of Bucharest (e-mail: **vlad.ochea@gmail.com**).

The Seller's obligation of transferring the property of the good or, as the case may be, of the sold right has the nature of a *dare* obligation, which is performed via the performance of a compliance obligation (*facere* obligation). The existence of *dare* obligation cannot be denied, being remembered both by the Legislator from 1864 and the Legislator from 2009. Some legal texts highlighted in the Fifth Book ¬¬– About Obligations, Fifth Title – The Performance of Obligations, Chapter I – The Payment, Third Section – The Conditions of Payment and also the circumstances provided by the Civil Code in which the property/real estate right or any other right does not convey from the Seller to the Buyer at the exact time of concluding the contract outline the substance and the manner of the performance of *dare* obligation. The goal of the performance of *dare* obligation is the transfer of the property/real estate right. This is not a Roman legacy, but originated in the Glossators Era. In the Roman law system, *dare* obligation was not included in the scheme of consensual sale. Its recognition as a a different concept from *dare* obligation was made through its goal, namely to convey the property of a good. In essence, the transferring of the property was made through *mancipatio*, *in jure cessio* or *traditio*, those representing the manifestation of *dare* obligation, which became effective through some compliance obligations (*facere* obligations).

The obligation is a bond by virtue of which the debtor is obligated to procure a benefit to the creditor, and the creditor has the right to obtain the due benefit (art. 1164 of the Civil Code). The object of the contract is the legal operation, such as selling, renting, lending and others alike, agreed by the parties, as results from the contractual rights and obligations (art. 1225 par. 1). The object of the obligation is the benefit to which the debtor undertakes. The above-mentioned legal provisions do not offer a clue regarding on which elements could be phrased a definition of *dare* obligation. Art. 1483 and 1488 of the Civil Code illustrate the object of *dare* obligation. Thus, the obligation to convey the property implies both the obligation to deliver the good and the obligation to preserve it until delivery, and the obligation to pay an amount of money is performed by handing over the nominal amount to the creditor. The payment has also the nature of a *dare* obligation, since the obligation to pay an amount of money is nothing but the transfer of the property on some fungible goods.

As we previously stated, the obligation to convey the property – *dare* obligation – is performed via a compliance obligation (*facere* obligation). In case of failure to perform by the Seller, the buyer may ask for the enforcement of the obligation, on the grounds of art. 1528 of the Civil Code, dedicated to the enforcement of the compliance obligation (*facere* obligation). The Civil Code is considering just the enforcement of compliance and non-compliance obligations (*facere* and *non facere*). I believe that the explanation of this lays in the performance mechanism of *dare* obligation, which finds its purpose only through another instrument, namely the compliance obligation (*facere*). There is another version according to which there is no *dare* obligation but, according to their object, there are two types of obligations: compliance and non-compliance (*facere* and *non facere*), and the obligation of transferring the property is only an assortment of *dare* obligation, which can be subject to the enforcement procedure, as it does not violate debtor's liberty. Taking into consideration the legal provisions that govern the Sales Contrat, as well as some legal provisions which outline the general legal regime of obligations, previously-quoted, this version seems difficult to accept.

Further, I will exhibit those cases in which the sales contract is a contract which engenders obligations, emphasizing how the transferring of the property operates.

1. The sale of immovable goods (Real Estate)

After the completion of cadastre for each administrative unit and opening on request or ex officio the land books, there will become applicable, among others, the provisions of art. 885 of the Civil Code, which establish the constitutive or transferring of rights effect of the registration in the Real Estate Register: under the reserve of some contrary legal provisions, real estate rights registered in the Real Estate Register are gained, both between the parties and to the third parties, only through the registration in the Real Estate Register, on the basis of the fact or the act which entitles the registration. The main legal provision in this matter is represented by art. 877 of the Civil Code, according to which the real estate rights registered in the Real Estate Register are rights subject to the registration in the Real Estate Register. They are acquired, modified and extinguished only with the compliance of the rules of the Real Estate Register.

Art. 876 par. 3 of the Civil Code defines the real estate as being one or more joined pieces of land, whatever category of use, with or without constructions, owned by the same person, placed on the territory of an administrative unit and which are identified through a unique cadastral number.

From the correlation of both art. 885 and 1676 of the Civil Code, according to which in the sales of real estate, the transferring of property from the Seller to the Buyer is subject to the Real Estate Register legal provisions, it follows that the transfer of real estate does not automatically operate at the time of the conclusion of the contract, but subsequently, through the registration of the gained right by the Buyer in the Real Estate. Thus, the Sales Contract becomes an engendering of obligations one and the Seller has the obligation provided by art.

1672 par. 1 of the Civil Code, namely to transfer the property of the good or, as the case may be, the sold right. This is *dare* obligation which is performed through a compliance obligation (*facere*). After art. 1673 par. 1 of the Civil Code provides that the Seller is obliged to transfer to the Buyer the property of the sold good, art. 1677 provides that the Seller is obliged to erase from the Real Estate Register, at his expenses, the registered rights on the sold good, if those rights are extinguished. Art. 1483 establishes that the obligation of transferring the property also implies the obligation to deliver the good and to preserve it until its delivery. As far as real estate rights registered in the Real Estate go, the obligation of transferring the property implies the obligation to deliver all the necessary inscriptions and documents in order to perform the registration. The Seller's obligation, provided by art. 1677 of the Civil Code is a first step towards achieving the goal of transferring the property, as only after the fulfilment of this obligation the Buyer can register his right. The fulfilment of the Real Estate Register formalities are a compliance obligation (*facere*).

The law provides to the Buyer the right to sue the Seller, if the latter does not perform his obligation of delivering all the necessary inscriptions and documents in order to perform the registration. Thus, according to art. 896 par. 1 of the Civil Code, when the person obliged to transfer, establish or modify in the benefit of another person a real estate right does not fulfill the necessary obligation in order to perform the Real Estate registration, the court can be asked to order the registration; this right is subject to a statute of limitation by law. In this respect, the request of the registration will be submitted to the district office in whose jurisdiction is situated the Real Estate.

Art. 888 of the Civil Code provides as a condition for registration an authenticated document by a public notary which proves the Seller's will to conclude the Sales Contract and also to transfer the Real Estate to the Buyer.

Until the time of registration with the Real Estate Register, the buyer has a jus ad rem, which further becomes jus in re – the Real Estate right. Although this metamorphosis seems curious, it represents the goal of the *dare* obligation, which is a legal fiction. From the conclusion of the contract until the time of registration with Real Estate Register, the Buyer's right is temporarily under protection, because, after the registration certificate is issued, the Real Estate Register is "frozen" for 10 days.

The correlative right of *dare* obligation is jus ad rem. According to the famous French jurist of the XVIII century Robert Joseph Pothier, *le jus in re, dont le droit de dominium est une des principales espèces, est un droit que nous avons dans une chose; le jus ad rem est un droit de créance personnelle que nous avons contre une personne qui s'est obligée à nous donner une chose, pour la contraindre à nous donner cette chose, dans laquelle nous n'avons encore aucun droit jusqu'a ce qu'il nous l'ait donnée. Le jus in re suit la chose, en quelques mains qu'elle passe, et il donne à celui qui a ce droit, lorsque la chose n'est pas par-devers lui, une action pour réclamer la chose, ou le droit qu'il a dans le chose, contre tous ceux qui se trouvent la posséder. Au contraire, le jus ad rem, qui e un droit de créance personnelle, suit la personne qui a contracté l'obligation de donner la chose. Il ne donne d'action que contre la personne qui a contracté l'obligation de la donner, et contre ses héritiers ou autres successeurs universels qui on succédé à son obligation: il n'en donne aucune contre des tiers qui posséderoient la chose qu'on s'est obligé de nous donner*[1].

Given that the transfer of real estate is not achieved through *traditio*, the content of *dare* and, accordingly, of jus ad rem, is different compared to the one portrayed by Pothier. As noted above, the Seller is obliged to hand over the documents necessary for the registration in Real Estate Register.

The observations that I have previously made are subject to *condicio a qua*, namely the ending of the cadastre works in each administrative unit and opening, on request or ex officio, of land books. For the time being, the registration with the Real Estate Register is the same as the previous regulation, having the purpose of enforceability against the third parties, according to art. 56 par. 2 of the Law no. 71/2011 for the implementation of the Law no. 287/2009 regarding the Civil Code. However, this does not necessarily mean that the Sales Contract of immovable property does not have an engendering of obligations character. The characteristic of the Sales Contract as being a transferring of property contract or, on the contrary, an engendering of obligations contract, requires a broader interpretation. Although, between the Parties, as an effect of the conclusion of the contract, the right enters into the Buyer's patrimony, however the Buyer does not have a genuine Real Estate right yet. The striking feature of the Real Estate right is to be a right opposable erga omnes. In the eyes of third parties, until the registration with the Real Estate, there is not an utter right, inasmuch as the right cannot be opposed to third parties. Only upon the registration will the Buyer acquires a *jus in re*. Until then, the Buyer has a *jus ad rem* in relation to third parties and a Real Estate right in relation to the Seller.

[1] Șerban Mircioiu, Transferul dreptului de proprietate prin vânzare. Studiu de drept comparat (Bucharest: Universul Juridic, 2014), 168-169 apud Robert Joseph Pothier, Oeuvres complètes de Pothier, Tome 8, nouvelle édition (Paris: Thomine et Fortic Libraires, 1821) 89-90.

2. *Dies a quo* sales contract. *Condicio a qua* sales contract

The sales contract preserves its real estate/property transferring character, even if the parties have postponed the transfer of real estate/property by agreeing upon a *dies a quo* or a *condicio a qua*. This shall apply only if the sold good is not real estate or the sales contract does not engender the obligation to transfer real estate or property. A type of *dies a quo* sales contract is that which contains a title retentions clause, regulated by art. 1684 and 1755-1757 of the Civil Code. A type of *condicio a qua* sales contract is the trial sales contract, regulated by art. 1681 of the Civil Code.

3. Alternate sales contract

Art. 1461 par. (1) of the Civil Code provides that an obligation is alternative when its object consists of two main services and the performance of one releases the debtor of the whole obligation. If the seller undertakes the obligation to transfer the real or, as the case may be, the personal property of one of the two goods that constitute the object of the obligation, the contract has an engendering of obligations character, because the transfer of the real or, as the case may be, the personal property shall occur when the seller makes his choice between the two goods [art. 1462 par. (2)].

4. Sale of future goods

Art. 1658 of the Civil Code provides that, if the object of the sale consists of a future good, the buyer shall acquire the real or, as the case may be, the personal property when the good has been manufactured. With respect to buildings, real estate register provisions shall apply. In case of sale of goods belonging to a limited gender that does not exist at the date on which the contract is concluded, the buyer shall acquire the personal property when the seller will individualise the goods. When the good or, as the case may be, the limited gender is not manufactured, the contract is null due to the lack of its object. However, if it's the seller's fault that the good or, as the case may be, the limited gender is not manufactured, he shall be obliged to pay damages. In the meaning of this article, the good is considered to be manufactured when it can be used according to the destination in respect to which the contract was concluded.

The transfer of real or, as the case may be, the personal property is postponed until the good is manufactured. Thus, this type of sales contract has an engendering of obligations character.

In order to register the real property in building, the buyer has to exhibit the certificate of completion which proves that the manufacturing of the good is complete.

The transfer of real or, as the case may be, the personal property is postponed until the good is manufactured. Thus, this type of sales contract has an engendering of obligations character.

5. Sale of another person real estate or, as the case may be, property

One of the novelties brought about by the Civil Code is the regulation of the sale of another person real estate or, as the case may be, property. Although subject to controversy under the former Civil Code, I am of the opinion that such a contract could be concluded prior to the entry into force of the New Civil Code on October, 1st, 2011.

According to art. 1230 of the Civil Code, if the law does not provide otherwise, goods belonging to a third party can constitute the object of the performance of a contract and the debtor is obliged to procure it and to transfer it to the creditor or, as the case may be, to obtain the permission from the third party. In case of non-performance of this obligation, the debtor shall be held liable for the damages thus caused.

According to art. 1683 of the Civil Code, if, on the date of conclusion of a contract regarding an individualised good, this good belongs to a third party, the contract is valid and the seller is obliged to ensure that the transfer of real or, as the case may be, personal property, from the third party to the buyer is made. The obligation of the seller shall be performed either by the acquisition of the good, or by the ratification of the sales contract by the third party, or by any other direct or indirect means which transfer to the buyer the real or, as the case may be, personal property in the good. The real or, as the case may be, personal property transfer shall operate de jure, if the law does not provide or the parties do not agree otherwise. If the seller does not ensure that the transfer of real or, as the case may be, personal property is made, the buyer is entitled to claim the avoidance of the contract and, as the case may be, damages.

If the seller would be the owner of the personal property which consists of a individualised good, the personal property would be transferred upon the conclusion of the contract. The sale of another person real or, as the case may be, personal property engenders for the seller the obligation to transfer the real/personal property. The seller is the debtor o a *dare* obligation and he shall perform it via a *facere* obligation. His performance could consist either in entering into a contract with the third party who is the owner of the good, or in convincing the third party to ratify the contract entered into by him and the buyer. There is a connection between the sale of another person property and the promise of another person deed. The expression used in art. 1683 par. (3) of the Civil Code "the real or, as the case may be, personal property transfer shall operate de jure" does not lead to the conclusion that the sale of another person real or, as the case may be, personal property is not an engendering of obligations contract.

6. Sale of gender goods

According to art. 1678 of the Civil Code, when the object of the sales contract consists of goods from a limited gender, the personal property shall be transferred to the buyer upon the date of the individualisation of those goods by delivering, counting, weighing, measuring them or by any other means agreed upon or imposed by the nature of the good.

If the individualisation is done by delivering the goods, the personal property shall be transferred by *traditio*, like in Roman Law. The performance of the obligation to deliver the goods is the vehicle that transports the personal property from the patrimony of the seller to that of the buyer. In other cases, the obligations to transfer the personal property and to deliver the goods are separate, but the former is performed through the same *facere* obligation which takes the form of counting, weighing, measuring them or by any other means agreed upon or imposed by the nature of the good. The choice of the goods that will be delivered to the buyer belongs to the seller, but the obligation to transfer the personal property will be performed only when and if at least medium quality goods are delivered. (art. 1486 of the Civil Code).

3. Conclusions

Having as main inspiration source the French Civil Code, the Legislator from 1864 assumed the characteristic of transferring the property of the Sales Contract, with some exceptions defined by the nature of the sold goods.

According to art. 644 of the 1864 Civil Code *property is achieved and transferred by means of inheritance, bequest, contract and traditio*. According to art. 557 par. 1 and 4 of the Civil Code, *the property may be achieved, according to the law, by means of contract, inheritance, bequest, accession, acquisitive prescription, the effect of possession in good faith in movable goods and fruit, by occupation, traditio and by court decision, when it is characterized by the transferring of property effect by itself*. With the exception of the cases expressly provided by law, as respects the immovable goods, the property achieves by means of the registration in the land book, in compliance with the legal provision provided by art. 888. The current regulation establishes, with the value of principle, the character of transferring of property of the contracts while preserving *traditio* as a manner of achieving property, with special application in the gender goods matter.

The Real Estate alternated in the Romanian law system, as a consequence of the genesis of the Romanian state, with the exception of the Decree no.115/1938, aimed only at the opposability against third parties of the transferring of property achieved at the time of the conclusion of the contract. Thus, in the Old Kingdom was applied the personal publicity system of Real Estate, with French origins, whilst in Banat, Crișana, Maramureș and Bucovina was applied, even after War World I, the real publicity system of Real Estate Register , with Austrian origins.

Noting the shortcomings of the system established by Law no. 7/1996 regarding the cadastre and the land book publicity and taking into consideration the significance of the immovable goods in the civil circuit, the Legislator from 2009 stated the transferring of property or constitutive of right effect of the Real Estate registration, which will influence the Sales Contract, as it will become an engendering of obligations one.

With respect to movable goods, with the exception of gender goods, the Buyer acquires the right over the good once the contract has been concluded, which means that, in relation to this category of goods, the Legislator considered that possession is the most suitable form of publicity.

The transfer of Real Estate by means of the Sales Contract resembles with the Austrian legal system, follower of the titulus and modus theory, by the virtue of which the transfer of the Real Estate is split, similar to the ancient Roman consensual Sales Contract, in two acts: a personal act and a real act, meant to achieve the transfer of the Real Estate (the contract and the delivery).

The legal provisions analysed herein are not an absolute novelty as they are not completely unknown to the Romanian legal system, the Sales Contract characterized by the engendering of obligation character being, as many other legal concepts, a Roman legacy, even if the peculiarities of the legal mechanism and reasons why the sale had and has, in some cases, engendering of obligation effect, differ.

In spite of the difference between the movable and immovable goods, I salute the option of the Legislator, declaring myself a supporter of the engendering of obligations character of the Sales Contract and I hope that the effects of the registration in the Real Estate Register will be fully effective as soon as possible.

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LEGAL CONSEQUENCES OF MERGERS AND ACQUISITIONS

Amelia-Raluca ONIȘOR*

Abstract

The research analyses the legal effects of mergers and acquisitions from the Romanian Company Law perspective, underlining certain general principles, the procedure of annulment of such a legal transformation of companies and the protection of the employees of companies participating in the merger according to the Law no. 67/2006.

These consequences of mergers and acquisions are to be seen in the broader light of the most important purpose of this legal instrument, maximizing financial and organizational efficiencies, thus legal certainty is a desirable goal to be assumed by any merger regulation.

Keywords: *mergers, acquisitions, legal consequences of mergers, nullity.*

1. Effects of merger and acquisitions for the participating companies

1.1 General principles

Mergers and acquisitions is a legal transaction involving the change of society pact, a way of external reorganizing of the companies, to bring together assets and activities[1].

With the completion of this operation, certain legal effects which accompany these types of statutory changes are produced.

The main legal consequence of such operations is determined by dissolution without liquidation of the company which ceases to exist. The other legal effects of mergers, expressly provided by article 250 paragraph (1) letter a)-c) of Law no. 31/1990, are ensuing and concern:

i) universal transmission or with universal title of the society's assets dissolved by the company or beneficiary companies;

Referring to the universal transmission of assets, it must be emphasized that the rights and obligations belonging to companies which dissolve, are transmitted in the conditions and safeguards accompanying them at the time of the operation. Although the transmission is done on a contractual basis, pursuant to the judgment adopting the merger, it has also a legal nature, by its express consecration in the provisions of article 238 paragraph (1) of Law no. 31/1990.

The fact that the assets transmission is universal and operates de jure, it determines that the transfer of rights and contractual obligations of the company dissolved in favor of the acquiring or new company formed, to be imposed automatically to contractors, without any formality. Enforceability of the principle of merger to the latter, third parties of the legal operation of reorganization is due to the publicity formalities required by law for the merger procedure.

Of course, if any trademarks, patent or other intellectual property rights, it is also necessary to fulfill the formalities laid down by the special legislation, such as those inserted in the provisions of Law no. 84/1998 on trademarks and geographical indications. In the case of immovable property, it must be followed the procedure for registration in the land register on the basis of the reorganization document concluded in authentic form, in accordance with the provisions of article 242 paragraph (3) of the Civil Code.

At the same time, the universal transfer of assets will be carried out in accordance with the distribution rules set out in the merger and acquisition project, according to article 250 paragraph (1) letter a) of Law no. 31/1990.

Universal character and universal title of transmission of assets requires, on the one hand, that all the rights belonged to the company being acquired or merging companies to be transmitted through merger, and, on the other hand, to be transmitted also the obligations of the company or companies who cease to exist.

Thus, standing to bring proceedings – locus standi – or standing to be sued in a dispute started by or against the company which ceases to exist after the merger will be made by the beneficiary company or companies. According to article 38 of the Civil Procedure Code, it is operating a transmission of the standing to pursue the proceedings.

Similarly, for disputes triggered after the date on which the merger takes effect, active or passive procedural legitimacy belongs to the beneficiary company. In this regard, the beneficiary company may sue the managers of the acquired company for damages, may initiate enforcement relying on an enforcement order to the company absorbed.

* PhD candidate, Faculty of Law, "Nicolae Titulescu" University of Bucharest (e-mail: **amelia.busca@gmail.com**).

[1] See Ioan Schiau, Titus Prescure, *Legea Societăților comerciale nr. 31/1990. Analize și comentarii pe articole*, Ed. Hamangiu, 2007, p. 687. [*The Law of Companies no. 31/1990. Analyzes and comments on articles*], Hamangiu, 2007, p. 687.

The merger can not be a reason per se for cancellation or rescission of contracts, they being imposed between the parties laid down by law, an interpretation contrary eluding itself the main purpose of the regulation of such legal-technical operations, simplification of the operation of universal transmission of assets. The rescission or termination has the nature of a penalty for non-fulfillment of a contractual obligation, or, patrimonial devolution is not a such non-execution.

Târgu Mureș Court of Appeal stated in a decision of this case[2], that the effect of the merger by absorption is the one of universal transmission of assets, the legal beneficiary acquiring both the patrimonial rights and obligations belonging to the absorbed company in the case judged. It thus concluded that the existence of an enforcement which could be successfully opposed to the absorbed company makes that the procedure about getting a new title to the absorbed company for the same claim to be uninteresting[3].

From the date from which the merger produces effects on third parties, i.e. from the date of advertising procedures, the company acquires the quality of universal cause, benefiting, inter alia, of the rights in favor of the company that is reorganizing the judgment[4].

As decided by the High Cassation and Justice - Civil Division I, in the decision no. 5141 / November 08th 2013[5], the effects of the judgments in cases where the dissolved company had a party concept, are extended from the date of the merger - date of establishment of the new company, the latter acting as universal successor of the company being divided, just as it would have participated in the proceedings, the successor being obliged to comply with the judgment entered in res judicata.

In the absence of a stipulation in the contract, an absorbent company is entitled to a clause of guaranteeing a debt referred for a company being absorbed[6].

As regarding the rights of the third parties, the new company or the absorbing company is required to comply the company's obligations that are reorganizing, regardless of the agreed decision to adopt the merger[7].

Following universal transmission of the assets that accompanies the merger operation, creditors may be harmed only economically, not legally, the value of the assets that were the object of their universal pledge being able to be reduced, possibly by attaching them to a new patrimony. However, creditors have the right to object, in the conditions provided by article 243 of Law no. 31/1990.

Regarding the effect of dissolution without liquidation of the absorbed companies or companies that merge, which reach at least one of the participating entities in the merger, it causes loss of legal personality at the time the merger takes legal consequences.

Regarding contracts of companies which are abolished, as was pointed out earlier, these change in the subjective aspect, due to the intervention of legal subrogation of the absorbing company or new company, in the rights of the company/companies abolished as a result of the merger.

By Decision no. 77 / A of October 10th 2013, Târgu Mureș Court of Appeal Civil section II, of administrative and fiscal departament, cited by the High Court of Cassation and Justice, Civil Division II, in Decision no. 2327 / 19.6.2014, in case no. 3/1371/2011, it was considered that the conditions under which the merger interfered with the defendant company, the latter took only the outstanding contract with written clauses thereof, not bound to comply or continue various commercial habits established by the terminated company after the merger[8].

It should be noted that the aforementioned subrogation occurs without further formalities than those provided for the validity and enforceability of the merger.

However, the concession contracts, that are intuitu personae, can not be transferred without the consent of the grantor, given the prohibition in article 28 paragraph (6) of Law no. 219/1998.

Furthermore, employment contracts concluded by the absorbed company or the abolished one, as a result of the merger shall be forwarded by law to the beneficiary company.

Following the universal transmission, augmentation of capital occurs regarding the absorbent company with the regime of a contribution in kind.

ii) award of shares or of shares in the company or the beneficiary companies to the associates of the company which is dissolved;

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[2] Decision no. 363/R/11.05.2006, on website : http://portal.just.ro/43/Lists/Jurisprudenta/DispForm.aspx?ID=90.

[3] The court noted that "by the universal transmission effect, the plaintiff must use the procedural means provided by law to enforce the judgment given and not to take steps to order a new enforceable title".

[4] In this regard, the Supreme Court ruled in France by commercial decision of October 21st 2008, published in *Bulletin d'information de la Cour de Cassation* (hereinafter "BICC") no. 697 of March 01st 2009. The conclusions are valid in the Romanian commercial law, due to the similarity regulations.

[5] Pronounced in case no. 13923/95/2011, published on the website www.scj.ro

[6] *Cour de Cassation*, Chambre Commerciale, commercial decision of July 10th 2007, BICC no. 671 of November 15th 2007.

[7] See the decision of the French Supreme Court, Chambre Commerciale, April 7th 2010, application no. 09-65899, published on the website Légifrance at http://www.legifrance.gouv.fr/initRechJuriJudi.do

[8] Published on the internet at: http://lege5.ro/en/Gratuit/gqydmobtgm/decizia-nr-2327-2014-privind-obliga-ia-de-a-face

The legislator regulates the situation of mutual holdings of securities between the participating companies in the merger.

According to article 250 paragraph (2) of the Law, the shares in the absorbent company can be exchanged for shares issued by the company being absorbed and are held either by the absorbent company itself or through a person acting in its own behalf but on behalf of the company or by the company being absorbed itself or through a person acting in its own behalf but on the company behalf.

iii) the absorbed company ceases to exist since its removal from the commercial register.

This extinctive effect is, in fact, an essential feature of the merger, with repercussions on the validity of the operation. Thus, there are not part of the reorganization of merger type the disposals and exchanges of securities, shares, in which case their issuing company continues to protect its autonomy and its legal status.

Dissolution caused by merger is not followed by liquidation, it becomes useless by the transmission with universal assets character of the company or companies being absorbed / that merge. Therefore, the principle of survival of legal personality for liquidation is not applicable to this method of reorganization.

1.2. Date on which the merger is effective

Law number 31/1990 establishes different dates to produce merger effects, depending on the specifics of each operation.

According to article 249 letter a) of the Act, the effects of the merger are occurring after the date of registration in the trade register of the new company or the last of them.

In case of merger by absorption, the general rule provided for by article 249 letter b) of the Act shows that the effects are produced from the registration decision of the last general meeting which approved the operation.

The legislator established, as an exception to the general principle previously pointed out, the situation in which the parties agree that the operation takes effect on a specific date, stating that it can not be after the conclusion of the current financial year of the absorbent company or beneficiary companies or earlier conclusion of the last financial year of the company or companies that transfer their assets.

1.3. Effects of the merger towards third parties

As a general rule, contractual rights and obligations belonging to the company which will be forwarded to dissolve are transmitted to the absorbent company or the newly created company. The latter is part of a contract, without other contractors to object, as a result of the universal transmission of the assets.

However, some contracts do not follow this regime. It is about the conventions intuitu personae, at the conclusion of which the consideration of the contractor is determined. Because these contracts are submitted to new company or absorbent company, it is required the prior consent of the contracting party[9].

1.4.Protection of employees of companies participating in the merger

According to article 243 paragraph (9) of Law no. 31/1990, the opposition institution to the merger recognized to social creditors and governed by the provisions of article 243 paragraph (1) - (8) of the same law does not apply to wage claims arising from the individual employment contracts or applicable collective agreements, which satisfy the conditions of paragraph (1), whose protection is made according to the Law no. 67/2006 on the protection of employees' rights in case of transfer of the enterprise, unit or parts thereof, and according to other applicable laws.

For the purposes of the constitutionality of the above provisions was ruled the Constitutional Court Decision no. 404/2012 relating to dismiss the objection of unconstitutionality of article I point 4 of Government Emergency Ordinance no. 90/2010 amending and supplementing Law no. 31/1990[10].

The court was notified of the objection of unconstitutionality of article I point 4 of Government Emergency Ordinance no. 90/2010 amending and supplementing Law no. 31/1990, exception made by a union in a case covering the outcome of the opposition against a merger ruling thereon.

In motivating the exception of unconstitutionality, its author argued that the legal provisions criticized affect free access to justice for employees who see themselves deprived of the appeal of the opposition to the merger / division given that they are holders of firm, liquid debts, but not due. According to the author of the objection, removal of employees from among those persons who can raise objections was made on the basis of discriminatory criteria.

The Court held that protection of employees is carried out according to the provisions of Law no. 67/2006 on the protection of employees' rights in case of transfer of the enterprise, unit or parts thereof. The provisions of article 5 of Law no. 67/2006 provide imperatively that the rights and obligations of the assignor arising from individual labor contracts and applicable collective labor

[9] See in this respect, on the character *intuit personae* of an exclusive concession contract or of a commercial agency contract, Cour d'appel de Paris, November 2nd 1982, *Bulletin repide de droit des affaires (Éditions Francis Lefebvre*) February 15th 1983, p. 12; and the Cour de cassation, chambre commerciale, October 29th 2002, Bulletin Joly Societies, 2003, p. 192.

[10] Published on the internet at https://www.ccr.ro/ccrSearch/MainSearch/SearchForm.aspx

contract existing at the time of the transfer; will be transferred entirely to the transferee, it having also the obligation to comply with the applicable collective labor contract. Thus, the new legal entity is obliged to provide all rights to salary and other that employees had prior to the time of the merger.

Thus, the Law 67/2006 on the protection of employees' rights in case of transfer of the enterprise, unit or parts thereof has transposed into national law Directive 2001/23 / EC[11].

Prior to adoption of this particular normative framework, were introduced Articles 173 and 174 of the Labor Code - Law no. 53/2003, norms that are the common law on the matter. These provide that employees enjoy protection of their rights where a transfer of enterprise, unit or parts thereof, to another employer, by law, that the rights and obligations of the transferor arising from a contract or relationship employment existing on the transfer date will be entirely transferred to the transferee and the transfer of the enterprise, unit or parts thereof can not constitute grounds for collective or individual dismissal of employees by the transferor or the transferee. At the same time, it is recognized a right to earlier information and consultation of the transfer, of the trade union or, where applicable, of the employees representatives on the implications of legal, economic and social consequences for employees resulting from the transfer of ownership and the related obligation borne by the transferor and transferee.

Law no. 67/2006 transposing the Council Directive 2001/23 / EC on the approximation of the laws of the Member States relating to the safeguarding of employees in the event of transfers of enterprises, units or parts of enterprises or units[12].

Regulating a detailed procedure, special rules - Law no. 67 / 2006 – define at article 4 letter d) the notion of transfer, as the passage of property owned by the transferor to the transferee of an enterprise, unit or parts thereof, aimed at continuing the principal or secondary activity, whether intended or not making a profit.

Thus, article 5 of Law no. 67/2006 provides that the transferor's rights and obligations arising from individual labor contracts and the applicable collective contract, existing on the transfer date, will be fully transferred to the transferee.

Prior to the transfer, the transferor has to notify the assignee of all rights and obligations to be transferred to it.

Failure to notify will not affect the transfer of these rights and obligations to the transferee and the rights of employees. [Article 6 of the Act]

The most important provision of the law is related to the fact that transfer of the business, unit or parts thereof can not constitute grounds for collective or individual employees' dismissal by the transferor or the transferee, provided by article 7 of Law no. 67/2006.

In addition, if the transfer involves a substantial change in working conditions to the detriment of the employee, the employer is responsible for termination of the individual employment contract. [Article 8]

The transferee has the obligation to observe the collective agreement applicable to the transfer date until the date of termination or expiry. By agreement between the transferor and representatives of employees, collective agreement clauses valid at the time of transfer can be renegotiated, but not earlier than one year from the date of transfer.

Where, following the transfer, the enterprise, unit or parts thereof do not preserve its autonomy and the collective agreement applicable to the transferee is more favorable to employees transferred will apply more favorable collective agreement. [Article 9]

Where, following the transfer, the enterprise, unit or part thereof retains its autonomy, the representatives of the employees affected by the transfer maintain their status, powers and function of whether the conditions for representation are complied under the law. If legal representation conditions are not met, the transferred employees choose their representatives by law.

If the transfer of the enterprise, unit or parts thereof does not preserve its autonomy, the transferred employees will be represented by their express agreement by representatives of the employees of the transferee's company, until the establishment or inauguration of new representatives, under the law. [Article 10]

According to article 11 if the transferor or transferee envisages measures on its own employees, will consult with the employees' representatives in order to reach agreement with at least 30 days before the date of transfer.

Article 12 paragraph (1) of the Act provides that the transferor and the transferee shall inform in writing the employees' representatives themselves or, if they are not constituted or appointed on their employees, with at least 30 days before the date of transfer, on the date of transfer or proposed date of transfer, the reasons for the transfer, the legal, economic and social implications of the transfer for employees, the measures envisaged in relation to the employees and the conditions of work and employment.

Paragraph (2) of the same legal text, states that the information obligation under paragraph (1), shall apply regardless of whether the decisions resulted

[11] Directive 2001/23 / EC of March 12th 2001 on the approximation of laws of the Member States relating to the safeguarding of employees in the event of transfers of enterprises, units or parts of enterprises or units, published in Official Journal L 082/16, 05 /volume 06, p. 20.

[12] Published in the Official Journal L 82 of March 22nd 2001.

from the transfer are taken by the transferee or by an enterprise exercising control over it.

2. Nullity of the merger of companies on the commercial activity

2.1. Legal nature of the merger nullity

Merger nullity is both a cause of inefficiency and a sanction lacking the transaction of the contrary effects of legal rules enacted to achieve the reorganization process to companies / company involved. Thus, it intervenes only when it conflicts legal rules governing the conditions of validity, of background or shape of the operation.

From the legal regulation of the merger nullity, namely the provisions of article 251 paragraph (1) of Law no. 31/1991, it is deduced the legal nature of the nullity of the operation said. Thus, the legal text expressly provides that the nullity of a merger to be declared only by court order, expressly excluding the possibility of amicable nullity in this matter.

Reported to the nature of the interest protected by the legal provisions violated in pursuit of completing the merger, its nullity can be absolute or relative. The law itself refers to the provisions of article 251 paragraph (3), to the absolute or relative grounds for nullity, namely the nullification proceedings and of declaration of the merger nullity.

The same text establishes the prescriptive nature of the nullity, so it can not be relied upon expiry of 6 months from the date on which the merger or division became effective.

It is noted, however, that the premises for nullity or annulment of operation are strictly provided by the law and the sanction cannot be extended to other legal situations.

2.2.The grounds of the merger nullity

According to article 251, paragraph (2) of the Act, the two grounds of nullity, strictly established, are: the lack of judicial control in accordance with legal regulations and absolute or relative nullity of one of the general meeting which voted the merger project.

In this regard, the commercial sentence no. 7702 of June 24th 2010 in case no. 50861/3/2009 of Bucharest Tribunal, irrevocable by decision no. 3601/2011 of the High Court of Cassation and Justice, Civil Division II[13], the court held that there can be retained grounds for nullity of the merger decision of general meeting on the conduct of the merger in two stages, "because on the date of preparation and publication of the merger project Law no. 31/1990 was no longer compulsory to conduct two-step merger, article 239 of the Act does not contain no penalty for the lack of judgment in principle on the merger or division, and the merger nullity can be declared only in accordance with article 251 of the same law.

Thus, the reason for nullity of the judgment of the general meeting alleging infringement of the provisions of article 134 of Law no. 31/1990 was rejected by the court, given that it is not found in the grounds for nullity mentioned in article 251 of mentioned regulation.

A) Lack of judicial / administrative control

Regarding the first question of nullity, the text provides that the legal nullity may intervene in the merger which was not subject to judicial control in accordance with article 37 of the same law.

Thus, according to article 37, paragraph (1) of the Act, the control of the legality of acts or facts which, by law, are registered in the trade register, is exercised by justice by a delegated judge.

It should be noted that through article 1 of Government Emergency Ordinance no. 116/2009 for establishing measures on trade registration activity[14], notwithstanding the Law no. 31/1990, it was provided that has jurisdiction to hear applications for registration in the trade register and, where appropriate, other applications under the jurisdiction of the judge delegated to the regulation of trade registration conducted by commercial registrars, for the director of the trade register office attached to the court and / or the person or persons designated by the Director General of the National Office of the Trade Register.

This legislative amendment was based on the desire to remedy with celerity the blockage existing at the trade registry offices.

Consequently, the control of legality performed to record changes of the articles of association with the trade register, just like any other registration, is carried out by the Director of the Trade Register attached to the tribunal and / or the person or persons designated by the Director General of the National Office of the Trade Register and not by the delegated judge.

Specifically, after drafting the merger project and signing it by representatives of participating companies, it is submitted to the Trade Register Office where is registered each company, together with a statement of the company which ceases to exist after the merger or division on how was decided to extinguish its liabilities, and a statement regarding the manner of publication of the merger project or division (article 242, paragraph (1) of Law no. 31/1990)

[13] *In extenso*, on the Internet at: http://www.scj.ro/1093/Detalii-jurisprudenta?customQuery%5B0%5D.Key=id&customQuery%5B0%5D.Value=78160

[14] Approved by Law no. 84/2010.

The law provides that the merger or division, will be targeted by the delegated judge, for publication in the Official Gazette of Romania, Part IV, at the expense of parties, in whole or in excerpt, according to the judge's delegation or demand of the parties, with at least 30 days prior to the dates of extraordinary general meetings in which are to decide, pursuant to article 113 letter h) on the merger. (Article 242 paragraph (2) of Law no. 31/1990)

To simplify the procedures and to reduce the administrative costs, the legislator has given companies the possibility, if they have their own web page, to be able to replace the publication in the Official Gazette of Romania, Part IV, provided in the paragraph (2) with the publication made through its own website, for a continuous period of at least one month before the extraordinary general meeting which is to decide on the merger / division, period ending not earlier than the end of that general final meeting. (Article 242 paragraph (2^1) of Law no. 31/1990)

Therefore, the lack of performance of a judicial / administrative control targeting the merger project for publication in the Official Gazette or on its own web page, is ground of nullity of the merger operation as a whole.

Clearly, because is the question itself is the nullity operation, it is necessary to invoke such irregularity to be achieved the completion of the merger process, of course, within the period prescribed in Article 251 paragraph (3) of Law no. 31/1990.

B) The situation in which the judgment of one of the general meeting which voted the merger project is void or voidable

Without distinction on grounds of public policy or private character of the rule disregarded the adoption of the ruling of the General Assembly which voted the merger project, such an irregularity per se justifies a declaration of nullity in the merger process.

It should be noted that if earlier completion of the process fusion, absolute nullity or, where applicable, relative to this legal act drew the imprescriptible character or prescriptible of the action in finding the nullity or annulment of the judgment, from the date on which the merger becomes effective regardless of the nature of the interest protected by the infringed rule, the invocation of the merger nullity for this reason is prescriptible within 6 months provided for in article 251 paragraph (3) of Law no. 31/1990[15].

2.3. The procedure of nullity declaration

As noted above, the nullity of the merger has a judicial character and the right of action is prescribed under article 251, paragraph (3) of Law no. 31/1990, within 6 months from the date on which the merger or division has become effective pursuant to article 249, or if the situation has been rectified.

The date on which commences the prescription term - dies a quo - is, in case of the formation of one or more new companies, specifically in the case of the merger, from the date of registration in the trade register of the new company or the last of them, and in case of merger by absorption, from the recording date of the last judgment of the general meeting which approved the operation, except that, by agreement, it is stipulated that the operation will take effect on another date. In the latter situation, the conventional chosen date may not be later to the end of the current financial year of the absorbent company or beneficiary companies, nor the later to the end of the last financial year of the company or companies that transfer their assets.

During this time is essentially legal, and the calculation of this period is done according to the general rules contained in the provisions of article 2552 of the Civil Code. Thus, it shall expire on the corresponding day of the last month, and if the last month has no corresponding day to the one in which the term began to flow, the term shall expire on the last day of this month.

Thus, by Decision no. 178 of April 10th 2009 pronounced in case no. 2718/87/2008, Bucharest Court of Appeals - Commercial Section VI[16], it was noted that under article 251, paragraph 3 of Law no. 31/1990, the cancellation procedures and declaration of merger nullity or division may not be initiated after the expiration of six months from the date on which the merger or division became effective under article 249, or if the situation has been rectified. Also, according to article 249, letter b of the Law no. 31/1990, republished, the merger takes effect from the date of registration of the last general ruling that approved the operation.

The Court found that the date specified in article 249 letter b) of the Act was to September 26th 2007, when it held general meetings of both companies, so the company that is being absorbed and the absorbent company, meetings that approved the merger, noting that there were no oppositions to the merger project.

[15] For details, see Cristian Gheorghe, *Drept comercial român*, Ed. C.H. Beck, Bucureşti, 2013, p. 518-520. [*Romanian Commercial Law*], Ed. C.H. Beck, Bucharest, 2013, p. 518 – 520. The author argues that the action for annulment of the general meeting judgment which approved the merger project, brought after the consolidation operation, "is absorbed by the action in the operation nullity, existing only inside and with its justification" (*opus citatum, p. 520*).

[16] Available on the Internet, at the address: http://portal.just.ro/2/Lists/Jurisprudenta/DispForm.aspx?ID=427

Given that from this date passed more than six months, the request of declaration of nullity of the merger by D.G.F.P.J.T. was recorded before Teleorman Court on October 20th 2008, the Court accepted this lateness exception formulation request and rejected the request as being out of time.

Being a period of extinctive prescription, it is subject to the institution of suspension[17], interruption[18] and restoring the prescription period[19], given that the law provides otherwise. Of course, common law causes of suspension, interruption and restoration in term provided for by article 2532, article 2537, respectively article 2522 of the Civil Code have not fully implemented the mergers situation, given the specific of this operation and the topics that may invoke the nullity of this operation.

An action for annulment / nullity may be exercised by the associates of the companies participating in the merger, stating that, on the invocation of the relative nullity of decisions of the general meetings, must take into account the provisions of article 132, paragraph (2) of Law no. 31/1990. More specifically, they exclusively act as shareholders who have not taken part in the general meeting or voted against and asked to insert it in the minutes of the meeting.

It should also be noted that, from the regime of absolute nullity, any person may request the its declaration judicially, but must be proven he essential condition for setting in motion the civil action, namely the interest, practically benefit pursued by the plaintiff, who must be legitimate, vested and present, personal and determined according to article 32, paragraph (1) d) of the New Code of Civil Procedure.

In this regard, it was ruled also the High Court of Cassation and Justice, Civil Division II, by decision no. 2580 / June 27th 2013, in case no. 1508/1259/2011*[20]. Thus, in line with those adopted by the appeal court, it was noted that "the plaintiff has locus standi because it relied on a ground of absolute nullity, which can be invoked by third parties to the merger agreement," but it did not justified "a practical interest in invoking this absolute nullity".

The court vested with such action shall grant the companies involved in the merger process a deadline for rectification, in cases where the nullity is likely to be remedied. [Article 251, paragraph (4)]

Of course, the assessment on the possibility of rectification belongs to the court.

The provisions of article 251, paragraph (3) from the last thesis of the law take into account the possibility that the companies involved to rectify the irregularity prior to referral to the court. According to the law, cancellation procedures and merger or division nullity declaration may not be initiated if the situation has been rectified.

In the legal doctrine[21], it was stated that legal provisions do not refer to a real inadmissibility of the action, the court being forced to determine whether the grounds for nullity and fixing them until the notification date of the court.

We agree with this view, arguing that, indeed, the law does not stipulate a plea of inadmissibility, the analysis of existence at the time of the action, a plea of nullity of the operation is done either in terms of the merits of the action, either the existence of the interest demanded by law to promote the action based on concrete facts before it.

Regarding the mandatory procedure prescribed by law, must be evoked the conclusions of the High Court of Cassation and Justice, in the Commercial Decision no. 153 of January 18th 2011[22], which showed that in the procedural framework governed by the provisions of article 364 of the Civil Procedure Code, criticisms must concern the arbitration decision and the judgment of the court in an action for annulment and not for reasons which may be invoked in accordance with the rules established by another law.

Thus, continued High Court's reasoning, the exception of nullity judgment of the extraordinary general meeting of shareholders and of the merger company can be analyzed only after the procedural rules laid down by the mandatory provisions contained in article 132, article 250 and article 251 of Law no. 31/1990 and can not be valued on incidental way.

As required by article 251, paragraph (5) of the law, "[the final declaration of nullity decision of a merger or division will be forwarded ex officio by the court to the registry offices at the headquarters of

[17] Suspension of the prescription term is "that change of the course of the prescription that lies in stopping rightfully the flow of the prescription term during limiting situations provided by law that put it in the impossibility to act on the holder of the right to act". See, în acest sens, Gabriel Boroi, Liviu Stănciulescu, *Instituții de drept civil în reglementarea noului Cod Civil*, editura Hamangiu, București, 2012, p. 310 și următoarele. [*Institution of civil law in the regulation of the new Civil Code*], editura Hamangiu, Bucharest, 2012, p.310 și următoarele.

[18] Interruption of prescription term is to change its course consisting of removal of the prescription period elapsed prior occurrence of an interruption and the start of another prescription. *Ibidem*, p. 314 et seq.

[19] Restoring the term is a benefit granted by law to the right holder to action which, for good reasons, could not trigger the action within the prescription period, so that the body of jurisdiction is entitled to deal in substance the complaint in court, although it was brought after the expiry of the prescription period. *Ibidem*, p. 319-322.

[20] Published on the Internet, at the address, http://www.scj.ro/1093/Detalii-jurisprudenta?customQuery%5B0%5D.Key=id&customQuery%5B0%5D.Value=113441

[21] Cristian Gheorge, *opus citatum*, p. 522.

[22] Available on the Internet, at the address: http://www.scj.ro/1093/Detalii-jurisprudenta?customQuery%5B0%5D.Key=id&customQuery%5B0%5D.Value=82969

trade companies involved in the merger or division concerned"].

2.4. Effects of merger nullity

The legal consequences of the sanction of nullity of a civil legal act are governed, traditionally, by the three principles of the common law of such sanctions: retroactive effects of nullity, reinstatement in the previous situation – restitutio in integrum, the cancellation of both the operation and subsequent legal acts - resolute iure dantis, resolvitur ius accipientis.

In the matter of merger nullity, these principles known, however, justified limitations on the specific operation, the need to protect the interests of third parties in good faith, and for ensuring legal certainty.

Thus, first, article 251, paragraph (6) of Law no. 31/1990 provides that "[the final decision of declaration of nullity of a merger [...] shall not affect the validity of obligations incurred by itself in the benefit of the absorbent or beneficiary company engaged after the merger or division became effective under article 249, and before the ruling of nullity to be published."

As a result of the principle of restoring the previous situation, the company or companies that have ceased to exist by merger, regain legal status, are canceled the legal effects of removal from the trade register and are excluded amendments of articles of association of the benefiting companies.

However, according to article 251, paragraph (7) of the Act, if the nullity declaration of a merger, the companies involved in the merger shall be jointly liable for the obligations of the absorbent company after the merger or division became effective, pursuant to article 249, and before the ruling of nullity to be published.

Conclusions

This paper aims to examine the effects of the merger on the companies' business, and the nullity of such an operation from a dual perspective, theoretical and practical.

Although Romanian law covers a broad regulatory issue mentioned, the regulations are imperfect.

Thus, as a *de lege ferenda* proposal, we believe that it would be necessary to clarify and define the causes of suspension, interruption and restoration of the time limit on the period of extinctive prescription provided in article 251, paragraph (3) of Law no. 31/1990. Common law cases are not adapted to the operation, nor reported to topics that can engage in a procedure of annulment or declaration of nullity of the merger. However, keeping in view the wishes of legal certainty, predictability and creating an attractive tool for companies that want to reorganize, those cases that determine, ultimately, the timing of the procedure referring to the merger should be restrictively provided by law.

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THE RIGHT TO A FAIR TRIAL IN THE DYNAMIC INTERPRETATION OF THE EUROPEAN COURT OF HUMAN RIGHTS

Alexandra PANAIT [*]

Abstract

The European Court of Human Rights has constantly highlighted the importance of Article 6 of the Convention and by a dynamic interpretation, the jurisprudence of the Strasbourg Court has gradually enriched the content and the practical impact of the treaty text, recognizing various additional guarantees compared to those expressly provided for by the Convention, such as certain specific applications of the equity principle and the national court's obligations of loyalty and compliance with the Convention, which represent essential elements of the general concept of a fair trial.

Keywords: *CEDH, fair trial, jurisprudence, article 6.*

1. Introduction

According to the International and European procedural law, the guarantee of a fair trial is considered a fundamental right.

However, the concept of this fundamental right is still controversial. Leading specialists in the domanine developed three criteria for the protection of fundamental rights: the protection against the executive and legislative power, the protection by the law, by the Constitution and by international or supranational law and the protection by the intervention of ordinary courts, constitutional courts and international courts.

For determined the application field of the guarantee of a fair trial, it is necessary to establish the content of that procedural guarantee of Article 6 of the European Convention on Human Rights. In this context, the question is to know what guarantees good organization and functioning of justice in the context of litigations.

Among each decision, the European Court of Human Rights has highlighted the importance of Article 6 of the Convention, which enshrines the fundamental guarantees of procedure, aiming to strengthen the internal and international mechanisms for safeguarding the rights and freedoms provided in the benefit of litigants.

In a dynamic and purposive interpretation, the case law of the Strasbourg Court has gradually developed the content and the practical impact of the treaty text, recognizing various additional guarantees compared to those expressly provided by the Convention.

Thus, the European Court has established some particular applications of the requirement of equity defined by Article 6 of the Convention, enforcing essential elements of the general concept of a fair trial.

Also, the European Court established the existence of a limited procedural and institutional autonomy in the benefit of Member States, by devoting a positive obligation of loyalty and compliance for the national courts in the application of procedural guarantees provided by the Convention.

1.1. Particular applications of the requirement of equity

The jurisprudence of the European Court of Human Rights has recognized the existence of a more complex content of the right to a fair trial, developing in particular the importance of respecting the right to enforcement of court decisions, the particular implications of the language of proceedings and the right to appear in person to protect the rights of defense or the role of the mass media regrading the fairness of the proceedings.

Regarding the right to the execution of court decision, according to the Strasbourg Court "the execution of a judgment or a decision by any court whatsoever, should be considered as part the trial, under the protection of Article 6 "," would not be understood by Article 6 paragraph 1 should describe in detail procedural guarantees - equity, public and celerity - granted to the parties and does not protect the setting implement the judicial decision."[1]

In the same case - Hornsby v / Greece, the Court indicated that the right to a fair trial "would be illusory if the internal legal order of a Member State allowed a final judicial decision to remain inoperative to the detriment of a party ".

Accordingly, taking into consideration the purpose and spirit of the European Convention, the principle of the supremacy of law requires the execution of court decisions, taking into consideration also the important implications of this procedural step for the right to respect of the property of individuals.

[*] PhD Candidate, Faculty of Law, "Nicolae Titulescu" University of Bucharest (e-mail: **alecsa.panait@yahoo.com**).

[1] Hornsby v/ Greece, nr. 18357/91, from 19.03.1997.

However, the implementation of court decisions by state authorities is conditioned to that the decision is final and mandatory. So as a principle, the only decisions that must be executed are those that are not subject to any supervision by higher courts which would have the jurisdiction to review them.[2]

Regarding the right to the execution of court decisions and the right to free access to remedies, a debate has been created regarding the compatibility of certain domestic laws with the principles mentioned above, concerning the rules which prohibit the exercise of the right of appeal against a judicial decision if the applicant does not justify having performed or having deposited on consignment the amount of money regarding which he has been declared debtor.

Indeed, the Strasbourg Court indicated that these internal rules can be considered compatible with the European Convention, taking into consideration the legitimate aims pursued by that legislation, including the protection of creditors, avoiding dilatory appeals or the necessity to strengthen the authority of judges.[3]

To fulfill the requirements imposed by the Convention, the Court stated that some positive obligations are imputable to the Member States to perform an adequate execution of a final and mandatory court decision. For example, the Court held the responsibility of the Italian State, in a case involving the expulsion of some tenants, for violation of the right to a fair trial by an extended absence from the state authorities in the execution of 'a Judgement.[4]

Although the primary responsibility for the breach of a court decision belongs to a private person, the Court gave a horizontal effect to the decision, thus retaining the default of the Member States.

Other essential elements of the general concept of a fair trial such as those provided in the benefit of the accused have been extended by case law of the European Court civil trial, as the right to a fair trial.

Regarding the language of the proceedings, the right to linguistic freedom in justice was not expressly provided for in the Convention. Some rules are embodied only by Article 6 paragraph 3 paragraphs a and e in favor of those accused of criminal offenses.

However, the case law of the European Court considered, in some cases, taking into account the specific circumstances of each case, that the language used in the procedure and related procedures may be taken into account in the assessment of character fair or not of the trial as a whole.

In civil matters, the case law recognizes the right to an interpreter in exceptional cases and under strict conditions. For example, a person who receives a citation in a language that does not understand, must have the necessary time to obtain a translation and can not claim to be a victim of a violation of the fairness of the proceedings. Also, the obligation under domestic legislation to draft a writ of summons in a certain language is not an obstacle to the free access to justice, even if the defendant ignores the respective language.

Similarly, if during the civil trial, if the defendant ignores the language of the proceedings, but he is assisted by a lawyer who understands the language being used and if the personal participation of the defendant is not required, this process respects the established requirements of fairness the Convention.

For the same reasons of existence provided in the benefit of the accused, the Court has sometimes admitted the existence of a right to linguistic freedom also in favor of the plaintiff in a criminal trial, as a requirement of a fair trial.

Another fundamental element of the right to a fair trial is the right to appear in person in the context of judicial proceedings. In civil cases, the warranty is not expressly required by the Convention.

However, taking into consideration the specific circumstances of each case, the case law of the Strasbourg Court recognized in some categories of cases, that the right to a fair trial implies the right of the defendant to appear in person in the trial. So when the judge considers that the personal appearance of the defendant is necessary for the proper conduct of the trial, the national authority must take all appropriate and necessary measures to ensure that the person concerned has a real opportunity to appear before the judge.

Article 6 of the Convention does not provide specific forms or arrangements to ensure the personal appearance of the defendant, but the treaty text imposes Member States the obligation to provide the framework for the establishment of the truth and to protect the right of defense of all parties of a trial.

However, even for a person accused of a crime, this guarantee is not absolute. For example, the right to appear in person is not required if the defendant is represented by counsel or has had a real opportunity to present themselves before the court. Also, taking into account the complexity and technical specificity of a certain case, the written nature of the procedure can be justified. Similarly, a court may have the jurisdiction only to rule on matters of law or to examine an existing file, so the ruling can take place without the presence of the parties. Of course, a

[2] Ouzounis and others *v.l* Greece, nr. 49144/99, from 18.04.2002.
[3] Pages v. / France, nr. 50343/99, from 25.09.2003.
[4] Scollo v./ Italy , nr. 19133/91, from 19.03.1997.

person whose absence is attributable to his fault can not claim to be a victim of a violayion of procedural fairness.

In accordance with the established case law of the European Court, foe the cases in which the litigant's personal conduct has a direct contribution to the formation of the opinion of the judge, the right to a fair trial necessarily implies right to appear in person before the judge handling the case.

A more delicate aspect concerning the right to a fair trial provided by Article 6 of the Convention is represented by the impact of mass media on the trial. Often, case law has considered that certain statements issued by the judicial authorities investigating the case, are violating the confidentiality of records and had adverse consequences with regard to the fairness of the proceedings, affecting also the litigants.

Also, major media campaigns, often with a violent nature, are able to affect the independence and impartiality of the judges through media pressure, affecting also the more general right of the parties to a fair trial.

However, Member States must balance the procedural requirements resulting from the Convention and the public's right to be informed of court proceedings and the curiosity of citizens about the conduct of litigations.

2. The duty of loyalty and compliance with the Convention of the national courts

The jurisprudence of the European Court established a framework of procedural and institutional autonomy of Member States, believing that a positive duty of loyalty and compliance must exist for the national court which is responsible for hearing a particular case, regarding the application of procedural guarantees provided by the Convention.

The obligations of the national courts with regards to the fairness of the proceedings includes the duty to provide adequate reasoning of the judgments, the obligations to establish penalties commensurate with the gravity of the fault of the defendant and the loyal attitude to the defense of the parties.

Regarding the motivation of judgments, according to the case law of the Strasbourg Court, as in a civil trial, as in a criminal trial, the right to a fair trial requires that judgments are motivated with sufficient clarity to allow the defendant to verify if all claims and applications were reviewed by the judge.

The individual must also be able to assess if there are chances for a remedy, examining issues of law and facts on which the judge based his decision. This requirement of an adequate motivation helps to achieving transparency of justice, a fundamental element of the right to a fair trial.

However, the obligation to motivate the judgments is required only in the assumptions that the treaty text is applicable, especially in the case of a dispute over civil rights or obligations or in the case of a criminal charge.

The right of every individual to receive a reasoned decision is not absolute. According to the jurisprudence of the Court, a decision given in a summary manner may be sufficient; the judge is free to respond only to relevant applications that are likely to influence the final outcome of the case, without being required to analyse the conclusions without relevance in the case.[5]

So this rule is subject to a relative appreciation, some space for interpretation is left to the national court which takes into account the specific circumstances and merits of each case. For example, the Convention does not prohibit judges to base their motivation on arguments proposed by either party to the dispute. Also, individuals do not have the right to require the judge to motivate each arguments or means that have been rejected.

When it comes to statements whose meaning is not clear to the defendants, the Court stated that the requirement to motivate has a special significance. For example, in a case concerning a registration procedure of lawyers, the incident has subordinated the respective legislation to the existence of "exceptional circumstances" and the Court found that it is of "serious difficulty" as to determining the meaning of this requirement. Considering that the legislation does not provide any explanations of the meaning of terms, this requires the judge to provide adequate reasoning for the decision by which the request of the defendant was rejected.[6]

However, the Court made a distinction between a lack of motivation and an error of reasoning, concerning which the judge of Strasbourg is not competent to censure a mistake of jugement of facts or law, with the exception of the situation in which this error is likely to violate the rights and freedoms guaranteed by the Convention.

Regarding some degree of proportionality of sanctions established by the national court, is has been decided that the right to a fair trial guaranteed by Article 6 of the Convention requires national judges the obligation to modulate the sanctions that they decide according to the criminal behavior of the defendant.

Some judges have gone beyond this principle, establishing a just proportion between the incident, sanction and the behavior of the convicted person,

[5] HiroBalani v. /Spain, nr. 18064/91, from 09.12.1994.
[6] Malige v. / France, nr. 68/1997/852/1059, from 23.09.1998.

even in the presence of legislation which does not include such possibility.

On the other hand, some judges would not interpret texts in an extensive manner, considering that in cases where the legislature has chosen to establish a system of automatic sanctions, a review of proportionality has already occurred.

In deciding such a debate, the case law of the European Court decided, in a case concerning a traffic violation, an ancillary penalty resulting from an automatic way of conviction can not be considered disproportionate because "the Act provided some degree of modulation depending on the gravity of the offense committed by the accused."

Another obligation of the national court in the implementation and consistent interpretation of the Convention is the existence of a loyal attitude from his parte against the rights of defense of the parties. The jurisprudence of the Court has already accepted that a careless and unprofessional attitude of the defendant's lawyer is likely to affect his right of having heard equitably by the court.

However, the Convention specifically provides the right to be assisted or represented by a lawyer only in the benefit of a person accused of having committed a criminal offense. But nothing in the treaty text recognizes for the parties to a civil trial the right to have the assistance of a defendant of his choice.

Taking into account the spirit and aim of the Convention, the European institutions have implicitly admitted that the national courts have an obligation to take appropriate measures for the proper administration of justice, guaranteeing litigants the right to a fair trial.

For example, according to a case law of the Strasbourg Court, the fact that a court rejects a party to the dispute either assisted or represented by a defendant of his choice, may constitute a violation of the right to fair trial guarantees the Convention.

However, taking into account the importance for the parties, the European Court considers that in the civil cases that do not have a complex character, prohibiting the parties of the dispute to be represented or assisted, is not in itself a violation of Article 6 of the Convention.

Also, the European Court accepts compliance to standard text of national law that imposes the obligation on individual specialized assistance in the framework of a certain phase of the procedure, to the requirements of proper administration of justice.

Finally, national jurisprudence often goes beyond the requirements of the Convention, considering that the right of any party to be assisted or represented by a lawyer is a necessary corollary of the benefit of the rights of defense.

3. Conclusions

The European Convention on Human Rights not only proclaims the rights and freedoms for the benefit of individuals, but also establishes practical ways of the enforcement by Member States authorities. Also, the treaty text contains several provisions establishing safeguard duties and functional guarantees of substantial rights and freedoms.

Turnovers of jurisprudence consisting in particular in the development of original and authentic meaning of treaty provisions, have enriched significantly the scope and content of the procedural safeguards any individual can rely on in front of the national courts.

Consequently, taking into consideration "the prominent place the right to a fair trial held in a democratic society" and that "the Convention is intended to guarantee not theoretical or illusory, but practical and effective rights" the use of procedural safeguards in the context of litigation has become widespread, the European Convention on human rights is considered a source of law and an effective instrument that can be invoked by individuals.

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IDENTIFYING BEST PRACTICES IN INSURANCE

Răducu Marian PETRESCU*

Abstract

This work aims to identify and develop best practices in the insurance field. We must mention from the beginning that best practices are not compulsory or mandatory rules of law, they cannot and do not want to be placed above the legal provisions in force, they only complement the law. Moreover, we intend to look into the implementation of the Solvency II Directive from the point of view of best practices in insurance.

In this research, the main method of study was the theoretical qualitative research (especially document analysis), with the purpose to identify and theoretically develop the information on best practices in the insurance field.

The main results of the research consist in the identification of general best practices in performing the activity (such as communication/consultation with the interested parties, the consistency as regards contractual/non-contractual relations, the effectiveness and efficiency, transparency and honesty, fair treatment of customers etc.) which have been presented in short and which could be implemented by any company that seeks to achieve superior performances, including the insurance companies. The work also includes some important best practices, described in detail, in a sensitive area such as the insurance field (best practices in relation to the management of personal information, the management and settlement of disputes by insurance companies or intermediaries in the field of insurance etc.).

Keywords: *insurance, best practices, Solvency II, Relevant JEL code: G22 Insurance, Insurance Companies.*

I. Introduction

Implementing good practices in various fields has always represented a concern for those activities/businesses/companies who wanted to grow and deliver more to their business partners or customers. Best practices aim to improve relations between companies and customers, as well to obtain higher performances, by offering a fair, transparent, efficient and friendly behavior.

II. Contents

2.1. Best practices of entities operating in insurance

2.1.1. General best practices in carrying out the activity

Implementing best practices in insurance, as well as in any other field of activity, certainly contributes to the stability and development of this sector. It can only be beneficial for entities (insurers, reinsurers, insurance brokers, etc.) to comply with best practice rules that take into consideration the interests of those contracting an insurance, regardless if it's a life insurance or a general one. Best practices are necessary in order to ensure that customers are treated fairly, both before and after the conclusion of a contract, up to the point where all the obligations laid down have been fulfilled. Of these practices, we will mention the following, some of which are identified by some specialists:

a) communication, consisting in transmitting the information of interest to concerned persons, especially to customers, on a regular basis;

b) consultation with interested parties;

c) consistency as regards contractual/non-contractual relations with interested parties;

d) flexibility regarding the instruments used and the adopted strategies in the case of changes;

e) independence (autonomy, without unjustified political influences);

f) effectiveness and efficiency;

g) liability, as business owners and interested parties must comply with clearly defined processes, providing justifications for the decisions taken;

h) transparency and honesty[1];

i) promoting the products and services in a clear, fair manner, that is not misleading. In the event that, subsequently, an insurer or intermediary becomes aware of the fact that the information supplied is not accurate and clear or it is misleading, the insurer or intermediary should withdraw their information, and notify in the shortest possible time any person who relies on the respective information;

j) fair resolution of customer complaints;

k) manage customers' reasonable expectations;

l) lack of conflicts of interests if the customers receive recommendations before the conclusion of an insurance contract. In their relations, either among themselves or with customers, the insurers and intermediaries may encounter conflicts of interest. Conflicts of interest may appear if a party has professional competition and personal interests. This may include requesting and accepting incentives (money, their equivalent, commissions, goods etc.) for the purpose of adopting a certain

* PhD, Faculty of Law, "Nicolae Titulescu", University of Bucharest (e-mail: **rmpetrescu@yahoo.com**).

[1] Sanford Berg, "Developments in Best-Practice Regulation: Principles, Processes, and Performance", 2000; taken from: http://warrington.ufl.edu/centers/purc/purcdocs/papers/0005_Berg_Developments_in_Best-Practice.pdf accessed in August 2015.

conduct. If some intermediaries representing the interests of customers receive incentives from insurers, this could lead to a conflict of interests which might affect the independent character of the consultancy offered by them;

m) provision of services/new products which take into account the clients' interests, which is a sign of compliance with best practices. If the provided services or products are the same, although the customer requirement is different, this is an indication of failure in using best practices[2].

Fair treatment of customers is a very important aspect in insurance. The insurers and intermediaries in the field of insurance have the task of acting with skill and diligence when dealing with customers. The concept of competence and diligence implies that insurers and intermediaries should fulfill their duties in a reasonable way, with prudence and on the basis of adequate policies and procedures which shall pursue this result. Moreover, the insurers and intermediaries must assume and implement appropriate measures in order to ensure that employees and their agents meet high standards of ethics and integrity. The policies and procedures that ensure fair treatment of customers are particularly important, especially in the case of retail customers since there is an asymmetry in information which tends to exist between the insurer or intermediary and these clients[3].

At the same time, it is very important that all processes in which clients interact directly with insurance companies or intermediaries in the field of insurance (issuing of insurance policies, the collection of insurance premiums, settlement of disputes, renewal of contracts of insurance) be coordinated in a uniform manner, while aiming at their simplification and standardization. The operational activity of companies should be monitored and assessed on the basis of specific performance indicators, and necessary resources for the conduct of these processes must be optimally managed and allocated. The aim is, therefore, to provide quality services to customers, as well as innovative solutions, adapted to their needs.

2.1.2. Best practices in relation to the management of sensitive/personal information

In general, personal information refers to such information that a person or entity collects, holds, uses, or communicates to third parties in the course of its activities. In the insurance business, information security is, of course, important, because concluding insurance policies involves a significant amount of financial, medical and personal information, (including credit card information) to be collected. Protection of personal and financial data is one of the key responsibilities of the financial services industry, regardless of the form in which they are made accessible (written/electronic)[4].

Considering the amount of sensitive and confidential information that has to be managed, the insurers and intermediaries in insurance should ensure that they comply with the best practices in this field, while certain measures need to be taken, such as:

- development of policies and procedures for the privacy protection, in order to ensure compliance with the legal provisions in force and best practices;
- training the employees, at all levels of the organization, in order to promote the importance of requirements for privacy protection;
- implementing internal control mechanisms that meet the objectives of privacy protection;
- implementing appropriate technologies in order to ensure the confidentiality of the financial, medical and personal information of insured persons;
- implementing policies and procedures related to the security of data in order to be able to report, in good time, security infringements to responsible persons, affected customers and the supervisory authorities[5].

2.1.3. Best practices in the management of insurance company websites

The European Insurance and Occupational Pensions Authority (EIOPA) considers that best practices may be applied even in the case of websites of insurance companies. Therefore, the EIOPA recommendation is that these websites provide and/or display:

- information on the main characteristics of the products;
- uniform and suitable information regarding the complexity of the products;
- information in a clear and accessible language, avoiding jargon and technical useless terms as much as possible;
- information regarding the details of all of fees and charges;
- clear information concerning what is covered for each of the offered products.

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[2] International Association of Insurance Supervisors (IAIS), "Insurance core principles, Standards, Guidance and Assessment Methodology", 1 October 2011; taken from: http://iaisweb.org/modules/icp/assets/files/Insurance_Core_Principles__Standards__Guidance_and_Assessment_Methodology__October_2011__revised_October_2013_.pdf.pdf accessed in August 2015.

[3] *Ibidem.*

[4] International Association of Insurance Supervisors (IAIS), "Insurance core principles, Standards, Guidance and Assessment Methodology", 1 October 2011; taken from: http://iaisweb.org/modules/icp/assets/files/Insurance_Core_Principles__Standards__Guidance_and_Assessment_Methodology__October_2011__revised_October_2013_.pdf.pdf accessed in August 2015.

[5] *Ibidem.*

- up-to-date information[6].

2.1.4. Best practices in knowing the customers correctly

Confirmation of the fact that the information supplied by the customers are accurate represents very important good practice. Providing wrong information and stolen identities are aspects that have led to fraud in the past. The insurance companies will have to take several measures to ensure that customers are in fact the persons they say they are. This will require the best practices, such as appropriate documentation and obtaining more information[7].

2.1.5. Best practices in the management and settlement of disputes by insurance companies/intermediaries in the insurance business

In the case of solving disputes filed by holders of insurance policies, EIOPA has developed guidelines applicable to competent authorities in the Member States of the EU which shall make every reasonable effort to respect them. According to these guidelines, the competent authorities should ensure that insurance companies and intermediaries in the insurance business:

- establish a policy for solving the disputes. This policy should be defined and approved by the higher managing board of the insurance companies/intermediaries in the insurance business, which should also be responsible for implementing and monitoring its compliance;
- have a function for managing disputes, which allows to settle disputes in an unbiased manner, as well as to identify and minimize potential conflicts of interest;
- register disputes internally, according to national requirements concerning time limits and in an appropriate manner;
- provide information regarding disputes and their settlement to national competent authorities;
- continuously analyze data concerning the settlement of complaints in order to ensure that they identify and deal with any recurring or systemic problems, as well as potential legal and operational risks, for example, by: (i) analyzing cases of individual disputes with the purpose of identifying fundamental common causes of types of claims; (ii) analyzing the measure in which these root causes may also affect other processes or products, including processes and products which are not directly related to the object of the dispute; and (iii) correcting these root causes, where this is reasonably practicable;
- provide information in writing regarding the settlement procedures;
- publish the details of the dispute settlement procedures (e.g.: how to submit a complaint, the type of information to be provided by the applicant, the procedures followed for reaching a settlement) in an easily accessible manner, for example, in brochures, leaflets, or other contractual documents displayed on its own website:
- shall keep the applicant informed regarding the stage of the examination of the complaint;
- collect and analyze all the relevant evidence and information regarding the dispute;
- respond without unjustified delay or, at least, within the time limits laid down at national level;
- provide a detailed explanation of the position of the insurance company regarding the dispute when a final decision is adopted which does not fully fulfill the applicant's request and shall present to the applicant an alternative method of settlement of the conflict, the existence of competent national authorities etc.[8] [9].

2.1.6. Best practices regarding corporate management

Corporate management identifies mechanisms by which a company is run and controlled or, in another definition, corporate management represents the sum of implemented systems and processes in order to run and control a company with the purpose of increasing its performance and value[10].

At the European level, it is considered that the mechanisms of corporate management of an insurer must:

- promote the development and implementation of policies that clearly define and support the objectives of the insurer;
- define the roles and responsibilities of the persons involved in the management and supervision of the insurer by clearly establishing who has legal obligations and powers to act in the name of the insurer, and under what circumstances;
- provide the corrective measures to be taken in the event of non-compliance with their competencies and duties;
- provide effective systems of risk management and internal control, including effective compliance functions, for actuaries and internal audit. These

[6] EIOPA, "Report on Good Practices on Comparison Websites", 2014; taken from: https://eiopa.europa.eu/Publications/Reports/Report_on_Good_Practices_on_Comparison_Websites.pdf accessed in August 2015.

[7] http://www.best-practice.com/best-practices-regulation/financial-regulations/5-challenges-for-insurance-companies/ accessed in August 2015.

[8] EIOPA, "Guidelines on complaints-handling by insurance companies", 2012; taken from: https://eiopa.europa.eu/Publications/Guidelines/EIOPA_2012_00050000_RO_CORv2.pdf#search=RO%20corv2 accessed in August 2015.

[9] EIOPA, "Guidelines on complaints-handling by insurance intermediaries", 2014; taken from: https://eiopa.europa.eu/Publications/Guidelines/EIOPA_GLs_Complaints_Handling_Intermediaries_RO.pdf#search=EIOPA%20GLs%20Complaints%20Handling%20Intermediaries%20RO accessed in August 2015.

[10] http://rocg.ro/pentru-companii/ce-este-guvernanta-corporativa/

systems and functions must be appropriate to the nature, the extent and complexity of the activities and risks of the insurer and should be adapted as the insurer's business, as well as internal and external circumstances, change. Moreover, an insurer's system of risk management must include all strategies, policies, processes and controls for the identification, assessment, monitoring, management and risk reporting to which the insurer may be exposed as legal person and as a group[11].

Corporate management is often referred to as a system of "checks and balances". This means that an insurer must be flexible and receptive to developments affecting its operations, and at the same time the insurer must be transparent and maintain control in such a way as to ensure that the powers have not been unduly concentrated in a specific location and that they are used in the interest of the insurer[12].

2.2. Implementing best practices in the insurance business introduced by Solvency II Directive

The Solvency II system radically changes the surveillance act philosophy in the insurance business by introducing a system based on the assessment of risks to which insurance and/or re-insurance companies are exposed. Solvency II Directive, which is to be applied as of 1 January 2016, introduces a number of principles and good practices aimed at ensuring economic stability in the insurance industry and providing a degree of predictability of the evolution of each insurer. The new system will ensure a harmonized approach of supervision across the European Union, which will help provide a level of action for all insurers and re-insurers, and it will provide common protection for all consumers, regardless of their legal form, size or location. Solvency II will harmonize regulations on solvency throughout the European Union, which shall lead to the creation of a single market with potential benefits to customers by increasing competition, transparency and flexibility.

The specificity of Solvency II is that, in addition to the set of principles which constitute the level 1 of EU law, most of the secondary legislation will be developed at the European level, by the European Commission, and best practices will be promoted by the European authority in the field, the European Insurance and Occupational Pensions Authority, by issuing guidelines. With regard to the insurance market in Romania, the Financial Supervisory Authority has the objective of initiating the transposition of the Solvency II Directive into national law and preparing the insurance market for the implementation Solvency II standards.

III. Conclusions

By analyzing the insurance field, we came to the conclusion that the stability and the development of this sector depends on how much the entities developing such activities comply with good practices that serve the interests of those who contract an insurance. As it can be seen from all that we have shown above, best practices in the insurance field aim to build a fair relationship between an insurer/intermediary in insurance and existing or potential customers. Understanding customers' needs, proper management, offering the best service, permanent consultation and increasing transparency will obviously result in raising professional standards and, by default, a growing business.

Recently, the implementation of a system of best practices in companies has had an important evolution. Best practices have become essential key-points for business success. As soon as they become more aware of this, companies will continue to overcome any difficulties by ensuring compliance with best practices.

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[11] International Association of Insurance Supervisors (IAIS), "Insurance core principles, Standards, Guidance and Assessment Methodology", l October 2011; taken from: http://iaisweb.org/modules/icp/assets/files/Insurance_Core_Principles__Standards__Guidance_and_Assessment_Methodology__October_2011__revised_October_2013_.pdf.pdf accessed in August 2015.

[12] *Ibidem.*

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THE EFFICACY OF THE ARBITRATION CLAUSE IN A SIMULATED ACT

Tudor Vlad RĂDULESCU*

Abstract

The article focuses on the effects that an arbitration clause can still produce when it is contained in a simulated operation, whether it is in the apparent act or in the secret one, depending on the forms of simulation.

Keywords: *simulation, arbitration clause, relativity of contracts, overt act, ccovert agreement.*

1. Introduction

The material aims to address the issue of compatibility between the arbitration clause and the operation of simulation. More specifically, to answer two problems that could arise if the parties, chosing to hide the true legal relationship between them, have concluded a secret act, known only by them, and a public act, ostensible, enforceable against third parties, where they chose to introduce an arbitration clause.

Thus, the two problems can be summarized as follows: 1. the action for declaration of the simulation will be the jurisdiction of the courts or of an arbitral tribunal? and 2. if disputes are in relation to the performance of the obligations arising from the covert contract, the one taking effect between the parties, the competence will belong to the courts or to the arbitral tribunal?

The above problems may arise, as we have shown, where the parties have included the arbitration clause only in the content of the public act, and not in the secret one, and shall be established to what extent this clause will be more effective, or, in in other words, what is the relation between the arbitration clause and the avert contract between the parties: of independence or dependence?

To provide an answer to these problems, we will do a review of the two institutions meeting at issue: **the simulation**, exception to the enforceability of documents to third parties, but especially viewed from the perspective of relativity and enforceability if the effects of contracts between the parties, and the arbitration agreement, disguised under the mantle of **arbitration clause**, first seen individually, and then we will review to what extent the second one can somehow influence the action for declaration of the simulation or general or material jurisdiction where there occur issues in the execution of rights and obligations arising between the parties.

2. Some consideration regarding the legal operation of simulation

Without trying, in these lines, to formulate a new theory on simulation, or to fully resume the existing one, we only intend to draw some determining elements of this operation in order to create an overview of the issue, which is the subject of the article.

Thus, the simulation could be defined[1] as the legal operation whithin which, through a public legal act, but apparent, is created a new legal situation than the one established by a hidden legal act, secret, but real, called inappropriate and secret[2].

To understand the definition given above, we consider necessary to explain certain terms used in explaining the concept.

The secret act is the one expressing the real intention of the parties and establishes the true legal relationship between them; to be valid, the secret act shall meet only the substantive and validity requirements of the civil legal act, and not the formal ones, as evidenced by the interpretation *per a contrario* of the dispositions of art. 1289 para.2 Civil Code.[3]

The public act is the one creating the appearance and that is concluded for this purpose, i.e. to hide reality under its lying mantle; its existence is essential to the existence of the simulation[4]. As concerns this act, it is necessary to be fulfilled both the substantive conditions (capacity, consent, object and cause) and the formal ones,

* Tudor Vlad Rădulescu, PhD Student, Faculty of Law, "Nicolae Titulescu" University of Bucharest (e-mail: **tradulescu@yahoo.com**).

[1] For further definitions of this legal transaction, proposed by doctrine and jurisprudence, particularly the ones previous to the current Romanian civil code, see F.A.Baias, *Simulaţia. Studiu de doctrină şi de jurisprudenţă*, Editura Rosetti, Bucureşti, 2003, p. 46-49.

[2] G. Boroi, L. Stănciulescu, *Instituţii de drept civil în reglementarea noului Cod civil*, Editura Hamangiu, Bucureşti, 2012, p. 172.

[3] Was also expressed the opinion as meaning that the secret act, however, should also fulfill the formal conditions required by law if the simulation is achieved by interposing persons or mandate without representation, cases in which the parties of the public act are not the same with the ones of the secret act; see F.A. Baias în F.A.Baias, E. Chelaru, R. Constantinovici, I. Macovei, *Noul cod civil. Comentariu pe articole*, ediţia a II-a, Editura CH BECK, Bucureşti, 2014, p. 1438.

[4] F. Baias, *op.cit.*, p. 55.

required by law. Moreover, when the secret act is a document for the validity of which the law requires compliance with a specific formal requirement (eg, donation), although this act will not take the form of the authentic document, however, for the validity of simulation, as a legal operation, the public act shall be concluded in that form, even if the law does not require, for its valid conclusion, the compliance of a certain formal condition[5] so that the secret act "borrows" the form from the public act.

2.1. The conditions of validity of the simulation

To be valid as legal operation, the simulation must meet, in an opinion, a series of conditions, that we recall hereunder: **(1)** there is a secret act; **(2)** there is a public act; **(3)** the secret act must is completed concurrently, or possibly before the conclusion of the apparent one and **(4)** both legal acts are entered into by the same parties[6].

According to another opinion[7], embraced also at the level of the latest jurisprudence of the High Court of Cassation and Justice[8], in addition to the two acts, is also necessary **(5)** the existence of the overt act, namely the intention of the parties that the legal operation produces all the legal effects specific to the simulation, *animus simulandi*, which differs from the discrepancy that may spontaneously occur between the declared will and the real intention, which will be settled through the interpretation of the contract[9].

2.2. Forms of simulation

From the point of view of the form in which can appear simulation, this legal operation can be done fictitiously, by disguise (total or partial) and by interposition of persons; legal literature[10] has made a distinction between *absolute* simulation and *relative* simulation, the latter classiffying itself in *objective simulation* (when are hidden objective elements of the act, such as the nature of the contract, its object or cause) and *subjective simulation* (in case of simulation by interposition of persons).

In its first form, of the fictitious act, the simulation means the existence of only two of its three elements, respectively the public act and the covert agreement. Thus, the parties conclude an apparent act that is nevertheless devoid of any effects through the covert agreement, the participants in the simulation remaining in the state preceding the conclusion of the public act; between the parties are not born any new rights and obligations, except those strictly determined by the will to simulate (e.g. the obligation to consent to the dissolution of the apparent act within a certain period, the right of the one who consented to simulation to receive a certain remuneration, etc.)[11]. In short, through the fictitious act, the parties „dissimulate" to conclude a legal act (aiming, most of the times, at defrauding the interests of certain categories of participants in the legal relations - creditors), in reality the act being non-existent.

The disguise, the second way to hide the reality can be total or partial, depending on the element on which the parties conclude the covert agreement. Hiding the nature of the contract representing the real intention of the parties makes the disguise to be complete, while concealing only certain elements of the secret contract will be just a partial disguise l (i.e., hiding the real price, hiding the actual date on which was concluded the secret act, hiding the way the obligation is to be executed, etc.).

Finally, simulation through the interposition of persons implies the conclusion of the public act between certain parties, while in the secret act (but also in the covert agreement) takes part a third person, who will be the real beneficiary ofthe public act, so in the patrimony of whom will be produced the legal effects of the concluded act.

2.3. Effects of simulation

In terms of the effects produced, Romanian legislature of 2009 remained faithful to the principle of neutrality of simulation, art. 1289 paragraph 1 Civil Code providing that the secret act shall take effect only between the parties and, if the nature of the contract or the stipulation of the parties does not show to the contrary, towards the universal successors and with universal title. So, simulation, as a rule, is not sanctioned, than when is pursued an unlawful cause, the secret producing effects between its parties but also to persons treated as parties, to third parties in good faith, being enfroceable onlu the public apparent act.

If one party refuses to perform its obligations arising from the secret contract, the other party may ask the court to find the simulation, and then to enforce the performance or to resort to any other remedy provided by law for non-performance

[5] Similarly, see G. Boroi, L. Stănciulescu, *op.cit.*, p. 176; contrarily, see P.Vasilescu, *Drept civil. Obligaţii*, Editura Hamangiu, 2012, p. 493.

[6] C. Stătescu, C. Bîrsan, *Drept civil. Teoria generală a obligaţiilor*, Editura Hamangiu, Bucureşti, 2008, p. 78; we consider that this condition must be fulfilled only if the simulation takes the form of the fictitious act and disguise, not in the case of simulation by interposing persons.

[7] L. Pop, I.F.Popa, S.I.Vidu, *Tratat elementar de drept civil. Obligaţiile*, Editura Universul Juridic, Bucureşti, 2012, p. 223; F.A.Baias, *Simulaţia*, p. 67 şi urm.

[8] ICCJ, secţia I civilă, dec. nr.5782 din 12.12.2013, pe www.scj.ro.

[9] L.Pop, I.F.Popa, S.I.Vidu, *op.cit.*, p. 223.

[10] F.A.Baias, *Simulaţia,* p. 97 ş.u.; L. Pop, *Tratat de drept civil. Obligaţiile. Volumul II: Contractul*, Editura Universul Juridic, Bucureşti, 2009, p.619; P. Vasilescu, *op.cit.* , p. 490.

[11] F.A.Baias, *Simulaţia,* p. 99.

(exception of non-performance, enforcement in nature, rescission or termination, etc.)[12]

It is not the object of this study to treat in detail the effects produced by this legal operation, since the issue to be reached concerns only the parties of the simulation, not the third parties, either successors with particular title, or unsecured creditors, which is why regarding the effects produced, we limit ourselves to the observation made in the previous paragraph.

3. Arbitration – alternative means of dispute settlement. The arbitration clause

The code of Civil Procedure entered into force on 15.02.2013 defines, for the first time, the institution of arbitration, stating that it is an alternative jurisdiction having private nature (art. 541 para. 1 Civil Procedure Code). So arbitration is a means of settling disputes by decisions rendered by a third party that are binding on the parties[13].

Arbitration is a legal institution with a dual legal nature, both contractual and judicial. The legal basis of arbitration is the arbitration agreement, under its two forms– compromise and arbitration clause[14]. So, as has been stated in the literature[15], the term of arbitration agreement was created only to simplify the legal language, as long as an arbitration agreement stricto senso never exists. This is in fact the meaning of art. 549 para. 1 Civil Procedure Code, according to which the arbitration agreement may be concluded either as an arbitration clause in the main contract or established in a separate agreement, to which refers the main contract, either in the form of compromise.

Compromise and arbitration clause have different forms, but their purpose is the same: represent the common will of the parties to resort to arbitration proceedings for the settlement of the dispute between them. Both shall be concluded in writing, under the penalty of absolute nullity, thus being formal acts, without importance, as the document is an authentic one or under private signature. The solemnity of the arbitration agreement consists in its contents, in addition to the written form, as will be explained below.

By compromise, the parties agree that a dispute arising between them shall be settled by arbitration, the provisions of art. 551 para. 1 Civil Procedure Code concluding that, under the penalty of nullity, the parties shall show the object of the dispute and the names of the arbitrators or the manner of appointing them in case of ad-hoc arbitration.

The arbitration clause is the clause inserted in the main contract or in another contract to which the main contract refers whereby the parties establish that disputes arising from the contract where it is stipulated or in connection with it, are settled by arbitration (art. 550 para. 1 Civil Procedure Code). So, the arbitration clause concerns, unlike the compromise, *future disputes*, yet unborn, but which may arise in connection with the contract containing that clause.

According to art. 550 para. 2 Civil Procedure Code, the validity of the arbitration clause is independent of the validity of the contract where it was entered, text giving expression to the principle of autonomy of will of the arbitration clause related to the contract in which it is inserted. Thus, we can say that we are dealing with a "contract into a contract", the main agreement seeming to aliase, as if we were in the presence of two separate contracts, one etsablishing the mutual material rights and obligations of the parties, and another one agreeing on the method of settling the disputes relating to those rights and obligations[16].

Thus, it was observed in practice that the validity of the arbitration clause is not affected by the invalidity of the contract in which it has been entered, the less it will be affected if the parties, through their will, have terminated the contract in which it was provided[17].

A provision similar to the one in the Civil Procedure Code, however general, we also find in the Civil Code, which, in the section on termination, states that it has no effect on the clauses related to dispute settlement or on those intended to take effect even in case of termination. Or, among clauses peratining to dispute settlement there are, most often, the arbitration clauses.

Finally, again with reference to the arbitration clause, the Civil Procedure Code, under art. 550 para. 3 sets out a special rule for the interpretation of this clause, stating that, in case of doubt, it should be interpreted as meaning that it applies to all disagreements arising from the contract or legal relationship to which it refers. This rule of interpretation is an application of the interpretation provided by art. 1268, para. 5 Civil Code, according to which the clauses intended to exemplify or to remove any doubt on the application of the contract to a particular case, do not restrict its application in other cases that have not been expressly provided.

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[12] L.Pop, I.F.Popa, I.S. Vidu, *Curs de drept civil. Oligaţiile*, editura Universul Juridic, Bucureşti, 2015, p. 175.
[13] F.G.Păncescu în G.Boroi (coord.), *Noul cod de procedură civilă. Comentariu pe articole,* vol. II, editura Hamangiu, Bucureşti, 2013, p. 23.
[14] G. Dănăilă, *Procedura arbitrală în litigiile comerciale interne*, editura Universul Juridic, Bucureşti, 2006, p. 42.
[15] M. Badea, *Procesul comercial cu element de extraneitate*, editura Hamangiu, Bucureşti, 2009, p. 211.
[16] G. Dănăilă, *op. cit.*, p. 53.
[17] Sentinţa nr.69 din 8.05.1998 a Curţii de Arbitraj Comercial Internaţional, în G. Dănăilă, *op.cit.*, p. 55, footnote 68.

4. The effect of the arbitration clause on the legal operation of simulation

Typically, the arbitration clause contained in contracts has a standard content, which tends to cover all disputes that may arise between the parties regarding the concluded contract.

In this regard, The Romanian Chamber of Commerce and Industry made a recommendation on the content of the arbitration clause in commercial contracts, meaning that *Any dispute arising from or in relation to this contract, including the conclusion, performance or termination thereof shall be settled through the arbitration of the Court of Internaţional Commercial Arbitration attached to the Chamber of Commerce and Industry of Romania, according to the Rules of Arbitration of the International Commercial Arbitration Court, in force, published in the Official Gazette of Romani, part I."* [18]

After reviewing some general issues regarding simulation and arbitration clause, we will try to provide answers to the questions which were the starting point of this article and that we resume hereunder:

the action for declaration of the simulation shall be the jurisdiction of the courts or of an arbitral tribunal?

and

if disputes arise in relation to the performance of the obligations arising from the secret contract, the one taking effect between the parties, their settlement competence will belong to courts or to the arbitral tribunal where the arbitration clause exists solely in the public act?

The answer to the first question can be given starting from the provisions of art. 550 para. 3 Civil Procedure Code, to which we referred above, which we consider closely related to the purpose of the action for declaration of the simulation.

Most of the time, the action for declaration of the simulation is an action-means, which is only the necessary step to reach the true contractual reality, then aiming at demanding its abolition or the performance of the obligations it has generated[19]. The action for declaration of the simulation does not aim so much at denouncing the simulation but something concrete in relation to the acts forming the simulation mechanism (simulators may pursue the enforcement or annulment of the hidden and third parties may claim being defrauded of their interests through the suspect hidden act)[20].

In these circumstances, the action for declaration of the simulation, from the point of view of the parties, may pursue, as its purpose, either to terminate the hidden contract (its cancellation, rescission or terminatio) or performance of the contractual obligations, as they have already been drawn up in the act representing the real intention of the parties. We cannot agree with the view according to which the action for declaration of the simulation is a fullu-fledged action, even if the arguments in support of this theory, from a theoretical point of view, are at least attractive, from a very simple reason, procedurally speaking: the interest.

According to art. 32 para. 1 Civil Procedure Code, the conditions governing the civil action are as follows: capacity to stand trial, standing, formulating a claim and the interest.

This latter requirement, on the interest, was defined as being the practical use pursued by the one who initiated the civil action[21], and, in order to be valid, must meet the following requirements: be determined legitimate, personal, **vested and present** (art. 33 Civil Procedure Code).

Thus, we wonder, what could be the vested and present interest of the parties to bring an action for declaration of the simulation, without a real reason, which would expose them to a prejudice if they did not resort, that time, to action (and which can relate either on the abolition of the secret act or on the obligations arising herefrom). We believe that an action for declaration of the simulation, made by one party, with a single head of claim, without invoking other claims, shall be dismissed by the court as devoid of interest. We consider that the real issue of autonomy of action for declaration of the simulation could arise if the claimant in such a request were a third party and not one of the parties, that knows very well what was the real intention and in what consisted the covert agreement, situation that yet is not covered by this study.

For these reasons, we consider that the action for declaration of the simulation, made by one party is an action that serves either as the abolition or the performance of the secret contract, in which case it would fall under an eventual arbitration clause made either in the manner recommended by the Chamber of Commerce of Romania, or in the more general way "any disputes arising in connection with this agreement shall be settled by arbitration".

As to the second issue raised, it can be summarized as follows: if the parties had agreed on an arbitration clause only in the apparent (overt) act, the legal operation of the simulation will also extend on the competence on settling any dispute concerning either enforcement or abolition of secret act, as meaning that the arbitration clause will no longer be effective?

We believe that the response relates to the legal nature of the arbitration clause, namely to its principle of autonomy to the main contract, but also

[18] www.arbitration.ccir.ro/clauzarb.htm, consulted on 19.03.2016.
[19] P. Vasilescu, *op.cit*, p. 500; for contrary opinion, see F.A.Baias, *Simulaţia,* p. 208-209, L. Pop, *Contractul,* p. 638.
[20] P. Vasilescu, *idem.*
[21] G. Boroi, M.Stancu, *Drept procesual civil*, editura Hamangiu, Bucureşti, 2015, p. 36.

to the content of the covert agreement, as a key element of the simulation.

Thus, as long as the covert agreement relates only to the elements of substantive law (i.e. the true rights and obligations of the parties that arise from the secret act), we believe that the provisions of the secret act will be completed with the ones of the public act, apparently, concerning to the jurisdiction for settling any disputes that will arise in the contract. This reasoning is all the more evident when simulation by disguise and interposition of persons, by which the parties seek, in reality, to hide certain elements of the secret act from third parties (nature of the contract, the true beneficiary of the rights, etc.), and in no way what will be the competent institution to settle its disputes.

A problem could arise in case of absolute simulation, through fictitious act, when the public act is devoid of content, is only a form without substance, the covert agreement of the parties ruling as meaning the lack of will expressed in the apparent act. In this situation, the court or the arbitral tribunal hearing the request for the performance of provisions of the secret act, should, in principle, ascertain the extent of the covert agreement, namely whether it took into account the public act in its entirety, including the clause conferring general jurisdiction or only the specific effects of the public contract signed. If such a research is not carried out, or if the court cannot conclude one way or another, we consider that the arbitration clause is integral with the other terms of the apparent (overt) act, notwithstanding the rule established by Art. 550 para. 2 Civil Procedure Code, the parties aiming by its introduction in the contract, at creating conditions to remove any doubt on the authenticity, veracity and efficiency of that agreement.

5. Conclusions

As a conclusion, we can say that in what concerns simulation, the effectiveness of the arbitration clause will always depend on the research of the covert agreement, the key element of this legal operation, which represents the real intention of the parties. We should not lose sight of the autonomy enjoyed by the arbitration clause within a contract, but this rule must be adapted to the special conditions of simulation and to the aims pursued by the parties.

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THE IMPLICATIONS OF THE POLITICS AND OF THE EDUCATIONAL LAW IN THE DEVELOPMENT OF THE ROMANIAN SOCIETY

Andreea RÎPEANU*

Abstract

The evolution of policy and law school over time. Education, school education constituted and we, as elsewhere, an object of research and appreciation. Numerous pens, school people and great scholars were carefully bent on such a topic with implications for the development of society of all time. In the broadest sense of the word, education is a phenomenon that includes the company's genesis, evolving into the most closely related to it. Therefore, we can say that various forms, learning occurs with human society, the opportunities and aspirations that can not be broken.

Keywords: teacher, education, school, *professional organizations, society*.

1. The evolution of the politics and of the educational law in time.

The education, school and teaching have formed for us, as for everyone else, a research and valuation object. A number of pens, school people and great scholars have carefully oriented to such a subject with implications in all-time society development.[1]

In the widest sense of the word, education is a[2] phenomenon included in the society's genesis, evolving in the closest connection with it. This is why we can say that, under various forms, education appears once with the human society, from which possibilities and aspirations it cannot be broken.[3]

Education starts since the time of the *primitive commune*, by oral transmission, from generation to generation, of knowledge and techniques related to food procurement, hunting, fishing, agriculture and animal breeding, living and coating, ornaments and tools of defense against enemies, which means that the human progress is closely related with the surrounding environment.

Therefore, the education in our country, sensitive since its beginning, in the ideological and cultural processes and developments, will bear the general stamp of the time, the one of an important instrument in the consolidation and development of the society, satisfying its imperatives and exigencies[4].

Since the constitution of the Romanian feudal nations (14th - 16th century), there was a preoccupation for school development. *Clerics* and other literates were needed for the political - administrative institutions.

Supporter of the feudal state, the church has played an important role in the development of the culture from that time, and also in the development of education and teaching. It is explainable that the first schools will be organized near monasteries, episcopacies, cathedrals. The priests and monks, fulfilling the mission of teachers, have learnt the children to write, read, make calculations and memorize prayers.

Starting with the 14th century, the churches and monasteries will become the most significant centers of scholar activity, the most favorable environments for the development of the culture in that time[5].

In monastery schools, there were teachers, instructors, professors, named at that time *năstavnici* and *grămătici*[6], as also assistant instructors, named *vătaji*. Their mentioning in a number of documents shows a certain teaching activity[7].

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* PhD, Ecological University of Bucharest, Faculty of Law and Administrative Sciences, Bucharest, Romania, (e-mail: **andreea.ripeanu@yahoo.com**).

[1] Ştefan Pascu, *Istoria învăţământului din România*, Vol.I, Editura Didactică şi Pedagogică, Bucureşti, 1983, p.9.

[2] Precent where we can deduct a manner of acting, thinking; training, study, discipleship; the field and the activity of training and education (in schools), according to the *Explanatory Dictionary of Romanian Language*, Editura Universul enciclopedic, Bucureşti, 1998, p.542.

[3] Gheorghe Iscru, *Contribuţii privind învăţământul la sate în Ţara Românească până la jumătatea sec. al XIX-lea*, Editura Didactică şi Pedagogică, Bucureşti, 1975, p.11.

[4] Ştefan Pascu, *Istoria învăţământului din România*, Vol.I, Editura Didactică şi Pedagogică, Bucureşti, 1983, p.76.

[5] Proofs on the existence of monastery schools in that times also offer some iconographic representations. For example, on one of the walls of the church *Sf. Nicolae Domnesc* from Curtea de Argeş, in a composition, are depicted three schoolchildren with their teacher, during the training, Ştefan Pascu, *Istoria învăţământului din România*, Vol.I, Editura Didactică şi Pedagogică, Bucureşti, 1983, p.77.

[6] The term *grămătic* (greek.-gramatikos and lat.-gramaticus) assigned, on origin, the elementary school teachger for learning to write and read, Ştefan Bârsănescu, *Pagini nescrise din istoria culturii româneşti (sec.X-XVI)*, Editura Academiei, Bucureşti, 1971, p.140.

[7] Hence, in the *March 1415 charter*, issued by Mircea cel Bătrân, the năstavnic Sofronie is mentioned, also reminded in a document from 1467. Also, *the document from 3 April 1480*. refers to the nastavnic from Tismana monastery. In a *document from Moldova*, from the 15th

In the monastery school, education was generally basic. The teachers were teaching the young who were preparing for cure or for copying religious texts, to become copyists, clerks, gramatici.[8]

In the 17th century, although the educational forms are maintained, the Romanian education comes out from its patriarchal meanings, targeting higher purposes We find teachers, writers, clerks, in villages, like Toader from Stoiceştii Focşanilor, Gheorghe from Odobeşti, etc..

The word **school**[9] appears for the first time in our old literature in the work *Octoihul românesc* (1570) written by Diaconul Coresi: *aşişderea în şcoală meşterii şi dascălii să înveţe mai vârtos româneşte (en. School masters and teachers should learn Romanian with more dedication)*[10].

In his work, *Statutele şcolii din Şchei*, Johannes Honterus (1498-1549), famous educator who opened new paths for education and culture, referring to the *attempts to remedy a set-back of the education*[11], ***the lack of qualified teachers and inappropriate retribution of the existing ones***, was arguing that: *...the employment of teaching personnel fell upon the secular authorities, who, together with the clerical counterparts, will have both the obligation to remunerate and to control the teachers' activity. ...Each commune would have to ensure the required material conditions for the teachers..*

Nicolaus Olahus (1493-1568) has supported and renovated education and teaching, being the first organizer of the primary and higher education from Transilvania.

In this respect, in 1560, in the Tyrnavia Synod, he decides the employment of one teacher for children's education near every urban or rural congregation (therefore setting the foundation of primary education), democratic initiative, if we consider that the school was, until then, a privilege of the nobility.

For a good performance of the higher education (meant for training clerics), he ordered the creation, for teachers, aside a substantial salary, of a stăipt, meant to defend them from the abuses of the nobility.

Olahus believed so much in the role of education that, by his will (1562), he left a part of his assets to the schools founded by him.[12]

In Moldova, Vasile Lupu (1634-1653), a lover of culture, granted special attention to the role that the professor had in the school.[13]

In the last quarter of the 18th century, the Lordly Academy form Bucharest, higher education institution, was inaugurated.

In 1707, Brancoveanu reorganizes the Lordly Academy, by the act entitled *Rânduiala dascălilor*[14], whereby he sets the number of professors, the disciplines that every professor was to teach, the schedule etc.

Also, Brancoveanu makes efforts to ensure sufficient income for the payment of the teachers and the school, typography and librari for the development of the educational process.

To train the necessary teachers for the Academy, Brancoveanu granted scholarships to one of the graduates from Bucharest, to continue the studied in Italy.

Also in the 17th century, it is talked about the *family teachers* who teach Greek, Slavonian, Latin and Romanian, literature, history, art etc.

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century, it is talked about a grămătic from Neamt monastery. Some *muntenian documents* say about Radu, the grămătic from Tismana, or Stan, the grămătic from Ramnic, etc. The Moldavian chronicler Macarius (sixteenth century) recalls that Theoctistus II, before being Bishop of Moldavia, in the middle of the sixteenth century, when he was abbot of the monastery Neamt, hav served as năstavnic and teacher, in Ştefan Bârsănescu, *Pagini nescrise din istoria culturii româneşti*, Editura Academiei, Bucureşti, 1971, p.130.

The documents also certify the existence of other monastery schools. For the 18 clerks, gramatici and chancellors documentarily certified in Teleorman, it is possible for a sloveni school to have existed in Măniceşti or near Ţigănia-Drăghiceşti monastery, near Ruşii-de-Vede, in A. Manolache, Gh. Pârnuţă, *Contribuţii la istoria culturii şi învăţământului în Teleorman*, Bucureşti, 1979, p.47.

[8] Teaching in Slavonian (and probably in Romania) the writing, reading, church songs, were making exercises to draw the lordly initials and monograms, to know and practice the ritual of the religious service. Also, the teachers were teaching the interpretation of religious dogma, texts with phylosophical contents, religious code of laws. It was also teached Greek, chronology, astronomy (particularly in the perspectivel of understanding the religious calendar), rhetoric, music, elementary notions of arithmetics necessary to account the monastery revenue. Among all these disciplines, the first education object was the Slavonian grammar, in Ştefan Bârsănescu, *Pagini nescrise din istoria culturii româneşti*, Editura Academiei, Bucureşti, 1971, p.212.

[9] The first Romanian school known as – *The School from Şcheii Braşovului* - was constituted in 1459 (from wood) and in 1597 (from stone), as Sextil Puşcariu, brasovean literate, sais. The teachers teach in this school reading, writing, religious songs, Ştefan Pascu, *Istoria învăţământului din România*, Vol.I, Editura Didactică şi Pedagogică, Bucureşti, 1983, p.114.

[10] Ştefan Pascu, *Istoria învăţământului din România*, Vol.I, Editura Didactică şi Pedagogică, Bucureşti, 1983, p.109.

[11] Making reference to the education from Transilvania, criticizing the bad condition thereof, was assuring that efforts have been made for the desirious-learning youth to have, in the cities, a sufficient number of teachers and professors, and for the latter to be remunerated, so as no scholar to be without education due to his/ her poverty ..., Johannes Honterus, *Statutele Şcolii din Braşov*.

[12] Ştefan Pascu, *Istoria învăţământului din România*, Vol.I, Editura Didactică şi Pedagogică, Bucureşti, 1983, p.129.

[13] The school founded by him, the Higher Grade College from Iasi, needed famous teachers. Hence, seeing the lack of good teachers in Moldavia, he brought good and zealous teachers from Kiev, A. D. Xenopol, *Istoria românilor din Dacia Traiană*, VII, Iaşi, 1898, p.60.

[14] The first teacher was teaching seven disciplines: logic, rhetoric, physics, about sky, birth and death, about soul and metaphysics. The second teacher was translating various works of the Greek clasicism authors (*Isocrate's lectures, \Demostene' lectures*). the third teacher would have to translate the *Thoughts* of Chrisoloras and Caton, Fochilide and Pitagora, Esop, Homer. In adition, the grammar of Lascaris should have been tought, but the students should have been explained, in Eudoxiu Hurmuzachi, Nicolae Iorga, *Documente privitoare la istoria românilor*, vol.XIV, Bucureşti, 1915, p.392-394.

The 18th century is characterized by the development of a modern education. The content of education, generally, is no longer predominantly religious, and the teachers and their disciples were mostly secular.

For the first time, the idea *of educational system* appears in the Charter of Alexandru Ipsilanti from 1776, the most comprehensive act of school legislation from that time in Romania[15].

The state manifests a higher and higher preoccupation for school, for the necessary funds, to select the professors, for an effective control on the performance of the instructive - educative process.

All these measures can be considered the first *measures of school policy* met in the Romanian Countries.[16]

School development will keep pace with society development, serving in particular to the interests of the dominant class.

By the *1814 Charter*, dedicated to the organization of the Bucharest school, the lord of the Romanian Country, Ion Caragea, introduces the concept of *responsibility of the officials* in ensuring the conditions for the good performance of the instructive - educative process. *Instruction preservation* was primarily ensured by providing budget funds allocated regularly.[17]

Nicolae Mavrocordat (1711-1716) provided for the payment of such amounts from the lordly revenue.

Also to this respect, Grigore Ghica, considering the schools as the *fountain supplying the extracurricular crowd with the wealth of education and wisdom* [18] and being aware of the fact that for such institutions to operate, necessary funds were needed, by the *1743 Charter* he introduced the payment of 1-coin tax for each priest[19].

The fluctuation of measures on the necessary funds to maintain the schools was due to the instability of the Fanariot lords, switched by the Turkish between the two Princedoms.

It is to retain their preoccupation in this matter. The payment of the teachers' wages, although with high differences[20], but made with priority against other working people, certifies the role of the school in state and the consideration that the teachers begun to enjoy[21].

School development was closely related to the existence of an institution aiming at controlling teachers' activity and recording the progress made by the scholars[22].

With regard to Transilvania, the first school law on the elementary education, was drafted in 1774, sanctioned by Maria Tereza, under the name of *directive rules for the improvement of education from elementary or Serbian and Romanian non-united trivial schools*. The modernist highlights come out from the following passage, particularly significant: *... for the training of the young to the made under good conditions, capable teachers were needed, therefore it was provided not to employ and not to entrust the position of a teacher to anyone if such person was not appropriately certified by a detailed exam, which to show that he or she is prepared to teach students... .*

By the *1776 School Patent* (Schul-Patent)[23] some specifications are made in connnection with the preparation, employment and duties of the teachers; with regard to their payment, it was stipulated that this will be regulated by the contract made between the communal authorities and the respective teacher.

A special place in the school legislation was taken by *Ratio educationes* (1777) and *Ratio*

[15] The educational system was conceived in 4 steps:
- the beginner cycle (3 years), where grammar was teached;
- the advanced cycle (3 years), where Greek and Latin was teached;
- the 3-year cycle, where rhetoric, poetic, the Aristotel moral, Italian and French was teached;
- the upper grade, where arithmetics, geometry, history, geography, Aristotle phylosophy, astronomy were teached.

The elementary education was tought in schools of Slavonian and Romanian language, founded within the county capitals.
Middle schools (with two grades) were operating in Bucharest, Craiova and Buzau.
The higher education was ensured by the Lordly Academy, in Ştefan Pascu, *Istoria învăţământului din România*, Vol.I, Editura Didactică şi Pedagogică, Bucureşti, 1983, p.233.

[16] Ştefan Bârsănescu, *Istoria pedagogiei româneşti*, Bucureşti, 1941, p.47.

[17] Ştefan Pascu, *Istoria învăţământului din România*, Vol.I, Editura Didactică şi Pedagogică, Bucureşti, 1983, p.230-231.

[18] V.A. Urechia, *Istoria şcoalelor de la 1800-1864*, I-IV, Bucureşti, 1892, p.17-18.

[19] PReviously, Constantin Mavrocordat decommissioned, by the *1734 Charter*, the school tax charged from priests, deciding for the teachers to be paid from the treasury funds, in A. D. Xenopol, *Epoca fanariotă, 1711-1821*, Iaşi, 1892, p.618-619.

[20] By the *1766 School reorganization charter*, issued by Grigore Alexandru Ghica (Moldova), a large differentiation was created with regard to the wage for teachers. Hence, the Greek teacher in Galati was receiving 250 Lei, the Romanian teacher from Iasi 120 lei, the same amount was receiving the Greek teacher from Botosani and 60 lei each for the Romanian teachers in the lands, in V.A. Urechia, *Istoria şcoalelor de la 1800-1864*, I-IV, Bucureşti, 1892, p.52. The differentiation was even higher when comparing the payment of these teachers with the one of the Greek teachers from the Iasi Academy. Thus, the higher teacher was receiving 1500 lei and the first teacher of Greek grammar was receiving 600 lei, in Radu Iacob, *Istoria vicariatului Haţegului*, Lugoj, 1913, p.293.

[21] This fact explains the *1801 Resolution* of Alexandru Moruzi, lord in the Romanian Country, whereby it was ordered for the Facoianu High Stward to pay the teachers first.

[22] Hence, Grigore Ghica in the *1743 Charter* was arguing about the control of the teaching activity and the results thereof: *... and to check the schools, the teachers, twice per year, what kind of dedication they have...* in Ştefan Pascu, *Istoria învăţământului din România*, Vol.I, Editura Didactică şi Pedagogică, Bucureşti, 1983, p.232.

[23] whereby it was regulated the orthodox elementary education from Banat, which continued to remain under the control of the church and civil authorities.

educations publicae (1806) which dealt with all the issues of the education[24].

But, irrespective of the corner of the country where they performed, a thing is certain: *...although highly oppressed*[25], *one should underline the devotion that the teachers had, they did not stop to bring efforts in training the students*[26].

From the second half of the 18th century, it is noticed the preocupcation for stability and continuity in education. To this respect, the teachers who demonstrated competence and endeavor in education were appointed *irreplaceable teachers* (inamovibili)[27].

A step forward in school organization was made by the *School regulations*, applied in 1833 in the Romanian Country and 1835 in Moldavia, whereby the orientation and the basic principles of education were set: *...good education is the primary concern of a nation*. A valuable idea of the *Regulations* was with regard to the proclamation of the priority of merit and talent of the teachers[28], who were **having**, on their turn, **the obligation to improve continuously**.

School regulations are appreciated as the first school laws, in the modern sense of the word, including similar provisions along the 258/234 articles.

Hence, **the teacher** – central figure *of the Regulations*- was proposed in position, by the *Eforia şcoalelor*, consolidated by the lord and it remained inamovible, except for serious cases.

The duties of the teachers were numerous and not easy: they should have direct the scholars towards the holy, respect for codices and control, love for a good trim and love for country and to transform them in honest and working people before making them educated, etc..[29]

In Transilvania and Banat, *the 1854 school law* brings important changes in connection to the teachers. Therefore, the teachers were divided in three categories: ordinary[30], secondary[31], assistants[32], the payments being made depending on the group where the teacher was falling.[33]

After the defeat of the 1848 Revolution, the schools were closed for more than two years, all the teachers were decommissioned, a lot of them being imprisoned of pursued.

The new school legislation made of: *The new study curriculum from the Romanian Country* (1850) and *The settlement for the reorganization of public teaching in the Principality of Moldavia* (1851) were providing that the professors will teach in a system of schools according to the nation's demands, with the needs of the various classes of people and with a national character. Also, it was decided to increase the expenses for education, to ensure at least one part of the material basis, one of the primary conditions to develop the all-grade education, neglected after 1848.

The formation of the Romanian national unitary state in 1859 has opened new perspectives for education.

Thus, by the *Law of public instruction* from 1864, it was created an appropriate framework for the operation and development of school (it was constituted an education system with three levels: elementary, middle, higher), institution that acquired the appropriate statute for the role and tasks incumbent to it in the social life of the Romanian state.

The law of public instruction proclaimed two modern principles on the popular instruction (elementary education): gratuity and obligation, Romania becoming one of the first countries from the world with taking such measures[34].

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[24] and namely: the structure and objectives of education, education plans, selection of teachers and professors, principals, inspectors, their duties, origin of funds, ... in Ştefan Pascu, *Istoria învăţământului din România*, Vol.I, Editura Didactică şi Pedagogică, Bucureşti, 1983, p.241.

[25] as asserted in a *1813 anaphora*.

[26] To this respect, the budgets with the remuneration of the teachers from the Academy with teaching in Greek from Sf. Sava prove even more their work in sacrifice. The first teacher from Sf. Gheorghe-Vechi was remunerated 4 times less than the one from Sf. Sava.

In 1775, in order to help them, the teachers from the Greek and Hellenic school from Slatina were granted exemptions in the years 1775 and 1797.

Also, for the effort made in *educating children*, the teacher Chiru from the Râmnicul-Vâlcea school was exempted by Al. C. Moruzi, from all *the burdens* after 1798, in Ştefan Pascu, *Istoria învăţământului din România*, Vol.I, Editura Didactică şi Pedagogică, Bucureşti, 1983, p.246.

[27] The same was with the teacher Chiriţă from the School Sf. Gheorghe-Vechi from Bucharest, in Ştefan Pascu, *Istoria învăţământului din România*, Vol.I, Editura Didactică şi Pedagogică, Bucureşti, 1983, p.335.

[28] Ion Popescu-Teiuşanu, *Legislaţia şcolară feudală în Ţările Române*, in *Contribuţii la istoria învăţământului românesc*, Editura Didactică şi Pedagogică, Bucureşti, 1970, p.68.

[29] Anghel Manolache, Gheorghe Pârnuţă (coordinators), *Istoria învăţământului din România* (1821-1918), vol.II, Editura Didactică şi Pedagogică, R.A.-Bucureşti, 1993, p.16.

[30] Professors who graduated a higher education institute and having passed a teaching qualification exam.

[31] Professors teaching technical objects or without a qualification exam.

[32] Temporarily employed professors.

[33] Anghel Manolache, Gheorghe Pârnuţă (coordinators), *Istoria învăţământului din România* (1821-1918), vol.II, Editura Didactică şi Pedagogică, R.A.-Bucureşti, 1993, p.159.

[34] In 1864, school obligation was only included in the laws of a few countries from Europe: The Scandinavian Countries and Prussia and only in two states from S.U.A.-Massachusetts (1852) and New York (1853). In Italy, although proclaimed in 1859, school obligation was only achieved later, in 1877. In France, towards which schools the Romanians directed their aspirations, the obligation for elementary training was only acknowledged by the *Law of 28 March 1882* (Jules Ferry). England never had a law that would acknowledge the school incumbency, only in 1870, in Scotland in 1872. Switzerland acknowledges on its turn the incumbency of education by the *Federal Constitution* from 1874. Among the neighbour countries, Bulgaria recorded this principle in 1879, and Serbia in 1882. In Transilvania, Romanian land, the Austrian comination - pursuing propaganda purposes and the consolidation of the absolutist power, introduced school incumbency in 1857. The measure was reinforced after the creation of the Austrian-Hungarian dualism, by the Law XXXVIII/1868.

With regard to the professional training of the teachers, differences were between the rural and urban life.[35].

Also, by this law it was opened the road for democratic education, because one of the highest ideological positions of this law was the recognition of a full equality of the girls with boys in matter of education.

After the *1864 Law on public instruction*[36], it is intensified the activity to find forms to train the teachers, appropriate to the school development objectives and for the mission to be fulfilled.[37]. In this respect, in 1901 any difference is removed between the training of teachers and elementary teachers, creating a normal *unique* school.

At the end of the century, *The law f public instruction, 1864* was replaced with *The law on primary education and normal-primary education* from 1893 (The Take Ionescu Law). Although modern[38], it is particularly characterized by the difference made between the urban and rural education.

The law on primary and normal-primary education from 1896[39] (Poni Law) highlights even more the part that falls on the state in the material support ensured to schools.

The law on secondary and higher education from 1898 was the fruit of an ample consultation of the teaching body and of the activities of a commission managed directly by Spiru-Haret, the minister of public instruction at that time, and it provided among others that[40] a teaching seminary will be organized near each university, meant to prepare the teaching personnel for secondary education.[41]

The law on higher education from 1912 (C.C. Arion) provided for the increase oif the university autonomy and it specified the rights of the management bodies, the organization of faculties, managed based on their own regulations, which were previously approved by the Parliament etc. .

From 1912 and until 1918[42] no significant school law drafts were recorded.

In Transilvania, *the law on education* from 1868 made the foundation for the people's education organization (until 1918), which stood under the supreme state control. [43] The teachers had the right to organize in corporations (associations). Also, the law provided the control bodies of education and the scope of their duties. In connection with the training of teachers, it was provided the formation of *Preparandii*[44] with a teaching period of 3 years. The law stipulated, aside these Preparandii, an elementary school, as application school.[45]

On its turn, *The law from1893* was regulating the salaries of the teachers, in the meaning that, if in the church commune, due to poverty - determined by the state bodies - cannot ensure the legal wage of the

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With regard to the gratuity of elementary education, this was acknowledged generally once with proclaiming incumbency. The first states that granted gratuity were Italy, Norway, Switzerland, USA, Austria, Denmark, Prussia, England, in Constantin C. Giurescu, *Istoria învăţământului din România*, Editura Didactică şi Pedagogică, Bucureşti, 1971, p.118.

[35] If for cities, the teachers were trained in an urban elementary school, transformed in a primary special school, for villages, it was provided that any person who justifies the promotion of the course equivalent to the rural primary school could be a teacher. Twice per year, the training was organized on commune centers, where a short course of teaching was held.

The lack of precise provisions for the training of teachers, in a stage when the primary school was fixed with major objectives and the generalization of the first level of the education system was introduced, constitutes one of the boundaries of this law.

The professors for the urban area education were trained in normal higher schools provided in Bucharest and Iasi. The introduction of this provision in the law underlines that in order to increase efficiency of the middle education, a professional higher education was needed. IT was in fact a step forwards with regard to the teaching training of the teachers, in transforming them in youth educators.

Also, the teaching body of the universities was to be recruited among the personalities from that field, good specialists, in Anghel Manolache, Gheorghe Pârnuţă (coordinators), *Istoria învăţământului din România* (1821-1918), vol.II, Editura Didactică şi Pedagogică, R.A.-Bucureşti, 1993, p.223-225.

[36] With regard to the training of teachers for the middle education, the provisions of the 1864 law will only be applied starting with 1880.

[37] The school people criticized the idea to leave education and training on the priests. Constanţa Dunca was writing in this regard: *If you don't want for Romania to be lost, do not give the future generation on the hands of priests*; shee saw the solution of this issue in the formation of a high number of normal schools, article written in the magazine *Amicul familiei*, year II, 1864, no. 1 (15 March).

[38] In the meaning that it had teaching orientations towards practical activities (the introduction of labour, with the construction of workshops). School incumbency is established for the ages between 7 and 14 years. In the first chapter it was argued about the fines that the parents who failed to enroll their children in the schools would have to bear and it was provided that the obligation will be primarily applied to boys. Primary education was divided in: village schools, lower primary schools, higher primary schools and supplementary and repetition primary courses. The duration of courses in the normal teacher schools was established to 5 years, the same for normal elementary teacher schools, in *Istoria învăţământului din România* (1821-1918), vol.II, Editura Didactică şi Pedagogică, R.A.-Bucureşti, 1993, p.344.

[39] It was modified in the next decade: in 1897, 1903, 1908, 1909. The amendment from 1897 introduced the organization of the 5 rural classes on divisions.

[40] It included 114 articles, divided in 5 chapters. In the 2nd section, the conditions for appointment of principles were provided.

[41] Marin Niculescu, *Spiru-Haret, pedagog naţional*, Bucureşti, 1932, p.121.

[42] In 1918, within the project *Education for the villages*, Simion Mehedinţi drafted a legislation made of: *Legea Eforiilor şcolare and Legea pentru şcoala pregătitoare şi seminariile moderne*.

[43] Whi have had an important contribution in the development of elementary school from Transilvania and Banat, have fulfilled a multiple social functionality: they trained the youth, formed and developed national conscience of the young generations, made a science distribution activity, etc., in *Istoria învăţământului din România* (1821-1918), vol.II, Editura Didactică şi Pedagogică, R.A.-Bucureşti, 1993, p.308.

[44] E.g.: Preparandia from Arad, Preparandia from Oradea, Preparandia from Sibiu, Preparandia from Năsăud, Preparandia from Gherla, etc.

[45] Following the application of the *Law on education 1868* the number of elementary schools increase, the competence of the teachers was improved, the level of the elementary education increase, teaching associations were formed.

teacher, he can call for the *state aid*, but in this case, the state will be entitled to intervene more deeply in the administration and operation of the school.[46]

2. Professional organizations of the teachers.

There is no teacher in Romania - irrespective of the grade - not acknowledging that the Romanian school from 1859 and particularly in 1866, not yet has a well-delimited direction, a purpose, an ideal, towards which to direct the public concerns.[47]

The gradual procurement of the feeling of professional solidarity, the association in professional organizations of the teaching staff, become possible in the social-historical context of evolution on multiple plans that the Romanian society sees especially after the Law of public instruction from 1864.

As a preliminary form, the teaching conferences repesented the framework for periodical meeting where the feeling that the meeting of educators is required was formed.

In 1877, it was formed the The society of institutors from Bucharest which had among its objectives the widening of the scope of cultural and teaching knowledge for a professional improvement.[48]

In 1878, by the initiative of several teachers from Bucharest, was constituted the Society of the Teaching Staff from Romania, with the following purposes: lighting heads of families, the state body, all Romanians, about capital importance of education; closening relations between teachers of any grade and their grouping on the basis of solidarity, in an intelligent body; defending the rights and stimulation of the teaching staff activity; improving the organization, staff and indispensable material of a solid instruction.[49]

The Society develops its activity by organizing in Bucharest the First Congress of the Teaching Staff from Romania in 1884[50]. 14 more congresses followed.

In 1894, the Association of Buzau teachers and The Putna County Association are formed.

In 1902 it is formed the Association of teachers from Romania aiming at creating a pension and aid center, to support all their members.

In 1910, the Association affiliates to the International federation of the teacher associations and sends a delegation to the 2nd Congress of the Federation (Paris, July 1910).

In 1916 it is constituted the General association of the members of the Romanian primary teaching staff.[51]

All these professional associations (and more others) aimed at improving the statute of the teaching staff and the educational process.

The congresses of the teaching body represented real insights on the school situation at that time and also, horizon openings with regard to the united action of the teachers to contribute to the escalation of the prestige of their profession, in school, thinking and teaching practice progress.

3. Conclusions. There is no teacher in Romania - irrespective of the grade - not acknowledging that the Romanian school from 1859 and particularly in 1866, not yet has a well-delimited direction, a purpose, an ideal, towards which to direct the public concerns.[52]

Therefore, the education in our country, sensitive since its beginning, in the ideological and cultural processes and developments, will bear the general stamp of the time, the one of an important instrument in the consolidation and development of the society, satisfying its imperatives and exigencies[53].

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[46] *Istoria învăţământului din România* (1821-1918), vol.II, Editura Didactică şi Pedagogică, R.A.-Bucureşti, 1993, p.347.

[47] *the First Congress of the Teaching Staff from Romania,* the session from 2,3-4 April 1884, Tipografia Modernă, Bucharest, 1885, p.6.

[48] *Istoria învăţământului din România* (1821-1918), vol.II, Editura Didactică şi Pedagogică, R.A.-Bucureşti, 1993, p.426.

[49] *the First Congress of the Teaching Staff from Romania,* the session from 2,3-4 April 1884, Tipografia Modernă, Bucharest, 1885, p.6.

[50] The purposes of the Congress were:

- to study the existing lacks in the organization and performance of education;
- to propose means for improvement and measures to be taken to mitigate any determined deficiencies;
- to give the legislators, governments and state institutions the concurrence of the experience of the education members;
- to join the relations of collegiality between all the education members in a compact and smart body, in the *First Congress of the Teaching Staff from Romania,* Ssession from 2,3-4 April 1884, Tipografia Modernă, Bucharest, 1885, p.2.

[51] Due to the low number, secondary teachers could not constitute in a mass movement, as with their colleagues, from the primary education, their activity taking place in circles on cities, in *Istoria învăţământului din România* (1821-1918), vol.II, Editura Didactică şi Pedagogică, R.A.-Bucureşti, 1993, p.427.

[52] *the First Congress of the Teaching Staff from Romania,* the session from 2,3-4 April 1884, Tipografia Modernă, Bucharest, 1885, p.6.

[53] Ştefan Pascu, *Istoria învăţământului din România*, Vol.I, Editura Didactică şi Pedagogică, Bucureşti, 1983, p.76.

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THE INFLUENCE OF RELIGION ON THE ROMAN LEGAL SYSTEM

Andreea RÎPEANU[*]

Abstract

The origins of the science of Roman law are closely related to traditional religious practices. In the old era, it was reduced to knowing forms, kept secret by pontiffs, like religious rites. It is in fact the consequence of the confusion existent between ius, honestum and fas. Therefore, both the juridical consultations, and the religious ones were strictly provided individually and confidentially, considering the secret contents thereof, with a view to maintain the influence of a closed caste over population. All this period, when it was perpetuated a tradition taken over from prestate period, lasted until the year 301 before Christ, under the name of sacred or religious jurisprudence.

Keywords: *law, religion, pontiffs, legal science, sacral law*.

Introduction

The origins of the science of Roman law are closely related to traditional religious practices. In the old era, it was reduced to knowing forms, kept secret by pontiffs, like religious rites. It is in fact the consequence of the confusion existent between *ius*, *honestum* and *fas*. Therefore, both the juridical consultations, and the religious ones were strictly provided individually and confidentially, considering the secret contents thereof, with a view to maintain the influence of a closed caste over population. All this period, when it was perpetuated a tradition taken over from prestate period, lasted until the year 301 before Christ, under the name of sacred or religious jurisprudence.[1]

The justification of punishment and mainly of capital execution is encountered, at least initially, in religion, in providing the victim to the God offended by fact and whose revenge could fall thus over the entire community.[2] Even the notion of *sanctio*, by which the punishment was determined for the breach of a law is obviously related to *sanctus*, *sacer* and *sacratio*.[3]

Law and religion

For several centuries, the pontiffs have known the pomp days[4] and the solemn formulas that the parties in dispute were compelled to pronounce. The pomp days and formulas were revealed and displayed in forum by Gnaeus Flavius, the freedman of Appius Claudius Caeccus in 301 before Christ.[5] The pontiffs held the monopole of law, being the sole who knew and could provide explanations related to the trial. The first priest of the state was the king, until the foundation of republic.[6] The Romans didn't know later either the distinction existent today between state and church, aspects of religion, of sacred, rites and practices appearing in all aspects of Roman life, including in law and criminal law.

As for religion, Roma did not adopt an expansionist model, but there was rather an absorption of religious elements specific to other Mediterranean civilisations, however we must outline the importance of the cult financed by public resources – *sacra publica*.[7] The religious practices could be encountered in every aspect of daily life. The banquets, the meetings of senate, the parades and the wars were usually preceded by sacrifices. Many of such practices survived as well the period after the adoption of Christianity, as state religion. The sacrifices were forbidden starting with 1 January 439, when it was enforced *Codex Theodosianus*.[8] The religions was present in all aspects of social life, it was not limited to temples and feasts.[9] There was however a clear difference between res sacrae and res publicae. In this respect, it was asserted in recent studies, that both religious practices of Romans, and the juridical ones, wouldn't be so different as

[*] PhD, Faculty of Law and Administrative Sciences, Ecological University of Bucharest, Bucharest, Romania (e-mail: **andreea.ripeanu@yahoo.com**).

[1] E. Molcuț, D. Oancea, *Roman Law*, Șansa Publishing House, Bucharest, 1993, p.60.

[2] J. L. Strachan-Davidson, *Problems of the Roman criminal law*, Oxford Clarendon Press Publishing House, 1912, p.1.

[3] J. L. Strachan-Davidson, *quoted work*, p.3.

[4] Days when trials were judged.

[5] Vl. Hanga, *Borough of seven cholines*, Bucharest, 1951, p.185.

[6] Fr. Girard, *Histoire de l'organization judiciare des Romains*, Arthur Rousseau Publishing House, Paris, 1901, p.13.

[7] See Jörg Rüpke, (coord.), *A companion to Roman religion*, Blackwell Publishing Publishing House, 2007, p.7.

[8] *Codex Theodosianus*, 16,10,4 decreed: in all places and all towns, the temples must be closed, and pursuant to a general warning, the possibility to sin to belong to bad ones; termination of sacrifices (if someone commits such an act to be victim of revenge); the property of the one executed to be claimed by the town; the governors from province to be punished in the same manner if they neglect the punishment of such acts.

[9] See Jörg Rüpke (coord.) , *quoted work*, p.5.

previously thought, but much more dynamic, evidence of Roman specific conservationism. Therefore, the feasts with religious character were still organised in the town of Alba Longa, although it hadn't been for long time an important urban centre.[10]

For the lack of faith, it seems that there weren't juridical consequences, according to the former laws. There is however the possibility the state expressly demands a manifestation of faith, on certain occasions. In this respect, after the death of Cesar, when he was turned into a God (endowed with divine power), it was ordered to every citizen, under the death punishment, to celebrate the anniversary of birth of the dictator.[11] There was, mainly during the period of Republic, a religious freedom, but this does not mean that there is no strict supervision of cults.

In order to understand Roman religious one shouldn't ignore the two legends: of foundation of Rome and of first kings. The dam sent by Marte to nurse the two twins prefigure the warrior vocation of Romans. Pursuant to the defeat of Albans, Romulus and Remus decided to found a town on such places, where encountered and raised.[12] Wanting to find out the desire of law in this respect, Romulus selected Palatine and Remus the choline of Aventin. The fatidic signs appeared firstly to Remus, in the form of six eagles. Romulus was shown twice more eagles.[13] However, both Remus and Romulus were acclaimed as kings by its own camp, *this being the reason of much trouble, turning into a bloody fight, in tumble, seriously injured by his brother, Remus fell breathless*.

The second legend, presented by Titus Livius, recounts us the fact that Remus jumped over the new walls built up by Romulus, but without any bad intention. However. Romulus, taking the gesture in serious, killed him saying: *all those who dare to jump over the walls built by me to die like this*.[14]

The nature of these myths is symbolic for subsequent development of Roman spirituality and moral. Pursuant to such bloody sacrifice, the first offered to divinity of Rome, the people will always keep in mind a memory not rather pleasant. More than 700 de years, pursuant to the foundation of Rome (753), Horaţiu will still consider it an originary sin, the consequences thereof being able to cause the perdition of Borough, determining its sons to murder each other.[15] Similarly, *during every critical moment of its history, Rome will be disquieted, thinking that it feels the pressure of a blast. As on its birth, it didn't taste peace neither with men nor with Gods. This religious anxiety will put a pressure on his destiny. It is easy, too easy to oppose it to an apparent good consciousness of Greek boroughs. However, Athena had known crimes as well: on the origin of the power of Tezeu is the suicide of Egeu*.[16]

It was said that the legends of founding Rome would have on origin indo-European myths, mythological inheritance which, camouflaged in the oldest history of borough, represents by itself a religious creation susceptible to reveal us the structure specific to Roman religion.[17]

Initially, there was in Rome, as in other states of antic world, a confusion between law (*ius*) and religion (*fas*). Consequently, the priests were considered the maintainers and interpreters of divine will. The early legal practice was intensely maintained by pontiffs, from this college being elected as well the superior magistrates. The formula relied on a ritual practice involving accurate reproduction of some words deemed correct. The formulas were reserved to pontiffs, an elitist group of initiated people holding monopole over this knowledge. *Pontifices* were the only one able to draft testaments, contracts and who could provide evidence in trials. Under the direction of *pontifex maximus*, *comittia curiata* determines the sacred law and pontifical college, controlled state religion and ritual training. Starting with 3rd century before Christ, the place of pontiffs is taken by a class of legal advisors providing legal consultations in private law, including, both the field of contract, and that of crime.

In a society where guarding sacred goods of borough is deemed public duty and the recognition of sacrificers was an obligation, but which extended as well the application of domestic discipline over free citizen, when state religion was interested in doing this, the accomplishment of religious obligations was primitively rigoursly imposed, as well as sanctioned by criminal law. The one who, without being authorised in this respect, reveals the contents of the book of secret oracles, which may be consulted only based on a state order, risks capital punishment.[18] The guard of public sanctuaries was generally incumbent upon magistrates. When, exceptionally, other individuals

[10] See Plinius, *Naturalis Historia*, 3,69-70.
[11] See Dion, 47,18.
[12] See Titus Livius, *Ab urbe condita*, Minerva Publishing House, Bucharest, 1976, p.14.
[13] See Titus Livius, quoted work, vol.I, p.14 and Plutarh, *Romulus*, III-XI.
[14] The foundation of a borough entailed very struct rites: in order to be able to see the will of gods a good omen space is delimited on the sky; the space of borough, on its turn, was delimited by the ground plot ploughed, symbolicaly, to become inviolable, sacred.
[15] See Pierre Grimal, *Roman civilisation*, Minerva Publishing House, Bucharest, 1973, p.16
[16] See Pierre Grimal, *quoted work*, p.16.
[17] See Mircea Eliade, *History of faith and religious ideas*, Scientific Publishing House, Bucharest, 1992, p.106.
[18] See Val. Max., 1,1,13.

were appointed as well, who neglected their duties, a capital crime was committed.[19] There is no technical term to describe the sacrileges committed against Roman religion. The expression of Tertullian, *crimen laesae romanae religionis* is accurate, but it is not used frequently. At the same time, the notion of *sacrilegium* although frequently used, is not accurate, as it designates, at least on origin, the theft from a temple.

Although, the cult of other Gods, than those of Rome or those adopted by state is not deemed a delict, certain forms of foreign religion were morally and politically disapproved. Thus, during the Republic and Empire frequently were taken measures against the Egyptian cult, perceived as being too shocking for occidentals.[20] The repression consists in police measures, such as: it was forbidden public exercise of such practices; the altars and chapels were removed; the foreigners were applied measures of coercion etc.[21] According to Septimiu Sever, the king had, besides the duty to honour the gods of old rite that of disapproving and punishing any alienation from the old rite.[22] Consequently, the legal works consider capital crime the introduction of new divinities and related ritual practices.[23]

The notion of *iniuria* (injustice) of private law was applied more for the state, than for gods. The profanation of a temple or the trouble of development of a religious act has as consequence a criminal action ended with a condemnation. It is ignored the possibility of the existence of particular legal disposals in this respect. Anyway, if such disposals existed, they targeted exclusively the offence of state. Roman criminal law did not include any disposals for the offence committed against a divinity by words or writs.

On Romans, as the ideal was represented by the regularity of annual cycle in the ordered development of seasons, any anomaly represented a crisis situation in the relation with gods.[24] Therefore, the accurate signification of miracles must be deciphered by priests. The magic power of divining the future belonged only to magistrates and military heads; it consisted in the interpretation of forecasts.

The domestic cult, remained unchanged for 12 centuries of Roman history, during the entire period of paganism was led by *pater familias*.[25] On its turn, the public cult was under the control of state. During the royalty period, the king held the first rank in sacerdotal hierarchy, being considered *rex sacrorum* (king of sacred).[26] It is known the fact that in the home of King three categories of writs were practiced, dedicated to Jupiter, Iunonei, Ianus, Marte and Ops Consina (goddess of agrarian abundance).

It was rightfully asserted[27], that rituals predominate not only in religious life of Romans, but also in politico-institutional life, marking deeply the entire mental of Roman people.

The cult of Dionis[28] was known in the entire Mediterranean world, including in Rome. Pursuant to the extension of Roman domination in Greece, the esoteric (secret) associations were spread in the entire peninsula, mainly in Campania.[29]

Consequently, in 186 before Christ was adopted a *Senatusconsult of Bacchanalibus* which had as scope the suppression of the cult of Dionis.[30] In this respect, it was foreseen that noone, in the company of more than four individuals, men or women (two men and three women), will participate to sacred rites, but with the approval of praetor and Senate. The manner of investigating the case and of punishment are presented to us by Titus Livius. However, the recounting must be performed under the reserve that, despite its erudition, similar to its ancestors, he does not consider history a science, therefore, he does not feel forced to always consider the historical truth. *Ab urbe condita* contains in fact three kinds of texts (of analysis, rhetoric and literary). The accuracy of text depends however on the source of inspiration; similarly for the transmission of details.[31] The certification of this law[32] is due to the discovery of an inscription in 1640 at Tiriolo. The Consul Spirus Postumius Albinus performed an investigation (*quaestio*) related to conspiracy (*coniuratio*) appeared related to practicing the cult of Dionis.

The supporters of the cult (around 7000) were accused of several crimes, among which: practicing ritual orgies, organisation of crimes for own

[19] See Cicero, *Pro Rabirio*, 2,7.
[20] See Cicero, *De legibus*, 2,8,19.
[21] See Titus Livius, 4,30; 25,1,7,5.
[22] See Dion, 25,36.
[23] See *Digeste*, 48,19,30.
[24] See Mircea Eliade, *quoted work*, vol.II, p.107.
[25] See Mircea Eliade, *quoted work*, vol.II, p.109.
[26] See Mircea Eliade, *quoted work*, vol.II, p.111.
[27] See Eugen Cizec, *History of Rome*, Paideia Publishing House, Bucharest, 2002, p.18.
[28] Dionis was in Greek mythology the god of vegetation, of pomiculture, of wine, of ecstasy and of fertility, called on Romans both Bacchus or Liber. In Rome Dionis appeared in the theatre shows and it was called in sacrifices.
[29] See Mircea Eliade, *quoted work*, vol.II, p.226.
[30] Mircea Eliade in *quoted work*, vol.II, p.126, uses the phrase of *nocturne orgy mysteries*.
[31] See P.G. Walsh, *Livy: His Historical Aims and Methods*, Cambridge University Press Publishing House, 1967, pp.150 and 235.
[32] See Victoria Emma Pagan, *Conspiracy Narratives in Roman History*, University of Texas Press Publishing House, 2004, pp.51-53.

enriching, forgery of documents etc. The text was analysed by several researchers, who emphasized the similarities with the persecution of Christians later on. There are some debates related to the nature of text and on the reasoning for which the practitioners of cult were punished. Thus, on the one hand, it is stated that, considering that religion was a state monopole, the particulars couldn't be allowed to organise such a cult and also, that it is manifested an opposition towards the influence of Greek culture, and on the other hand, it was asked the question whether in 186 before Christ existed indeed a criminal organisation using a bacchic cult to hide the activity. This cult was frequently associated[33] with orgy, crime and robbery or falsification.

When a conspiracy was discovered, the procedure consists in delegating a magistrate that leads an investigation, followed by the execution of leaders. It provides as well the neutrality of the group, as well as the rewarding of informers. The conspirators were judged by extraordinary courts. The foreigners were judges as well, since conspiracy was considered a crime against state. Although there were some doubts related to the accuracy of data provided, it is clear that Aebutius and Hispala were the informers of consul Postumius.[34] The consul took them in custody to protect them and presented the case to Senate. Although some of the supporters of the cult committed suicide, the majority were caught, judged and executed or enchained;[35] the same for the leaders of the cult. On their turn, the altars were destroyed.

Conclusions

We believe that the asperity of punishments and the manner how this case was settled, must not be related to excessive intolerance of Romans opposite to religious cults, but rather to the prevention of a conspiracy. The severity and ampleness of investigation, carried out within five years prove the political nature of trial. The danger was determined by the existence of a potential complot against state and not by practicing a cult, since, as Ovidiu asserts, *Rome was the most dignified place of meeting of all gods*. The foreign cults were accepted and acknowledged at Rome by formal integration in official cults. Therefore, we must consider the social, political and military context after the second Punic war, when the security of state should be protected against any form of conspiracy.

Taking advantage of this situation, the senate used the legislation to control foreign influence, mainly that of Greek culture, control manifested several times, just to suppress the religious influences. In this respect, in 173 before Christ two epicurean philosophers were exiled; and in 155 before Christ the philosopher Carneades was exiled as well, on initiative of Cato cel Bătrân.

Despite all these, some bacchic practices survived in Rome, being tolerated by state to a certain extent.

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[33] According to Titus Livius there were bacchic rites not forbidden by state. However, the word *bacchic* represented mostly an insult, referring to immorality or sexual deviation.

[34] See Titus Livius, *quoted work*, 39,19,5.

[35] Titus Livius does not recount what happened further on with thouse enchained, however it is easy to understand. To be mentioned that Rome had no prison in the sense that we provide to the notion.

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CAUSA AND CONSIDERATION – A COMPARATIVE OVERVIEW

Dimitar STOYANOV[*]

Abstract

The article examines the Roman origin and historical development of "causa" as an essential requirement of the contracts, as well as its adoption in the majority of the national legislations belonging to the French legal family. Moreover, the article analyzes what has become to be known as the functional equivalent of causa in the English law – the doctrine of consideration and examines the correlation between them. In the end, the latest tendencies in codifying the European civil law with respect to causa and consideration are being critically discussed.

Keywords: *causa, consideration, mixed legal systems, comparative law, European private law.*

1. Introduction

There is hardly any major national legislation that does not contain any rules on contracts and their formation. Being looked upon as the most important consequence of the autonomy of the will, contracts serve as the founding stone of modern socio-economic life. Yet, the unrestricted application of this philosophical doctrine, as profound as it might be, could lead to results which cannot be considered appropriate, since virtually every promise would be treated as legally binding. Throughout the development of transactions, scholars and legislators have sought to establish numerous legal criteria to determine whether an expression of will is itself capable of producing the designated legal effect. These efforts were intended not only to protect the legal interests of the contracting parties by providing an obstacle to their desire or promise, but also to protect the interests of the whole society by promoting legal security in transactions.

The most notable examples of such criteria can be found in the necessity to observe a specific form or to hand over the goods (‘traditio’) in order to consider oneself bound by a contract. Thus, by providing additional requirements to the process of expressing one’s will a clear distinction between enforceable promises and simple arrangements could easily be established. However, this model of extreme formalism that dominated the rules of almost every ancient society (the most notable example being the law in Ancient Rome) suffered gradual weakening after the collapse of the Roman Empire. The canonist lawyers were seeking to strike a balance between the classical Roman texts and the new socio-economic situation in Europe, putting consensual contracts in a rather favourable position compared to the formal ones. Their interpretation of Roman texts influenced the future development of private law. Several centuries later, with the new era of Enlightenment, the autonomy of the will was established as the founding stone of modern contract law. Still, continental lawyers from that period had to answer the question how to distinguish between enforceable promises and accidental agreements when additional requirements were considered to be an exception rather than a rule. The need to establish new abstract criteria to be used as an essential element of the validity of contracts and as indicia of seriousness brought the modern theory of causa to life.

However, Roman law did not play a significant part in moulding modern private law everywhere in Europe. This is the reason why English common law did not adopt the concept of causa, but rather developed its own methods to determine which promises could be enforceable and the ultimate result of this process, lasting for centuries, became known as the doctrine of consideration.

The similarity of the two concepts is beyond doubt. They share some common features, yet there is a considerable difference in terms of notion, scope of application and legal consequences between them, which prevents the statement that the former is a complete functional equivalent of the latter.

Moreover, there is a third group of national legislations where neither causa nor consideration is acknowledged as a vital element of the contracts. It is sufficient for an agreement to be both valid and enforceable when there is mutual consent of the parties upon its primary points.

The main aim of this article is to analyse these three types of legal approach to the question how to distinguish between a simple agreement and a valid contract by presenting the theory of causa and the doctrine of consideration in a comparative perspective, trace its origin, present and future tendencies.

[*] Assistant at Civil Law in the New Bulgarian University, Sofia, PhD (e-mail: **dimitarstoyanov2011@gmail.com**).

2. Origin of the causa

As far as the origin of causa is concerned, many authors state is that it is a totally un-Roman concept[1], that no general theory of causa could be deduced from the Roman texts[2] and even that having such an abstract principle was impossible for the Romans because of the primitivism of their legal system that excluded any possibility of dealing with abstractions[3]. Although the presence of causa as a concept in Roman private law is admitted by a few scholars, they point out that it was used in various senses, differing immensely from the modern notion of causa[4]. The vast majority of the authors agree upon the fact that the earliest ideas of causa emerged as the result of the canonists' interpretations; a sophisticated medieval attempt to generalise various figures belonging to Roman private law[5]. St. Thomas Aquinas developed the idea that every effect is dependent upon its reason (causa) and causa is something without which a thing cannot exist. If everything is based on a causa, he said, this should apply to contracts as well. Influenced by St. Thomas Acquinas, the glossator Baldus, while interpreting the Roman contract of stipulation, stated that all contracts have a causa – the "nominate" carry it within themselves, while the abstract (such as the stipulation) receive it from outside[6]. Other scholars assume that the origin of causa can be found several centuries later, when the famous French scholar Jean Domat[7] put together a blend of Roman law and natural reason, the result of which was the theory of causa. Domat stated that in unilateral contracts, such as loan of money, causa lies in the fact that the creditor performed his obligation at the time of the conclusion of the contract and provided the money. Following that logical pattern, he continued with bilateral onerous contracts[8] where he assumed that the engagement of one of parties is the reason (causa) of the engagement of the other party. As far as gratuitous contracts were concerned, Domat identified the causa with the motive, the intention to make a gift. This theory was incorporated by another prominent French scholar – Robert Pothier (1699-1772) in his famous work „*Traite des obligations selon les regles tant du for de la conscience, que du for extérieur*, Tome 1, Debure l'aîné, 1761, in the chapter "*Defaut de cause dans le contrat*" and ultimately found its place among the other essential elements of the validity of contracts in the process of drafting the French Civil Code from 1804[9].

The merits of this theory are beyond doubt, but to my view one aspect of the origin of causa remains overlooked. Scholars' primary efforts are pointed at analyzing the interpretations of Roman law found in the works of glossators and natural lawyers, whereas traditionally little attention is being paid to the original Roman texts. In my opinion, Roman private law did contain all the vital elements that shaped the concept of causa.

Roman law of contracts has always been dominated by a strong formalism and pre-defined, "closed" types of contract. This meant that no agreement could be enforced unless it belonged to some of these types. An abundantly clear rule was that a nude pact does not constitute an action – *ex nudo pacto non oritur actio*[10]. By the time of Justinian's Corpus Iuris Civilis, contracts could be separated into three large groups – real, formal (verbal and litteral) and consensual[11]. Whenever the requirements for each those types were fulfilled, an action could be brought to enforce the obligation.

In addition to this closed system, another difficulty of tracing the roots of causa in Roman contract law should be considered as well. Causa as a notion was known to Romans, but it had various meanings[12], one of which was 'causa civilis'. Despite being used only once in the Digest (D. 15.1.49.2) its importance was pointed out by scholars since 'causa civilis' meant the reason for the

[1] Zimmermann, R., *The Law of Obligations. Roman Foundations of the Civilian Tradition*, (Cape Town, Wetton, Johannesburg: Juta & Co, Ltd, 1992), 549.

[2] Lorenzen, E., "Causa and Consideration in the Law of Contracts", *Yale Law Journal* 7 (1919): 630.

[3] Peterson, S., "The Evolution of "Causa" in the Contractual Obligations of the Civil Law" *Bulletin of the University of Texas*, 46 (1905): 39.

[4] Daruwala, P., *The Doctrine of Consideration Treated Historically and Comparatively*, (Calcutta: Butterworth & Co., 1914), 367.

[5] Buckland, W., *Roman Law and Common Law. A Comparison in Outline*, (Cambridge University Press, 1965), 227.

[6] See Zimmermann, R., The Law of Obligations, op.cit., p. 551.

[7] Jean Domat (1625-1696), lawyer and philosopher, representative of the Natural law school, author of "Les Loix civiles dans l'eur ordre naturel". It is interesting to point out that Prof. Zimmermann, being a staunch supporter of the canonist origin of the rule himself, does not refer to Domat in any way related to the causa. This peculiarity might be explained with the fact that in his works Domat claimed that his main aim is "to undertake the digesting of the Roman laws into their true and natural order, hoping thereby to render the study of them easier, more useful and more agreeable". What he in fact did was to develop a modern legal system, based on natural reason, upon the Corpus Iuris Civilis. See Peterson, S., The Evolution of "causa" in the Contractual Obligations of the Civil Law, op. Cit., p. 43.

[8] Rather than using the "closed" formalistic system of contracts in the Roman private law, Domat referred to them simply as "do ut des", "do ut facias" and "facio ut facias", thus acknowledging their application in every commercial relationship, both nominate and innominate.

[9] Keyes, W. N., "Causa and Consideration in California – A Re-Appraisal" *California Law Review* 47 (1959): 77.

[10] About the difference between contracts and pacts see for example Birks, P., *The Roman Law of Obligations*, Oxford University Press, 2014, 22 et seq.

[11] See D. 3.89.: *Et prius videamus de his quae ex contractu nascitur. Harum autem quattor genera sunt: aut enim re contrahitur obligatio aut verbis aut litteris aut consensu. „Let us now inquire into those (obligations), that arise from a contract. There are four kinds: contractual obligations, that arise either through re (handing over the good), by words (verbal), by writing (litteral) or through (reaching a) consensus.*"

[12] Some of them have nothing to do with the modern theory of causa and did not influence its origin, for example, pictatis causa in Roman family law or falsa causa in Roman law of testaments.

enforcement of contracts[13]. In the case of formal contracts, 'causa civilis' consisted in the observance of the prescribed legal formalities. As far as consensual contracts were concerned it was the consent of the contracting parties, meaning the exchange of mutual promises[14]. The causa civilis of real contracts could be found in the exchange of a thing. Along with them, however, by the time of compiling the Digest Roman private law was no stranger to a special kind of contracts, called innominate[15]. They were stated under the general formulae do ut des, do ut facias, facio ut des and facio ut facias. There is a specific text in the Digest dedicated to them - D. 2.14.7.1-2: "*Those agreements, who do not create an action do not retain their common name; instead they are consumed by the names of the other contracts: sale, hire, society, loan, deposit and other similar ones. But when they cannot be attached to those contracts, if there is a ground (causa), as Aristo decisively responded to Cels's question, an obligation arises, when I give you a thing, so that you would give me one, or so that you would do something: that is a contract and a civil obligation arises from it*"[16].

It is clear that innominate contracts were treated as real, that there had to be a performance by one of the parties. Its significance could be found in two aspects. First, giving the thing was the causa civilis that gave rise to the enforceability of the contract with an action[17]. The second aspect, however, can be derived from the interpretation of the text. If one of the parties gave the thing this was actually a pre-performance, conducted in order to receive a counter-performance – be it a thing or an operation provided by the other party. Since the Digest explicitly acknowledge the emergence of a contract ("synallagma"), the fulfilment of the first performance serves as the basis of the new contract, as a reason ("causa") for its existence and justifies the counter-performance, thus ultimately bringing a new contract into existence. Probably this interpretation has influenced Domat, since his concept of causa in bilateral onerous contracts resembles the provisions of D. 2.14.7.1-2 to a great extent.

The modern theory of causa can be traced back to Roman law in another aspect as well. Scholars point out that it had special significance as far as formal contracts were concerned[18]. The stipulation in the early stages of its development was an abstract formal contract independent from the various economic circumstances that would lead people to concluding it – a duty to pay was created despite the fact that the underlying reason for it failed. This considerable independence between the declared will and the actual circumstances suffered gradual weakening and two examples are able to attest to this process. First, the parties could impart special importance to the underlying purpose for entering into a stipulation. Thus, the external economic relationship could play the role of a condition of the validity of the stipulation[19]. The second case can be found in the Digest – D. 44.4.2.3 – *If anyone stipulates with another without any causa, and then institutes proceedings by virtue of this agreement, an exception on the ground of fraud can properly be pleaded against him*[20].The party who stipulated could paralyze the effect of the formal stipulation by using an exceptio doli, an exception which enabled him to escape liability by proving that the duty assumed either had no causa or was based upon an illicit causa[21].

As far as the first case is concerned, there are some differences between it and the result of the canonists' interpretation. First of all, the Romans limited this rule only to the case of a stipulation, whereas Baldus applied it to all contracts. Second, the external economic relationship could become the causa of a stipulation only by consent of both contracting parties. The canonists included causa to the essential elements of the contract *ipso iure*. Yet the legal consequences do not differ dramatically.

[13] See Lorenzen, E., Causa and Consideration in the Law of Contracts, op. cit., p. 625. Yet, there are some scholars who believe that causa civilis and modern causa are one and the same phenomenon, but it is an isolated point of view, such as Daruwala, P., The Doctrine of Consideration, op. cit., p. 364-365. Concerning the text (15.1.49.2) of the Digest, it would seem more precise to speak about obligations than contracts, since the text excluded the possibility of enforcing a stipulation when there is no reason (causa) for it - on the mere statement of debt without actually having borrowed the money.

[14] This type of contracts would ultimately become the founding stone of modern contract theory, but in Roman private law there were only four consensual contracts – sale, hire, society and mandate. See Birks, P., The Roman Law of Obligations, op. cit., p. 53 et seq.

[15] See Zimmermann, R., The Law of Obligations, op. cit., p. 549. Innominate contracts were never called "innominate" in the times of classical Roman law. This notion is believed to have emerged in the works of scholars of the Eastern Roman empire. What is important to stress out, however, is that this legal figure can be found in the Digest, meaning it was already known in the middle of the 6th century AD thus allowing us to use it and make conclusions about causa.

[16] *Quae conventions pariunt actions, in sou nomine non stant, sed transeunt in proprium nomen contractus: ut emptio venditio, locatio conductio, societas, commodatum, depositum et ceteri similes contractus. Sed et si in alium contractum res non transeat, subsit tamen causa, eleganter Aristo Celso respondit esse obligationem, ut puta dedi tibi rem ut mihi aliam dares, dedi ut aliquid facias: hoc synallagma esse et hinc nasci civilem obligationem.*

[17] This is explicitly indicated several lines below – D. 2. 14.7.2 - ... igitur nuda pactio obligationem non parit, sed parit exceptionem – *A nude agreement does not constitute an obligation, it only produces an exception (defense).*

[18] See Buckland, W., *Elementary Principles of the Roman Private Law*, (Cambridge University Press, 1912), 232.

[19] See Girard, P., *Geschichte und System des römischen Rechts*, II Teil, (Berlin, 1908), 495.

[20] *Si quis sine causa ab aliquot fuerit stipulates, deinde ex ea stipulation experiatur, exceptio utique doli mali ei nocebit*.

[21] See Lorenzen, E., Causa and Consideration in the Law of Contracts, op.cit., p. 628; Girard, P, Geschichte und System des römischen Rechts, op.cit., p. 496.

Whenever there was no external relationship to support the stipulation the debtor could simply deny payment, just like in modern times, when causa is absent. To my view, the possibility of making the validity of the stipulation depend upon the existence of an external economic relationship is what probably has lead the glossator Baldus to conclude that abstract contracts receive their causa from the outside while the others carry it within themselves.

Elements of causa may be found in the exceptio doli as well. The exceptio doli was an "abstract" exception, since its application was allowed in every case, regardless of its individual circumstances. Yet, the burden of proof that the duty was assumed without any reason or it was based on an illicit reason was set upon the debtor, according to the common principle in Roman evidence law "*reus in excipiendo fit actor*" – as far as exceptions are concerned, the defendant is in the position of the plaintiff[22]. Only one step is needed to draw the conclusion that a reason is present in every obligation until proved otherwise. This reputable presumption is today one of typical elements of causa and can be found in a number of national legislations.

The last element of the modern theory of causa can be found in the rules about unjustified enrichment in Roman law (D. 12.4-7). Whenever a promise or money has been given to the other party, but there was no reason for this, a *condictio sine causa* could be used to recover what has been promised. In the same text we can find the *condictio ex turpem causam* for recovery of what is promised for an illicit purpose or motive where the promisor was in fact innocent[23]. In modern times, the lack of causa or the presence of an illicit causa leads to the nullity of the contract.

This historical overview proves that the Romans did not develop a comprehensive theory of causa just because the predefined contract system excluded the necessity of introducing another abstract criterion to determine whether an agreement was deemed to be legally enforceable or not. At the same time one can find all the essential elements of causa in Roman contract law – the need for an economic reason to support the legal obligation that can even become an element of its validity (derived from the stipulation); the necessity for every transaction to be supported by some existing and permissible reason and finally a predecessor of the presumption that every obligation has a causa, until proven otherwise. This could lead to the only possible conclusion that as far as the causa is concerned, Romans had a notion of causa and despite the fact that they did not consider it an essential element of the validity of all their contracts, in practise they often applied its principles[24].

3. National legislations that acknowledge the legal function of causa as an essential element of the validity of contracts

The question who is the genuine creator of the concept of causa is naturally very important, but it should be considered that both the canonists and Domat have laid down only some of its most important features. The first time a modern theory of causa in its whole came to existence was in the year 1804. The earliest civil law codification to adopt the principle of causa was the French Civil Code from 1804. Causa is regulated as one of the four essential requisites for the validity of agreements, as shown in art. 1108[25] with some quite familiar ideas that are known to us since Roman time – the prohibition of an obligation that has no causa or has a false or unlawful causa (art. 1131 and 1133) and a reputable presumption of causa (art. 1132).

At the same time Domat's work has influenced the legal doctrine in its attempts to explain the concept of causa. Modern French scholars traditionally define causa as the typical legal purpose, a ground for existence of the undertaking signed by both parties to the contract[26]. There is a distinction between the objective causa and the subjective causa. Objective causa (*cause objective, cause abstraite*) is the logical result of Domat's theory but further developed. In this sense, in bilateral contracts causa consists of the aim of the buyer to acquire title to the thing and of the aim of the seller – to receive the money in exchange for transferring the property. Thus, in synallagmatic contracts the benefit offered by each of the contracting parties serves as the cause for the obligation of the other party. The motives that have guided the parties into concluding the contract are irrelevant. Scholars admit the existence of a second approach to causa – in its subjective form (*cause subjective, cause concrete*). Traditionally, it is being defined as the typical, deciding motive for the parties for entering into this type of contracts, their

[22] See Lieberwirth, R., *Latein im Recht*, (Berlin: Staatsverlag der DDR, 1988), 263.

[23] Buckland, W., McNair, A., Roman Law and Common Law, op. cit., p. 223.

[24] See Lorenzen, E., Causa and Consideration in the Law of Contracts, op.cit., p. 630.

[25] "Four requisites are essential for the validity of an agreement: The consent of the party who binds himself; His capacity to contract, a definite object which forms the subject-matter of the undertaking; a lawful cause in the obligation."

[26] See *Principles, Definitions and Model Rules of European Private Law, prepared by the Study Group on a European Civil Code and the Research Group on EC Private Law*, ed. by Christian von Bar, Eric Clive and Hans Schulte-Nölke, (Munich: Sellier European Law Publishers, 2009), 292.

subjective intentions and the specific reasons for concluding the contract[27].

The significance of causa can be found in a number of cases. First, it establishes that the reciprocal obligations of the contracting parties arising from bilateral contracts are strictly interdependent. Where one of these obligations is not executed, whatever reason might have lead to this, the other obligation has no causa and therefore the party can resist payment. If there was no concept of causa and the obligations of the parties were independent, payment would still be due and the only opportunity to recover it would have been the claim for unjustified enrichment. But the concept of causa ensures that whenever one of the parties fails to perform the other party could simply demand annulment of the contract, thus making contract law more secure and the arisen disputes easier and quicker to resolve[28].

The second feature of causa is that it restricts the courts' unlimited control upon the agreement between the parties[29]. Enacted in 1804, the French Civil Code is a legal embodiment of the major philosophical ideas of that period and was influenced in particular by the idea of individualism. Since autonomy of the will was established as the leading concept in the law of contracts, 19th century French scholars were convinced that the judge should be allowed to intervene in the contractual relationships as little as possible. As a result the control that could be imposed was limited to the objective verification whether a contractual counter-performance actually exists, whether it is one normally expected in the particular type of contract and whether it is not unlawful or false. Inquiries into the motives or other psychological factors that urged the parties into a contract were generally not admitted by the courts.

Although the modern theory of causa was laid down at the beginning of the 19th century, this does not mean it reached a standstill. On the contrary, the concept of causa has developed further, particularly by following some decisions of the French Cassation court and the efforts of legal scholars. Modern French legal doctrine has acknowledged two primary tendencies in the development of the doctrine of causa – its 'concretisation' and 'subjecitivisation'[30].

Throughout the last decades, the concept of causa has become more concrete, in the sense that it does not simply refer to a contractual counter-performance of any nature, but to a "real" contractual counter-performance, which includes taking into consideration the real, genuine interest it represents. A number of judgements of the French Court of cassation reveal a new approach in the assessment of causa – not from a formal point of view (since it might be not apparent at first glance), but from the point of view of the concrete, genuine interest, represented by the performance to the other contracting party, even when the terms of the exchange are apparent[31]. The process of "concretisation" of the causa has lead to a major change in French case law. In the past, where a counter-performance does not exist or is not immediately apparent from the contractual structure both unilateral and bilateral contracts were declared void for lack of causa. Today courts tend to undertake a search for the real interest pursued by the party who appears to impoverish itself. They go beyond the contractual structure and analyse the benefit or some other thing that has been previously received and is capable of sustaining an obligation[32]. If the benefit is still unclear, courts continue their attempt in establishing whether the contracting party nevertheless has an interest in the contract, since it may be provided through another contract or by a third party.

The second current development may be described as a "subjectivisation" of causa. It means that courts analyze the obligation and aim at establishing the causa of each of the contracting parties' obligations, without limiting themselves to the pre-established type of the contractual counter-performance[33]. Traditionally, causa is defined as the typical aim, associated with the certain type of contract and pursued by the parties. In the process of applying the principles of causa, courts proclaim the annulment of a contract that does not contain the interest which is normally expected to be present at this particular type of contracts. Thus courts determine the essential elements of a contract - the minimum inviolable prerequisites for its existence. Since this could lead to a number of contracts being proclaimed void on the ground that an apparent causa is lacking, the notion of causa was enriched by a new aspect. Courts are prepared to refine the control and to hold valid an agreement, provided that a real economic context is present. The search for the 'atypical' cause can be found in a rather recent decision of the French Cassation Court[34]. As a clause in a purchase contract of a hotel room by a family

[27] Tikniute, A., Damrauskaite, A., "Understanding Contract Under the Law of Lithuania and other European Countries", *Jurisprudence*, 18, (2011): 1397; Principles, Definitions and Model Rules of European Private Law, op.cit., p. 293.

[28] See Julliot de la Morandiere, *Precis de Droit Civil, Tome II*, (Paris: Dalloz), 1957, Russian translation by Fleischitz, E., Moscow, 1960, 270.

[29] Ibidem, p. 271.

[30] *Reforming the French Law of Obligations. Comparative Reflections of the Avant-Projet de reform du droit des obligations et de la prescription*, ed. by John Cartwright, Stefan Vogenauer, Simon Whitaker, (Oxford and Portland, Oregon: Hart Publishing, 2009), 77.

[31] *Cass. Civ. (3) 13. October 2004*, D 2004 AJ 3140.

[32] Reforming the French law of obligation, op.cit., p. 79.

[33] Ibid., p. 81.

[34] *Cass civ (3) 29. March 2006*, Bull civ I № 88, JCP G 2006 in: Reforming the French Law of Obligation, op. cit.,p. 88.

couple, the hotel set up a joint venture whose object was to share the fruits and costs of the hotel restaurant and would be managed by another company. The Court pronounced the purchase contract void, since the hotel assured the couple that they will never have to bear the losses of the hotel, yet on the ground of this clause the family couple would stand surety to the hotel. The absence of causa was proclaimed because of the impossibility of realising a profit, 'a specific goal of viability, expressly coupled with the purchase'[35]. This decision has been subject to eloquent critics. They raised the question about legal certainty in contract law, since every party dissatisfied by the absence of profit could purport to obtain nullity of the contract. Several scholars, however, justified this approach, since the contract should demonstrate by plain terms that the two parties knew of a particular goal pursued and have admitted it from the outset into their relations. Even if the is not the traditional one, associated with this particular type of contracts, the contract will still be held valid. On the contrary, where one cannot derive the goal from the contractual structure, or where it has been included without the express volition of both parties, the contract has no cause and this leads to its nullity[36].

On the face of it, the depth of the French courts' inquiry may seem quite intensive and unprecedented especially when one considers the reason why causa was actually brought to life – to ensure that courts will intervene as little as possible in the contractual relations. French legal doctrine even referred to these undergoing processes as an "exteriorisation" of the causa[37]. To my view, this process is actually a function of the autonomy of the will. Allowing courts to try and determine whether one of the parties has interest despite the lack of a visible counter-performance ultimately leads to decreasing the number of contracts declared void for the lack of causa, which can actually be perceived as a true manifestation of the main principle in the contract law – the autonomy of the will.

The provisions about causa in the French Civil Code have served as a role model for several other national legislations belonging to the Romanistic legal family. Causa is considered an essential element of the validity of contracts according to the provision of art. 1274 of the Spanish Civil Code. What is interesting to point out is that the Spanish legislator has adopted Domat's theory of causa and not its modern notion[38]. The "Spanish approach" of defining causa as a requisite of the validity of contracts is its original meaning, has influenced the Civil Code of the Philippines[39]. The modern French notion of causa can be found in the national legislations of Belgium, Luxembourg[40], Italy[41], Romania[42], Bulgaria[43] and Slovenia[44]. In the same meaning the requirement of causa can be found in some legislations not belonging to the EU: in Quebec[45], the States of Louisiana[46], California[47] and Montana[48] and in the United Arab Emirates[49]. The subjective meaning of causa (as the deciding motive that has lead a party to commit itself) is adopted by the national legislations of Chile[50] and Colombia[51]. This comparative overview clearly shows that the concept of causa is ever-evolving and it is constantly modified to suit the exercise of control over contractual obligations in the best way possible.

[35] Ibid. p. 89.

[36] Ibid. p. 89

[37] Ibid., p. 80.

[38] See art. 1274 of the Spanish Civil Code: "In onerous contracts the causa is understood to be, for each contracting party, the prestation or promise of a thing or service by the other; in remuneratory ones, the service or benefit which is remunerated; and in contracts of pure beneficence, the mere liberality of the benefactor".

[39] See art.1350 of the Civil Code of the Philippines that follows closely the provision of the art. 1274 of the Spanish Civil Code.

[40] See art. 1108 and art.1131-1133 of the Belgian Civil Code and the Luxembourg Civil Code. As a whole, both Civil Codes follow very closely the provisions of the French Civil Code.

[41] See art.1325 and art.1343-1345 of the Italian Civil Code. The provisions about causa are the same as in the French Civil Code.

[42] See art. 1235-1239 of the Romanian Civil Code. It is interesting to point out that the definition of causa in the new Romanian Civil Code of 2014 seems to have been influenced by the respective provision of art. 1410 of the Quebec Civil Code.

[43] See art. 26, (2) of the Bulgarian Law of Obligations and Contracts: "Contracts that … have no causa are void. The existence of a causa is presumed until otherwise proven."

[44] See art. 39 of the Slovenian Law of Obligations: "Every contractual obligation must have a permissible causa (ground). The causa shall be deemed impermissible if it contravenes the constitution, compulsory regulations or moral principles. (3) It shall be presumed that an obligation has a causa, even if such is not expressed.(4) If there is no causa or the causa is impermissible the contract shall be void."

[45] See s.1410 of the Civil Code of Quebec: "The cause of a contract is the reason that determines each of the parties to enter into the contract. The cause need not be expressed."

[46] See S. 1967 of the Civil Code of Louisiana: "Cause is the reason why a party obligates himself."

[47] See art. 1550 of the California Civil Code, where the requirement for a "sufficient cause" is explicitly provided.

[48] See S. 28-2-102 of the Montana Code, that resembles the provision of art. 1108 of the French civil Code.

[49] See S. 129 (c) of the UAE Civil Code: "The necessary elements for making of a contract are: agreement, subject matter and a lawful purpose for the obligations". To my view, there is no reason to consider that "a lawful purpose" has any other meaning than a lawful causa.

[50] See art. 1467 of the Civil Code of Chile, where the following definition is present: "By causa it is meant the motive that induces the act or contract".

[51] See art. 1524 of the Civil Code of Colombia, whose provision is the same as in art. 1467 of the Chilean Civil Code.

4. National legislations that have adopted the doctrine of consideration

In contrast to the causa as a requisite of contracts that can be discovered in the national legislations of countries belonging to both civil and common law, the doctrine of consideration is a typical feature of common law legislations only. The doctrine of consideration can be found in the legislation of the United Kingdom, the United States of America, Australia and Cyprus as well as in some mixed jurisdictions, such as the Republic of South Africa. The main focus of this article will be placed upon clarifying this doctrine in English law, where consideration emerged and developed.

Differing from the legal systems on the Continent, English law was not based on the blend of Roman law and Canonist law, but rather developed its own institutes[52]. Yet, it faced the same problem about enforceability of promises.

In the early stages of its development (around the middle of the 13th century AD), English law had not developed the doctrine of consideration as a universal requisite, applicable to all contracts. Promises to do or to give something had to be set out in a written form, called deed. Whenever there was a breach of a promise, a special action, called covenant was granted to the plaintiff. A requirement that the covenant must be written and issued under the seal of the covenantor was introduced in the 14th century. In the course of time, the action of covenant gradually limited its legal consequences to the recovery of damages for breach of a sealed promise and was finally supplanted by another action (assumpsit)[53]. In the course of the 16th century, the action of assumpsit became the common legal means for the protection of a party against default by the other party, including the enforceability of promises. The legal effects of the action of assumpsit led the jurisprudence to the conclusion that since creditors enjoy such a convenient way of protecting themselves against a misconduct, carried out by the other party, not every given promise, whatever its nature deserves legal protection[54]. In particular, it was assumed that the action of assumpsit shall not be used to enforce a gratuitous promise and only promises with a bargain, i.e. with a counter-performance will be worthy of protection[55].

The assumed policy of the jurisprudence to limit the cases where one can claim enforceability of a promise was just one of the premises of the doctrine of consideration. The second one could be found in a stunningly familiar issue that tormented the minds of civil law scholars as well – the need to reduce the role of formalism without sacrificing security of transactions. Both premises make it probable that in the 17th century judges inquired into the contractual bond, searching for a reason for the promise being binding[56].

The process of forming the doctrine of consideration did not remain unchallenged. In the 18th century an attempt to redefine the notion of consideration had been carried out by Lord Mansfield, Chief Justice of the King's Bench. He refused to recognize it as a vital criterion of a contract and treated it merely as evidence of the parties' intention to be bound[57]. If this intention could be ascertained in any other way (writing or witnesses) consideration was unnecessary[58]. His second conclusion was considered even more disturbing. Lord Mansfield eventually accepted consideration as essential to English contracts, but defined it as a moral obligation[59]. It took almost another sixty years for English case law to overcome Lord Mansfield's approach. In *Eastwood v Kenyon*, the concept of consideration as a moral obligation was condemned. The judges pointed out that the acceptance of a moral duty as the sole test of an actionable promise collides with English law that requires some factor additional to the defendant's promise so that it would become legally binding and this was the doctrine of consideration[60]. The logical consequence of the *Eastwood v Kenyon* case was that consideration was no longer looked upon as a rule of evidence or a moral obligation. Throughout the 19th century, various attempts to define consideration have been undertaken in case law. It has been established that a plaintiff can prove the presence of

[52] There is a statement that the theories of consideration derived from canon law, since the chancellors who adopted them were former ecclesiastics. This would mean that causa and consideration share the same historical roots. See Willis, H.E., What is Consideration in Anglo-American Law, *University of Pennsylvania Law Review*, 72 (1924): 249. The majority of scholars believe, however, that the doctrine of consideration was developed independent of outer influence, See Beatson, J., Burrows, A., Cartwright, J., *Anson's Law of Contracts*, 29th ed., (Oxford University Press, 2010), 91 et seq.

[53] Willis, H. E., What is Consideration in Anglo-American Law, op.cit., p. 251 et seq.

[54] Simpson, A., *A History of the Common Law of Contract: The Rise of the Action of Assumpsit*, (Oxford University Press, 1975), 199 et seq.

[55] Cheshire, Fifoot and Furmston's *Law of Contract*, 12th edition, (London, Dublin, Edinburgh: Butterworths 1991), 71.

[56] Some scholars regard this perception of consideration as being as close to the theory of causa as possible, since the meaning of "consideration" altered much in the next century, See Cheshire, Fifoot and Furmston's *Law of Contract*, op.cit., p. 71.

[57] *Pillans v Van Mierop* (1765) KB 3 Bur. 1663. Lord Mansfield added that "the ancient notion of consideration was for the sake of evidence only; for when it is reduced into writing, as in covenants, specialties, bonds, etc., there was no objection to the want of consideration". See Lorenzen, Causa and Consideration in the Law of Contracts, op.cit., p. 637.

[58] *Rann v Hughes* (1778), 7 Term Rep. 350. See McCauliff, C., A Historical Approach to the Contractual Ties that Bind Parties Together, 71 *Fordham Law Review* (2002): 850 et seq.

[59] "Where a man is under a moral obligation, which no Court of law or equity can enforce, and promises, the honesty of the thing is a consideration ... The ties of conscience upon an upright mind are a sufficient consideration" *Hawkes v Sanders* (1782), 1 Cowp 289.

[60] *Eastwood v Kenyon* (1840) 11 AD & EL 438.

consideration in one of two ways. He might either prove that he had given the defendant a benefit in return for his promise or that he himself had incurred a detriment for which the promise was to compensate[61].

This approach had been accepted and further developed in the beginning of the 20th century. English case law attempted to define consideration using the contract of purchase and sale – "An act or forbearance of one party, or the promise thereof, is the price for which the promise of the other is bought, and the promise thus given for value is enforceable"[62]. Despite the fact that defining consideration seems straightforward and simple, scholars do not think of it as a single principle, but rather as a doctrine that has evolved throughout the centuries. That is why three further sub-principles have been introduced to facilitate its application[63].

According to the first sub-principle, consideration should either be executory or executed, but not past. Consideration may be *executory* when a promise is made in return of a counter-promise by the other party and *executed* when it is made in return for the performance of an act[64]. Whenever the plaintiff purports to enforce a transaction, he must be able to prove that his promise (or act) together with the defendant's promise, constitute one single transaction and there is interdependence between them[65].

However, where the defendant has made a further promise, subsequent to and independent of the underlying transaction between the parties, it should be regarded as a sign of gratitude for past favours or a gift, and no contract can arise[66], since there is a "past consideration". Since it confers no benefit on the promisor and involves no detriment to the promise in return for the promise, the general rule is that past consideration is equal to no consideration[67].

The second sub-principle that has been accepted in the case law and among scholars is that consideration must move from the promisee[68]. This means that a promise can be enforced whenever the promisee has paid for it and there is a bargain. In the cases where the promise was not made by deed and the promisee did not provide consideration, no enforcement is allowed. At the same time this element means that even when the promise is supported by consideration provided by the promisee, consideration must move from the claimant, i.e. the person seeking to enforce the contract must have provided the consideration himself[69]. However, the application this principle should lead to the conclusion that a promisee cannot enforce a promise made to him where the consideration for the promise has been provided by someone else[70].

The third sub-principle lies in the requirement that consideration must be real, must be "something which is of some value in the eye of the law"[71]. That's why case law consistently declined to accept as consideration the case where a party refrains "from a course of action which he has never intended

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[61] "A valuable consideration in the sense of the law may consist in either some right, interest, profit or benefit accruing to one party, or some forbearance, detriment, loss or responsibility given, suffered or undertaken by the other" – *Currie v Misa* (1875) LR 10 Exch 153; "Consideration means something which is of value in the eye of the law, moving from the plaintiff: it may be some detriment to the plaintiff or some benefit to the defendant" – *Thomas v Thomas* (1842) 2 QB 851.

[62] This definition emerged originally in the English case law – see *Dunlop v Selfridge* (1915). This particular case is sometimes being referred to as the most significant case for the consideration doctrine. See Beatson, J., Burrows, A., Cartwright, J., *Anson's Law of Contract*, op.cit., p. 92.

[63] Richards, P., *Law of Contract*, 9th ed., (London: Pearson Longman, 2009), 58 et seq.

[64] Cheshire, Fifoot and Furmston's Law of Contract, op.cit., p. 74; Beatson, J., Burrows, A., Cartwright, J., Anson's Law of Contract, op.cit., p. 95.

[65] *Wigan v English and Scottish Law Life Assurance Association* (1909) 1 Ch 291.

[66] Cheshire, Fifoot and Furmston's *Law of Contract*, op.cit., p. 74.

[67] There are, however, some exceptions to this rule. A past consideration would be able to support a promise if the consideration was given at a previous request of the promisor. The Judicial Committee of the Privy Council has summarized the conditions under which this exception applies in *Pau On v Lau Yiu Long* (1980) AC 614 – "An act done before the giving of a promise to make a payment or to confer some other benefit can sometimes be consideration for the promise. The act must have been done at the promisor's request, the parties must have understood that the act was to be remunerated either by a payment or the conferment of some other benefit, and payment, or the conferment of a benefit, must have been legally enforceable had it been promised in advance." Further exceptions to the rule "past consideration is no consideration" can be found in the existence of an antecedent debt (*Wigan v English and Scottish Law Life Assurance Association* 1909 1 Ch 291) and in the case of negotiable instruments (s. 27 (1) of the Bills of Exchange Act 1882). See Beatson, J., Burrows, A., Cartwright, J., *Anson's Law of Contracts*, op.cit., p. 97. Some scholars assume that a moral obligation is equal to no consideration. The notion of "moral obligation" is used in a different, narrower sense in comparison to Lord Mansfield's definition of the consideration as a moral obligation. Scholars believe that an obligation should be considered moral whenever there is an impossibility to enforce it due to some specific legal defect. English case law has refused to consider binding the promise given by a discharged banker to pay his debts in full incurred before his discharge if this promise is not supported by "fresh consideration" – *Jakeman v Cook* (1878) 4 Ex.D. 26. See Treitel, G., *The Law of Contract*, 11th ed., (London: Sweet & Maxwell 2003), 80.

[68] Cheshire, Fifoot and Furmston's *Law of Contract*, op.cit., p. 77; Richards, P., *Law of Contract*, op.cit., p. 61.; Treitel, G., *The Law of Contract*, op.cit., p. 81.

[69] See Beatson, J., Burrows, A., Cartwright, J., *Anson's Law of Contracts*, op.cit., p. 98.

[70] It should be noted that English courts hesitate about this logical consequence. Australian courts, however, apply this requirement without doubt. See Coulls v Bagot's Executor and Trustee Co Ltd (1967) ALR 385, where the judges have accepted that "a person not a party to a contract may not himself sue upon it so as directly to enforce its obligations ".

[71] Treitel, G., *The Law of Contract*, op.cit., p. 83; Richards, P., *Law of Contract*, op.cit., p. 62.

to pursue"[72]. Furthermore, whenever there is impossibility, physical or legal, at the time of formation of the contract, consideration is held unreal[73]. Case law requires the impossibility to be obvious, meaning that "according to the state of knowledge of the day, so absurd that the parties could not be supposed to have so contracted"[74]. There is no consideration in the case when a promise is too vague or insubstantial to be enforced as well. Whenever a promise leaves the performance exclusively in the discretion of the promisor the consideration is deemed to be illusory[75].

It has been established that courts will inquire into consideration to prove that it is real, but the question about its adequacy should remain outside their scope[76]. Courts will not seek to measure the comparative value of both promises, since the adequacy of consideration is to be considered by the contracting parties at the time of making the agreement. The parties are presumed to be capable of pursuing their own interests and reaching a desired equilibrium in commercial transactions[77]. That's why courts cannot denounce an agreement just because it seems to be unfair. On the contrary, they have been prepared to find a binding contract in cases where consideration is virtually non-existent. Four centuries ago it has been assumed that "when a thing is to be done by the plaintiff, be it never so small, this is a sufficient consideration to ground an action[78] and this rejection of performing a quantitative check is meticulously applied by courts[79]. However, some exceptions where consideration is held to be 'insufficient' have been introduced[80].

5. The correlation between causa and consideration

As it has appeared, both the theory of causa and the doctrine of consideration are brought to life to serve as an "indicia of seriousness"[81] in an attempt to distinguish between a simple arrangement and a contract. This circumstance naturally leads to the question about the correlation between causa and consideration. At first glance there is a distinctive similarity not only in the function of both figures as "indicia of seriousness". Another common feature between them may be found in the reason why they were developed. Both causa and consideration have emerged as a result of the necessity to facilitate the exclusion of formalism that dominated the contractual relationships in both Roman private law and early English law. In modern times, formalism is considered an exception rather than a rule, since the need to observe a specific form is now usually substituted by the requirement of a causa or consideration in order to consider a contract valid and binding.

These similarities of both concepts did not remain unnoticed by judges and scholars. Case law shows that there was a considerable period of time in English law where consideration and causa were used interchangeably. In the *Calthorpe's case* consideration is defined as a "cause or meritorious occasion, requiring a mutual recompense, in fact or in law"[82]. Despite the fact that in its further development English case law abandoned the approach of defining the doctrine of consideration using causa, this proved to be a very robust idea. The question about the correlation between causa and consideration influenced the development of the enforceability of promises in the mixed legal systems.

The first Civil code of Louisiana, enacted in 1825, as well the next one, enacted in 1890, contained a definition of causa. It was assumed that "Cause is consideration or motive. By the cause of the contract in this section is meant the consideration or motive for making it"[83]. Scholars admit that until the end of the 19th century due to the strong civil law influence the common law doctrine of consideration, although specifically indicated in the provisions of

[72] *Arrale v Costain Civil Engineering Ltd* (1976)
[73] Beatson, J., Burrows, A., Cartwright, J., Anson's *Law of Contracts,* op.cit., p. 102.
[74] *Lord Clifford v Watts* (1870) LR 5 CP 577.
[75] *Ward v Byham* (1956) 1 WLR 496.
[76] Cheshire, Fifoot and Furmston's *Law of Contract,* op.cit., p. 81.
[77] *McEcoy v Belfast Banking Co Ltd (1935)* AC 24.
[78] *Sturlyn v Albany* (1587) Cro Eliz 67.
[79] In modern times this principle became known as the "peppercorn theory". In *Chappel & Co Ltd v Nestle Co Ltd* it was assumed that it is irrelevant whether the consideration is of some value to the other party: "A contracting party can stipulate for what consideration he chooses. A peppercorn does not cease to be good consideration if it is established that the promisee does not like pepper and will throw away the corn".
[80] Scholars agree that whenever there is a public duty imposed upon the plaintiff by law, any promise to carry it out is a promise without consideration. A further exception lies in the case where the plaintiff is bound by an existing contractual duty to the defendant. See Cheshire, Fifoot and Furmston's *Law of Contract*, p. 89 et seq.
[81] Zweigert, K., Kötz, H., *Introduction to Comparative Law*, 2nd Revised Edition, translated from German by Tony Weir, (Oxford: Clarendon Press, 1992), 417 et seq. See also Kötz, H., *Europäisches Vertragrecht, Bd.1 Abschluss, Gültigkeit und Inhalt des Vertrages, die Beteiligung Dritter am Vertrag*, (Tübingen: Mohr Siebeck, 1996) 77 et seq.
[82] This decision dates back to the year 1574. See Lorenzen, E., Causa and Consideration in the Law of Contracts, op.cit., p. 636. Other scholars also admit that in the 16th and 17th century consideration probably meant the reason for the promise being binding, fulfilling something like the role of causa in continental systems, See Cheshire, Fifoot, Furmston's Law of Contract, op.cit., p. 71.
[83] See art. 1890 of the Louisiana Civil Code 1825 and art. 1896 of the Louisiana Civil Code of the year 1890.

the Civil Code was not applied, because cause meant consideration[84].

To my view, this is only partially true. Scholars' primary aims are pointed at clarifying that under this definition consideration is not equal to motive[85] and omit an important aspect. A historical interpretation of this definition leads us to the conclusion that in 1825, when the first Civil Code of Louisiana was enacted, the notion of causa could have had no other meaning than the one manifested by J. Domat and R. Pothier – in unilateral contracts causa lies in the fact that the creditor performed his obligation at the time of the conclusion of the contract, in bilateral onerous contracts the engagement of one party is the reason for the engagement of the other party and in gratuitous contracts motive serves as causa. If a parallel can be drawn, causa in unilateral contracts and executed consideration seem to be quite alike, since both require something to be done or given. Causa in bilateral contracts and executory consideration are, on the other hand, quite different, but share the same function of establishing the difference between enforceable and unenforceable promises. As far as gratuitous contracts are concerned, they must be made by 'deed' in English law to become enforceable. The Louisianian legislator has included the motive in the definition of causa, since the existence of a motive justifies the existence of a gratuitous promise and substitutes the need for a causa. Following that logical pattern, we might conclude that the scope of causa is broader than the doctrine of consideration and that's why causa encompasses both consideration and the liberative motive, as set out in the definition of art. 1890 of 1825 Louisianian Civil Code. As we have seen, it is the causa, not the doctrine of consideration that is used as a universal requisite of the validity of contracts in present-day Louisiana.

In the Republic of South Africa, the question about the correlation between causa and consideration emerged in the beginning of the 20th century. The provision of art. 1371 of the repealed Netherlands Civil Code provided the requirement for a causa in every contract and consequently it was introduced into the legal system of Transvaal by the Dutch settlers as well. Yet, in 1904 a member of the Supreme Court stated that "the causa of Roman-Dutch law has become for all practical purposes equivalent to the valuable consideration of the Common Law"[86]. Despite the fact that this idea was not acknowledged by later South African case law, it was accepted by the majority of the scholars of that time[87].

The idea that causa and consideration are similar, but not the same worked its way into the case law of other mixed legal systems. In the Philippines causa and consideration were originally used as synonyms[88]. Later on, it was established that although somewhat different, both concepts work out equivalent effects in jurisprudence. The common law consideration was held narrower than the civil law causa, since consideration consists of some benefit to the promisor or a detriment to the promisee, whereas causa is the essential reason for the contract[89].

Modern scholars are inclined to accept that causa and executory consideration are similar[90], but others point out that it can be accepted only if causa is being used in its objective sense[91]. To my view, this statement is true, but several other circumstances should not be overlooked.

First, causa is an element necessary for more than just the plain formation of all contracts in civil law. It is used to invalidate unlawful or immoral transactions and justifies the consequences that follow from an excusable failure to perform one of the obligations on a bilateral contract. It can be said that causa accompanies the contract from its formation until its discharge. On the contrary, the doctrine of consideration imposes a standard solely for the formation of an onerous contract, since a gratuitous promise must be performed in the form of a 'deed' to be enforceable. Afterwards, there are several other legal figures, known to English law that are used to perform control over unlawful or immoral transactions or the excusable failure to perform, such as illegality, mistake and frustration. This means that consideration itself cannot carry out the functions of causa[92]. Thus a contract, supported by consideration, could be declared void from the outset for lack of causa or unlawful causa. That is why it can be assumed that the notion of causa and its scope of application are considerably wider than the doctrine of consideration.

At the same time in English law nominal consideration is sufficient to sustain a contract, whereas in civil law causa will not be applicable in this case. Civil law legislations usually have adopted

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[84] Drake, J., Consideration v. Causa in Roman-American Law, *Michigan Law Review* 4, (Nov. 1905): 39.

[85] Ibid., p. 22.

[86] See Zimmermann, R., The Law of Obligations, op.cit., p. 556.

[87] Drake, J., Consideration v. Causa in Roman-American Law, op.cit., p. 19; Lorenzen, E., Causa and Consideration in the Law of Contracts, op.cit., p. 639; Buckland, W., McNair, A., Roman Law and Common Law, op.cit., p. 233.

[88] See the decision of the Supreme Court Marlene Dauden Hernaez vs Wolfrido delos Angeles, G.R. No. L – 27010; April 30, 1969.

[89] See *Mixed Jurisdictions Worldwide. The Third Legal Family*, 2nd ed., by Palmer, V., (Cambridge University Press, 2012), 471.

[90] See Markesinis, B., Cause and Consideration: A Study in Parallel, *The Cambridge Law Journal* 37 (Apr. 1978): 58.

[91] Tikniute, A., Dambrauskaite, A., Understanding Contract under the Law of Lithuania and Other European Countries, op.cit., p. 1397; Principles, Definitions and Model Rules of European Private Law, op.cit., p. 292.

[92] Markesinis, B., Cause and Consideration: A Study in Parallel, op.cit., p. 74.

the Roman concept of *laesio enormis*, allowing the party to bring up an action and invalidate a contract where the price of the counter-performance is considerably lower than the price of his own performance. English law does not require consideration to be adequate. Although it has developed exceptions to ensure that the lack of adequacy is not due to fraud, mistake or irrational generosity[93], courts will not pronounce the invalidity of contract solely on this behalf. In this sense, as strange as it may seem on face of it, consideration is wider than the notion of causa.

If a conclusion may be drawn, it seems that the 'objective causa' can be considered the functional equivalent of executed consideration, since they stand as close as possible to each other. Apart from that, causa and consideration differ greatly in terms of elements, scope and legal consequences. What they share in common is a similar historical path and the function to establish which promises should be considered binding.

6. The need for coherence. The abandonment of causa in France.

Surprisingly, the concept of causa and the doctrine of consideration share another common feature. Both have been subject to criticism that has doubted their utility and even called for their abandonment[94]. Moreover, many national legislations, such as Germany[95], the Netherlands, Scotland[96] Greece, Portugal[97], Slovakia, the Czech Republic[98], Lithuania[99], Estonia[100] and Hungary do not acknowledge causa or consideration as necessary elements of the formation and validity of a contract. Thus the existence of two parties who have agreed upon concluding a contract is deemed enough. This has been accepted in the civil Codes of various national legislations outside the EU, such as Switzerland[101], Israel[102], Ethiopia, Armenia, Brazil, South Korea[103] and Russia.

Following the rapid development of international civil and commercial relationships both inside and outside the EU, the existence of three differing types of legal approach to the question whether an agreement is actually a valid contract could cause a number of complications and undermines the certainty of circulation. That is why several attempts to overcome this challenge have been undertaken on a supranational level. Of course, they differ considerably, but they all share one common feature – the need for a causa or consideration is abandoned and a contact is concluded, modified and terminated by the mere agreement of the parties, without any further requirement.

One of the oldest attempts to unify the requisites of the contract was set out in 1927, by a Draft of a French-Italian Code of Obligations. It never entered into force, due to the outbreak of World War II, but its provisions served as an eloquent proof that causa and consideration may not be included into the issue of formation and validity of contracts[104]. This principle was adopted several decades later with the UN Convention on Contracts for the International Sale of Goods (CISG) coming into force in 1980. Its article 11 provides that "A contract of sale need not be concluded in or evidenced by writing and is not subject to any other requirement as to form. It may be proved by any means, including witnesses".The provision of art. 1.2 of the UNIDROIT Principles (latest revision of 2010) is virtually the same[105].

The approach of simplifying the requirements to consider a contract valid and binding has inevitably influenced EU law as well. The ongoing attempts to create a unified European private law have resulted in introducing several "soft law" codifications, such as the Principles of European Private LAW (PECL) and the Draft Common Frame of Reference (DCFR)[106]. The provision of art. 2:101, (1) PECL sets out a quite liberal and simplified

[93] See Treitel, The Law of Contract, op. cit., p. 74.

[94] The most famous French anti-causalist is Marcel Planiol. See Planiol, M., *Traite elementaire de droit civil*, 7th ed., translated into Bulgarian by T.Naslednikov, (Sofia, 1930) 424 et seq. On the criticism of consideration see Chen-Wishart, M., In Defense of Consideration, *Oxford University Commonwealth Law Journal* 13 (2013): 209 et seq.

[95] Zweigert, K., Kötz, H., Introduction to Comparative Law, op.cit., p. 426-427.

[96] Mixed Jurisdictions Worldwide. The Third Legal Family, op.cit., p. 256.

[97] See Principles, Definitions and Model Rules of European Private Law, op.cit., p. 294.

[98] Ibid, p. 294.

[99] Tikniute, A., Dambrauskaite, A., Understanding Contract under the Law of Lithuania and Other European Countries, op. cit., p. 1400.

[100] Kull, I., European and Estonian Law of Obligations — Transposition of Law or Mutual Influence?, *Juridica International* 9 (2004) 33 et seq.

[101] Guhl, T., *Das Schweizerische Obligationenrecht*, Achte Auflage, (Zürich: Schulthess Verlag, 1991) 94 et seq.

[102] Kellerman, A., Siehr, K., Einhorn, T., *Israel Among the Nations*, (The Hague/Boston/London: Kluwer Law International, 1998), 299.

[103] Jin, Oh Seung, Overview of Legal Systems in the Asia-Pacific Region: South Korea, paper presented at the Conference *Overview of Legal Systems in the Asia-Pacific Region (2004);* 04.10.2004; available at http://scholarship.law.cornell.edu/lps_lsapr/6 (last accessed on 04.04.2016).

[104] Smith, J.D., A Refresher Course in Cause, *Louisiana Law Review* 12 (1951): 2.

[105] See Dennis, Michael J. The Guiding Role of the CISG and the UNIDROIT Principles in Harmonising International Contract Law, *Uniform Law Review* 19 (2014): 114–151.

[106] About the notion of "soft law" see Terpan, F., Soft Law in the European Union. The Changing Nature of EU Law. *European Law Journal* 21 (January 2015): p. 68-96.

approach. It excludes the formal requirements for the conclusion of a contract in such a way that a contract is concluded if the parties intend to be legally bound and reach a sufficient agreement *without any further requirement.*This implies that the contract can be concluded without the presence of causa or consideration[107].

The Study Group on a European Civil Code closely follows the approach of providing minimal substantive restrictions in the provision of art. 4:101, Book II of the DCFR[108]. The absence of a causa or consideration is considered to promote efficiency by making it easier for parties to achieve the desired legal results in a faster and more convenient way. At the same time the level of legal protection has not lowered since the contract could be proclaimed invalid of some defect of consent or illegality[109].

It is obvious that the undergoing abandonment of causa and consideration as a requirement of the formation of a contract is not merely a whim, but a consistent supranational policy that has emerged nearly a century ago. That is the reason why one cannot be surprised to see that the French legislator has undertaken a major reform of the law of obligations to harmonize it according to the latest tendencies in European private law. According to the "Ordonnance n° 2016-131 du 10 février 2016 portant réforme du droit des contrats, du régime général et de la preuve des obligations" which will enter into force on 01.10.2016, the French Civil Code abandons the concept of causa, so that a contract will be valid if the parties have capacity to contract, have given their consent and there is an object (see the new version of art. 1128, which will enter into force on 01.10.2016).

The abandonment of the concept of causa, happening in the very national legislation, where it was enacted for the first time, may seem really confusing at first glimpse. However, one should bear in mind that this is merely a reflection of the common European policy of adapting the law of contracts to the new circumstances. It seems that the theory of causa in civil law and the doctrine of consideration have finally performed their main task – to accelerate the fall of formalism and help establishing a new contract law, based on the autonomy of the will and consensualism. This is actually the main aim of every supranational attempt to harmonize contract law. The new concept is that the contract will have its foundations in the objectively expressed will of the parties to be legally bound without the need for a causa, since the presence of the autonomy of the will is itself considered enough to guarantee the validity of a contractual relationship. On the other hand, the regulatory functions of causa upon the post-formation phase of the contract have been overtaken by a set of profound rules that invalidate any contractual relationship whenever there is a defect of consent or illegality110 and other special rules. In this sense, causa is not useless, it has been made useless by providing an abundant number of provisions that have substituted it and are set to perform quite similar functions.

7. Conclusion

It seems that the theory of causa in civil law and the doctrine of consideration have a last thing in common – that neither of them will probably find its place in a future European codification of private law. Nevertheless, one should consider that causa and consideration have succeeded in establishing the autonomy of the will as the founding principle of contract law. Throughout the centuries they have influenced its development up to the point where they are no longer needed. To my view the concept of causa will suffer a gradual abandonment, just like it happened to formalism, since this is the present tendency in European contract law.

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[107] Storme, M., The binding character of contracts – causa and consideration, *Towards a European Civil Code* (red. A.S. Hartkamp, M. Hesselink, E. Hondius), 2nd revised and expanded ed., (Kluwer, 1998), 239-254; Maria del Pilar Perales Viscasillas, *The Formation of Contracts & the Principles of European Contract Law*, 13 Pace International Law Review (2001): 374; Zimmermann, R., Jansen, N., Contract Formation and Mistake in European Contract Law: A Genetic Comparison of Transnational Model Rules, *Oxford Journal of Legal Studies* 1 (2011): 9.

[108] II. – 4:101 Requirements for the conclusion of a contract.
A contract is concluded, without any further requirement, if the parties:
(a) intend to enter into a binding legal relationship or bring about some other legal effect; and
(b) reach a sufficient agreement.

[109] *Principles, Definitons and Model Rules of European Private Law. Draft Common Frame of Reference (DCFR). Outline Edition. Prepared by the Study Group on a European Civil Code and the Research Group on EC Private Law (Acquis Group)*, ed. by Christian von Bar, Eric Clive and Hans Schulte-Nölke, (Munich: Sellier European Law Publishers, 2009), 95.

[110] See Book II, Chapter 7 DCFR, called "Grounds of invalidity", corresponding to art. 14:101 PECL.

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A HISTORICAL PERSPECTIVE ON THE SPECIAL AVAILABLE PORTION OF THE SURVIVING SPOUSE PROVIDED BY THE ROMANIAN CIVIL CODE

Silviu-Dorin ŞCHIOPU[*]

Abstract

Nowadays, the article 1090 of the New Civil Code regulates the special available portion of the surviving spouse, a legal institution that has passed the test of time. Although the 2004 draft of the new Civil code failed to mention it, the Amending Commission (re)introduced the special available portion of the surviving spouse in competition with the children resulted from a previous relationship of the deceased spouse.

For a better understanding of the legitimacy and perennity of this institution, this short overview attempts, on the one hand, to highlight certain historical aspects that defined its evolution and present-day configuration, and, on the other hand, to examine the relation between the special available portion of the surviving spouse and the succession by representation of the deceased's descendants.

Keywords: *Romanian Civil Code, estate, inheritance, special available portion of the surviving spouse, donations and bequests, succession by representation.*

1. Introduction

At first glance, the regulation regarding the special available portion of the surviving spouse would have a novelty character, given the fact that the initial draft of the (new) Civil Code[1] did not contain these stipulations. Nevertheless, the special available portion of the surviving spouse is not a legislative novelty brought by the 2009 Civil Code[2], taking into consideration that it existed in the previous regulation.

Consequently, the current article is supposed to capture the historical evolution of the regulations regarding the above mentioned portion, but also to try solving some ambiguous aspects resulted from the different terminologies and from the different terms used throughout time, to practically outline, in the end, the same category of heirs. Also it tries to highlight the importance of the regulation regarding the special available portion of the surviving spouse both in terms of its existence throughout time, but also in terms of the necessity to realise a fair and equitable succession partition, regardless the number of heirs who are entitled to receive the deceased's inheritance.

What is more, from the arguments in this article, there could be identified the right methods to interpret the norm, starting from the premises taken into consideration at the moment of its editing, but without losing sight of the fact that no surviving spouse should undergo an unjustified limitation of the special available portion by extensively interpreting the rule of law.

Wishing to offer a stable foundation to the current study and to accurately delineate the frame of the norm envisaged for analysis, it starts from historical reasons, their beginning being placed in the late Roman era. After a brief presentation of the historical stages that defined its evolution, it is analysed the content of the current disposition of the article 1090 from the 2009 Civil Code.

Based on this analysis, made both in terms of the purpose intended by the legislator in the edict of the norm, but also in grammatical terms, being reported certain ambiguities of expression, which could generate difficulties in their application, it was intended to find the right solution in interpreting it.

After the entering into force of the 2009 Civil Code, it seems that there were no studies to express an argumented opinion by reference to the relation between the special available portion of the surviving spouse and the succession by representation of the deceased's descendants, in such a situation being imposed the necessity of the existence of a scientific approach that would highlight some of the cases that could arise and could be enclosed in the above mentioned norm, in a motivated and logical way, able to highlight the correlation between the purpose of the norm and its applicability.

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[*] PhD Candidate, Faculty of Law, "Nicolae Titulescu" University of Bucharest (e-mail: **dorinxschiopu@gmail.com**). This work was supported by Diacena Medical SRL.

[1] See *Proiectul Noului Cod Civil (The Draft of the New Civil Code)* (Bucharest: C.H. Beck, 2006), 167-170.

[2] *Law no. 287 from 17th July 2009 on the Civil Code*, republished in the Official Journal of Romania, Part I, no. 505 from 15th July 2011.

2. Historical aspects that defined the evolution of the special available portion of the surviving spouse

1.1. **Late** Roman Law

During the Principate, as a result of the noticeable and alarming decrease of the population, Augustus encouraged subsequent marriages, but during the Dominate, under the influence of Christianity[3] the legislator dealt with the overgrown ease with which the spouses favoured each other and thus sacrificed the interests of the children resulted from a previous marriage. In these conditions, on the one hand, the Church did not forbid the remarriage, and, on the other hand, the legislation did not encourage it, but somehow tried to prevent it[4].

The first step was in the year 382, when a constitution was drafted by which the widow who had children from a previous marriage was prohibited to dispose of the liberalities received from the first husband for the benefit of a stranger or of the children resulted from the second marriage, her having only the usufruct. Later, in 439, this provision was extended to widowers.[5]

The second step was in the year 469, when it was decided that the person who had children resulted from the first marriage could not give, through liberalities, to the new spouse more than the child had received by will or donation; this child's part could not have been inferior to his or her reserved portion. Later, in 486, this provision was extended to any subsequent marriage.[6]

Thus, as a result of the last two constitutions appeared, in the Roman law, what is called today the special available portion of the surviving spouse.

2.2. Edict of the Second Marriage (1560)

The above mentioned legislation was received in the old French law applied to the southern French regions of written law, mainly influenced by the Roman law, while the northern ones were dominated by the Frank customary law[7].

The regulation of the special available portion of the surviving spouse was extended to the regions of the northern France by Francis II through the *Edit des seconds noces* (Edict of the Second Marriage). Its writer, the Chancellor of l'Hôpital, mentions in the preamble that the widows do not know that they are rather sought for their wealth than for their person, forgetting their natural obligation towards their children, to whom they should be both mother and father. This normative act represents a reaction of the legislator to a famous scandal of the era: Anne d'Aligre, an old widow with seven children, remarried the younger Georges de Clermont, the latter receiving an enormous donation from his new wife[8].

The dispositions of the edict related to the special available portion of the surviving spouse passed in 1580 in the second edition of the Paris Custom, becoming article 279, and at the end of the 18th century this article was also extended to men[9].

2.3. Napoleon's Civil Code (The French Civil Code of 1804)

The special available portion of the surviving spouse appears within the preparing works of the French Civil Code in the third project presented by Jean-Jacques-Régis de Cambacérès in July 1796[10].

Later, in the project presented by Jean-Ignace Jacqueminot in 1798 to the legislation commitee, named by Council of the 500, the article 156 stipulated that „the man or the woman who remarries, having *children or descendants* from a previous marriage can only give the recent spouse a part equal to the *part of the* legitimate *child* who received the least, *and only in usufruct*."

This article was adopted by the Civil Code project editing commission appointed by Napoleon in 1800, becoming article 161. After consulting the courts of appeal, in 1801, the one from Paris presented the following remark: „This disposition seems too harsh; there were taken from the Roman laws the wisdom and equity of the Edict of the Second Marriage […] the conjugal love being equalled to the paternal one. But one should not be put beneath the other, and it is not fair that when the child has his or her own part in property, the spouse has his own in usufruct."[11]

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[3] The Fathers of the Church regarded the second marriage as a „legal prostitution", François Laurent, *Le droit civil international,* tome sixième (Bruxelles: Brulyant-Christophe&C^ie^ Editeurs, 1881), 470.

[4] The early Byzantine legislation (Novel 2.2.1) also stipulated pecuniary sanctions against people who contracted a second marriage (the man risked losing the dowry brought by the first wife and the woman risked losing the *ante nuptias* donations and the ones regarding the marriage received from the first husband, see M. Bérenger fils, *Les Novelles de l'empereur Justinien,* tome premier (Metz: Lamort, Imprimeur, 1811), 19.

[5] C.5.9.3 şi C.5.9.5, see P.-A. Tissot, *Les douze livres du Code de l'empereur Justinien de la seconde édition,* tome deuxième (Metz: Behmer, Editeur-Propriétaire, 1807), 217-220.

[6] *Idem,* 222-228.

[7] Jean-François Gerkens, *Droit privé comparé* (Bruxelles: Larcier, 2007), 71-74.

[8] Marcel Planiol, *Traite élémentaire de droit civil conforme au programme officiel des facultés de droit,* tome troisième (Paris: Librairie générale de droit & de jurisprudence, 1910), 222-223.

[9] See Robert-Joseph Pothier, "Traité du contrat de mariage", in *Œuvres de R.-J. Pothier,* tome troisième, ed. M. Dupin Ainé (Bruxelles: Tarlier, Libraire-Editeur, 1831), 512.

[10] Raymond-Osmin Benech, *De la quotité disponible entre époux, d'après l'article 1094 du Code Civil* (Toulouse: Administration du Mémorial de Jurisprudence, 1841), 68.

[11] *Idem,* 77.

During the year 1803, the new project was discussed within the State Council. In what concerns the special available portion of the surviving spouse, previous to the debates, no innovation intervened but the fact that art. 161 became art. 176.

Within the meeting from 18th March 1803, at the end of it, art. 176 came into discussion. The report records five speeches[12]: (1) Mr. Regnaud observed that this article changed the existent legislation[13]. (2) Mr. Treilhard said that the second part of this article would not be useful unless the goods whose disposition was forbidden would be reserved to the children from the previous marriage. Following this comment, the idea "*and only in usufruct*" was suppressed. (3) Mr. Regnaud observed that the first part of the article, by putting obstacles in the way of subsequent marriages, tended to determine the maintenance of the concubinage between persons who otherwise could not favour each other. (4) Mr. Cambacérès said that the interest of the children from the previous marriage determined the legislator to make a distinction between the two marriages, that it was enough to leave to the person that was remarrying the right to dispose over a child's part, but that he or she could be allowed to give it as a full ownership to the other spouse. (5) Mr. Berlier observed that, by giving the new spouse the right to receive a child's part, even in property, which was reasonable, might have been convenient to slightly modify this norm; because if there was only one or two children from the first marriage, and none from the second, the new spouse could take a half or a third from the heritage, if he was in competition with them. Thus, it would be fair to establish besides this main norm related to the child's part, an exception establishing that this could not exceed, in what concerns the new husband, a certain portion of the inheritance, for example a quarter. Thus, the limit of ¼ represents an innovation of the French Civil Code intended to strengthen the protection of the children from the previous marriage.

The article establishing the special available portion of the surviving spouse was adopted with the amendments proposed by the Consul Cambacérès and Mr. Berlier, six days later, becoming art. 1098, once the project was converted into a law. In its final form, art. 1098 from the French Civil Code provided that „The man or the woman, who, having *children* from a previous marriage, contracts a second marriage or a subsequent marriage will be able to give the new spouse only a portion equal to the *part of the* legitimate *child* who took the least and, by no means, these donations cannot exceed a quarter of the goods".

As the children's faith motivated the appearance of this legal institution, the term "*child*" used throughout art. 1098 of the French Civil Code deserves a special attention. This included not only the first degree descendants, but also the ones of subsequent degree, meaning the grandchildren and great-grandchildren of the deceased.

As we have already seen in the Jacqueminot project, the first part of art. 156 was referring to "*children or descendants*", while the second part was referring to "*the child's part*". The French legislator did not mention in the final draft the structure "*or descendants*", that going without saying that a child's previous death could not fail to offer his or her descendants the protection established by the special available portion of the surviving spouse.

We have to remark that the mention to the term *child* from the *second part of the art. 1098* from the French Civil Code cannot include the descendants, thus "*the child's part*" does not mean the part of the descendent of the subsequent degree (grandchild, great-grandchild). Otherwise, the surviving spouse would have had his or her special available portion exceedingly diminished as a result of its reference not to a child's part, but to a descendant's part when one of the children was previously deceased, but he or she had left children behind, each grandchild receiving a part from a child's part.

The grandchildren came to the inheritance of the ascendant on the basis of art. 739-740 from the French Civil Code (which corresponds to art. 664-665 from the Romanian Civil Code adopted in 1864, later abrogated) and art. 914 of the same code (art. 842 Civil Code 1864) regarding the available portion expressly stated that "*however, they are only taken into consideration for the child they represent*", so the number of grandchildren who came to the inheritance by representation did not influence the part of the surviving spouse as a result of the application of the norm regarding the special available portion[14].

By not referring the special available portion of the surviving spouse to the part of the subsequent degree descendant, it was possible to find ourselves in the situation in which a descendant of the donor could get less inheritance than the surviving spouse. In the event that one of the children was previously deceased but he or she had children, each grandchild would have received a part from the child's part, which meant less than the surviving spouse[15].

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[12] See Pierre-Antoine Fenet, *Recueil complet des travaux préparatoires du Code civil,* tome douzième (Paris: Videcoq, Libraire, 1836), 416-417.

[13] "Existent legislation" meant the transitory legislation after the Revolution from 1789.

[14] See Emile Saintespès-Lescot, *Des donations entre-vifs et des testaments*, tome cinquième (Paris: Auguste Durand, 1861), 616.

[15] Planiol, *Traite élémentaire de droit civil*, 830.

2.4. Alexandru Ioan Cuza's Civil Code (The Romanian Civil Code of 1864)

In what concerns the inheritance, the Romanian legislator from 1864, took up, with some exceptions, ad litteram, the text of the French Civil Code[16], and thus, art. 1098 became art. 939 of the Romanian Civil Code.

According to art. 939 of the 1864 Civil Code: "The man and the woman having *children* from another marriage, will be able to give the new spouse only a portion equal with the legitimate *part of the child* who received the least, and, under no circumstances, the donation should not exceed the quarter of the goods." [17]

The explanations based on the term "child" used throughout the article 1098 of the French Civil Code are thus valid also for the article 939 of the Civil Code from 1864. The same, by "*the part of the child*" it is not intended the part of the subsequent degree descendant.

In the same sense, it was also opined in the Romanian doctrine from the beginning of the last century[18], even though the Romanian legislator from 1864 did not take up the stipulation from art. 914 from the French Civil Code related to the available portion in art. 842, mentioned above[19].

This specification can be found in Carol II's Civil Code (adopted in 1940, but never entered into force), which, in the section dedicated to the available portion, in art. 1064 stipulated that the children who came by representation "are taken into consideration only for the one that they represent in the deceased's inheritance"[20].

Summarizing the above mentioned, as an intermediate conclusion, we could say that in the term "children", mentioned in the first part of the law, there were also included his or her descendants both in art. 1098 from the French Civil Code, as well as in its correspondent, art. 939 from the 1864 Romanian Civil Code.

Also, the child's part compared to the special available portion of the surviving spouse was the child's part – the first degree descendant – who inherited the least, not the part of a subsequent degree descendant who would have come to the inheritance by representation, the children's descendants being taken into consideration only for the stem they represented.

Thus, the special available portion of the surviving spouse was determined in relation to the stems by which the inheritance was divided, which meant in relation to the stem that had received the least, not in relation to the descendants (the branches) that the surviving spouse was actually competing with.

3. Present-day configuration of the special available portion of the surviving spouse in the Romanian Civil Code

Nowadays, the article 1090 of the New Civil Code regulates the special available portion of the surviving spouse, a legal institution that as we saw above has passed the test of time.

Although the 2004 draft of the new Civil code failed to mention it, the Amending Commission (re)introduced the special available portion of the surviving spouse in competition with the children resulted from a previous relationship of the deceased spouse through art. 829^2, which, by renumbering, became art. 1090 of the Civil Code.

According to the first paragraph of the article 1090 from the Civil Code: "The unreportable liberalities granted to the surviving spouse, who comes to the inheritance in competition with *other descendants than the ones they have in common*, cannot exceed a quarter of the inheritance or *the part of the descendant* who received the least."

In motivating the (re)introduction of the special available portion of the surviving spouse the Amending Commission[21] limited its action to mentioning that "Art. 829^2 regulates the special available portion of the surviving spouse, which, nowadays, can be found in art. 939 of the 1864 Romanian Civil Code.

This institution, whose purpose is to protect the children (or other descendants) from the previous marriage of the deceased in competition with the surviving spouse, as a result of the transformation of the reserved portion calculation system, the ordinary available portion that would be on the benefit of the latest spouse would be too large in the absence of a

[16] Mircea-Dan Bob, *Probleme de moşteniri în vechiul şi în noul Cod civil (Inheritance issues in the old and the new Civil Code)* (Bucharest: Universul Juridic, 2012), 31.

[17] For details regarding the translation error: „*the part of the legitimate child*" vs. „*the legitimate part of the child*" and the implications in what concerns the method of calculation of the special available portion of the surviving spouse, see Mircea-Dan Bob, „Cotitatea disponibilă a soţului supravieţuitor în concurs cu copiii dintr-o legătură anterioară a defunctului (Special available share of the surviving spouse in competition with the children resulted from a previous relationship of the deceased spouse)", in *Revista de ştiinţe juridice (Journal of Law Sciences)* 1 (2013): 63-65.

[18] „The descendants are only taken into consideration for the respective stem that they represent, according to art. 667", Constantin Hamangiu, Ion Rosetti-Bălănescu and Alexandru Băicoianu, *Tratat de drept civil român (Treatise on Romanian Civil law)* (Bucharest: ALL Beck, 1998), 430.

[19] „Although the words *néanmoins*, etc. were erased from art. 914 Nap. C. however the norm that the descendants of a child are only taken into consideration for this child applies with no difficulties", Constantin Nacu, *Comparaţiune între Codul civil român şi Codul Napoleon (Comparison between the Romanian Civil code and Napoleon's Code)* (Bucharest: Leon Alcalay, n.d.), 377.

[20] Ministerul Justiţiei, *Codul civil Carol al II-lea – ediţie oficială (Carol II's Civil Code - official edition)* (Bucharest: Monitorul Oficial şi Imprimeriile Statului, 1940), 210.

[21] This document was available at this address: http://www.just.ro/.

special limit. In editing this text, there were taken into consideration all the criticisms of the doctrine related to the current article 939 of the Romanian Civil Code from 1864."

Although the last part of the text stipulates that the members of the commission would have had in mind all the complaints of the doctrine related to the form of the regulation of the special available portion of the surviving spouse, however, the justification to maintain this institution, namely that "the ordinary available portion that would be on the benefit of the latest spouse would be too large in the absence of a special limit", is reproduced *ad litteram* after a *de lege ferenda* proposal of the professor Francisc Deak[22].

Comparing the version from 1864 to the present one, we notice that the legislator has replaced the structure "*children from another marriage*" with the structure "*other descendants than the ones they have in common*", modification that is fully justified since, in the doctrine, it was unanimously admitted that the meaning of children should not be restricted to the first degree descendants, but it should refer also to the ones of subsequent degrees[23].

However, what strikes is the replacement of the structure "*child* who received the least" with the structure "*descendant* who received the least". This transformation cannot be considered one with implications only on the form of art. 939 of the Romanian Civil Code from 1864, although from the motivation mentioned above it seems to result that there were no changes in what concerns the substance of the special available portion of the surviving spouse. In addition, we could not identify, in the doctrine, any *de lege ferenda* proposal that would have had as purpose the restriction of the special available portion in the hypothesis of the competition between the surviving spouse and at least two descendants who come to the inheritance by representation of the same child of the deceased.

If we were to interpret *ad litteram* the art. 1090 of the new Civil Code, we would find ourselves in the situation in which the surviving spouse, in competition with the descendants of the deceased's children, would be in the position to beneficiate from a special available portion a lot smaller than the one stipulated in the Civil Code from 1864, because, according to the new provision, his or her special available portion would be calculated not in relation to the stem (child) that received the least, but in relation to any descendant's part who received the least.

As we have mentioned above, the part of a grandchild who comes to the inheritance by representation together with his or her brothers/sisters is a part of a child's part (in this case, the grandchild's part is a fraction of the part of the stem the grandchild represents), which, implicitly, leads to the reduction of the special available portion of the surviving spouse, as opposed to the case in which the surviving spouse would be in competition with only one grandchild who comes by representation (in this case, the grandchild's part is equal with the part of the represented stem).

This innovation of our legislator is reflected in doctrine by two opinion trends. One of the opinions claims that "the term «the part of the descendant who received the least» designates the reserved portion of each descendant, calculated according to the dispositions of art 1088 NCC"[24], which implies referring the special available portion of the surviving spouse to the reserved portion of whichever descendant received the least, so not only the reserved portion of the child who would have taken the least, but including the reserved portion of the grandchild who would not come alone by representation on the same stem and would receive less than any other children or grandchildren of the deceased.

The other opinion claims that "the part of the descendant who received the least" should have sounded like this: «the part of the child who received the least from the inheritance»"[25]. Therefore, the descendant means only the child (the stem) and not the ones who come to the inheritance by his or her representation (the branch). If under the influence of the 1864 Civil Code the doctrine enlarged the concept of "child" from the first part of the article, to include the subsequent degree descendants, this time, the same doctrine replaces, in the second part, the term descendant with the one of child, although they are not equivalent, but they have different coverage.

A plausible explanation of this innovation is that the members of the Amending Commission extended the meaning of the term "children from another marriage" (descendants of any degree) also to the second part of the article which mentions "the legitimate part of the child who received the least" (first degree descendants) by mistake. The commission, after deciding that it would be more appropriated that instead of "children from another marriage" the new structure should be "other descendants than the ones they have in common", probably did not notice that the term "child" did not

[22] See Francisc Deak, *Tratat de drept succesoral (Treatise on succession law)* (Bucharest: Universul Juridic, 2002), 321, n. 2.

[23] *Idem*, 321.

[24] See Codrin Macovei, Mirela Carmen Dobrilă, „Art. 1090. Cotitatea disponibilă specială a soţului supravieţuitor" (Art. 1090. Special available portion of the surviving spouse), in *Noul Cod civil: comentariu pe articole (The New Civil Code: comments on articles)*, coord. Flavius-Antoniu Baias et al. (Bucharest: C.H. Beck, 2014), 1191.

[25] See Dan Chirică, *Tratat de drept civil: succesiunile şi liberalităţile (Treatise on civil law: successions and liberalities)* (Bucharest: C.H. Beck, 2014), 921.

have a unitary meaning in art. 939 of the Civil Code from 1864, but it had a wider meaning in the first part and a more restricted meaning in the second, and replaced the term "child" with that of "descendant" even in the second part of art. 1090 of the new Civil Code.

4. **The relation between the special available portion of the surviving spouse and the succession by representation of the deceased's descendants in the** Romanian Civil Code

As we saw above, by interpreting *ad litteram* the art. 1090 of the Civil Code, we could find ourselves in the situation in which the surviving spouse, in competition with the descendants of the deceased's children, would risk to beneficiate from a special available portion a lot smaller than the one stipulated in the Civil Code from 1864.

However, we must bear in mind that the grandchildren and great-grandchildren usually come to the inheritance by right of representation regulated in the art. 965 of the Civil Code. According to the latter article, a legal heir of a more distant degree of kinship, for instance the child of the deceased's child (second degree descendant), will collect the portion of the estate that would have been due in our example to the deceased's child (first degree descendant) if he or she had not been unworthy toward the deceased or deceased at the date of the opening of the inheritance.

On the one hand, the representation is a legal institution devised by the legislator "to neutralise the effects of abnormal events that occurred within a family (death of children before their parents, perpetration of serous offenses punishable by unworthiness etc.), so that, from the legal view point, none of the innocents be affected"[26] and, on the other hand, the descendants who come by right of representation should collect only the portion of the inheritance that would have been due to the represented legal heir if he or she had not been deceased or unworthy toward the deceased. Furthermore, due to the proximity of the degree of kinship[27], in the absence of the representation, the abnormal chorology of deaths or the unworthiness, would have removed the descendants of a more distant degree of kinship.

Thus, the subsequent degree descendants (for instance the grandchildren of the deceased) should receive and divide among them *no more* than would have received their parent (the child of the deceased) had he or she been alive or worthy at the date of the opening of the inheritance, regardless of the fact that they come to the inheritance together with or without the surviving spouse.

The expression "*descendant who received the least*" should be interpreted as the *child* – the first degree descendant – who inherited the least or would have inherited the least had he or she not been deceased or unworthy toward the deceased, but he or she had left children behind, at the date of the opening of the inheritance.

Consequently, despite the Romanian legislator's poor editing of the regulation regarding the special available portion of the surviving spouse, no surviving spouse should undergo an unjustified limitation of his or her special available portion by extensively interpreting the term descendants in the second part of the art. 1090 from the new Civil Code. As we already mentioned, the special available portion of the surviving spouse should be determined in relation to the stems (children) by which the inheritance is divided, which means in relation to the stem that had received the least, not in relation to the descendants (branches) that the surviving spouse is actually competing with.

5. Conclusions

As the aim pursued by the legislator through the regulation of the special available portion of the surviving spouse was that of re-establishing an equity situation, the norm having a protection purpose for the children of the deceased, we have to express our objections towards its poor editing. As a result of the replacement of the term "child" with that of "descendant" in the second part of the article 939 of the Civil Code from 1864 (art. 1090 from the new Civil Code) it could practically reach an unjustified restriction of the surviving spouse's rights.

It would be unfair that determining the special available portion of the surviving spouse should depend on the survival of those children of the deceased, who had more than one child. So, it would be inequitable that the surviving spouse, in competition with the children of the deceased should beneficiate of a bigger special available portion, but in competition with grandchildren should have a smaller available portion.

At the moment, it cannot be said that the new legal dispositions related to the special available portion of the surviving spouse would have beneficiated of a lengthy and repetitive application, to create a specific uniform practice in order to facilitate their understanding. As a result, we consider being necessary that at the enforcing of the norm from the article 1090 from the Civil Code to be taken into consideration the fact that, through a unitary interpretation of the term "descendants"

[26] Radu-Romeo Popescu, „Efectul particular al reprezentării succesorale în noul cod Civil (The Particular Effect of Inheritance by Right of Representation in the New Civil Code)", in *In honorem Corneliu Bîrsan*, ed. Adriana Almăşan (Bucharest: Hamangiu, 2013), 231.

[27] For details see, Ioana Nicolae, *Drept civil. Succesiuni. Moştenirea legală (Civil law. Successions. Legal inheritance)* (Bucharest: Hamangiu, 2014), 95-96.

extensively, it might reach the unjustified reduction of the special available portion of surviving spouse. Consequently, the purpose of the norm, that of (re)establishing an equity situation among the different categories of heirs, would be evaded, and that could be seen as a penalty in what concerns the surviving spouse.

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STATUTORY CANCELLATION OF THE LEASING CONTRACT - CONDITIONS AND EFFECTS

Raluca Antoanetta TOMESCU[*]

Abstract

The leasing contract termination by cancellation may have both a conventional (commissioria lex) and a legal nature. The legislature has stipulated in the leasing operations governing rules a number of cases in which the parties are entitled to request the contract cancellation but, these not being limiting, in the contract can also be inserted other clauses, according to the parties' interests, which will result in the contractual relationship termination by cancellation. The contract cancellation will take effect only for the future (ex nunc), so the analysis of the conditions under which the cancellation can be declared and the effects this decision will produce, are of special importance in view of carrying out the leasing operations.

Keywords: *leasing contract, cancellation, sponsor, user.*

The business world's economic activities development and evolution have imposed the development of some techniques and concepts which led to the emergence of new commercial contracts. So we are witnessing a continuous multiplication and diversification of the commercial contracts that the individuals and/or entities conclude between them.

The leasing contract, along with the contractor/construction – assembly contract, franchise and factoring contract, international tourism contract, is part of the international complex contracts group. From the legal realities of the international trade, the leasing proved to be the most important means of financing investments in goods and services. Taken from the western practice and treated with the specific superficiality, the leasing contract still managed as in Romania during 2005-2010, to impose through an expansion worth taken into account, only as ambiguous, poorly substantiated and unclear law to leave room to countless abuses, which led in the coming years to the multiplication – otherwise justified – of the big number of lawsuits pending in courts.

In essence, through a leasing contract, an individual or an entity resorts to a specialized institution for full financing, for the procurement of a movable or immovable asset, afterwards though the payment of some royalties to benefit from his right to use it, with the option that, upon the termination of the leasing contract, subject to the compliance of all the contractual obligations, he will become the owner of the asset. Until the payment of all the contractual obligations, the sponsor company will remain the owner of the asset.

The leasing contract is a bilateral legal act, for consideration, with patrimonial content, consensual, synallagmatic and commutative, with successive execution. By the Government Ordinance 51/1997, the leasing contract has become a typical contract (named).[1]

The cancellation is the most drastic sanction that could arise in the synallagmatic contracts with successive performance, for the culpable noncompliance by one of the parties, with the obligations under the contract. This right rests only on party which has carried out its contractual obligations, subject to the enforcement[2] cancellation (article 1549 of the Civil Code) and will take effect only in the future (ex nunc), resulting in the contract dissolution from the date of its declaration.

By the legislation standards, (only) to the sponsor is being recognized, by the legislature, through an enumeration that wishes not to be exhaustive, the right to cancel the leasing contract, in the following cases:

a) **If the user refuses to receive the asset at the deadline agreed with the supplier or stipulated in the leasing contract** (article 14 paragraph 1)[3].

Of course the sponsor will benefit from this right only if the refusal came from the user is not justified. The user has, therefore, by the arrangement with the supplier or by the terms of the leasing contract, the obligation to receive the asset on a determined date, if the asset meets quantitatively and qualitatively. If they fail to meet this obligation, the

[*] PhD in progress, "Nicolae Titulescu" University, Romania, address: 185 Calea Vacaresti, Bucharest 040051, Romania (phone: +4073101.86.90, e-mail: **ratomescu@gmail.com**).

[1] Dorin Clocotic, Gheorghiu Ghe., Operatiunile de leasing, Publishing House Lumina Lex 2000, page 57.

[2] Article 1549 - Law to resolution or cancellation: "(1) *If not requiring the contractual obligations enforcement, the creditor is entitled to the contract rescission or, where appropriate, termination, as well as damages, if entitled*".

[3] "ARTICLE 14 - (1) *If the tenant / user refuses to receive the asset at the deadline agreed with the supplier and/or in the leasing contract (...), the owner / sponsor has the right to cancel the leasing contract with damages*".

sponsor may, under the law, declare the cancellation of the leasing contract and also seek damages from them according to the common law[4]. The sponsor, however, can opt out of this right and can require the contract execution by the user, forcing him to the reimbursement of the costs incurred with the storage and upkeep of the asset over the period stipulated in the contract[5].

I believe that the user too should have benefited from the cancellation right with damages if the asset is not delivered in the period agreed upon or does not correspond ethnically or qualitatively. The user thus', even if he does not enter into possession of the asset in the period agreed upon, by the convention concluded with the sponsor, will be required to pay leasing rates for an asset not in his possession. Moreover, according to the ordinance, by the advance payment, which generally is not negligible, he will block an amount of money in the sponsor's account. Of course this would be more difficult to achieve in practice, because the cancellation may be declared in relation to the sponsor, and the damages payment in report to the supplier. Precisely for these reasons the legislator, notwithstanding the principle of contracts' relativity, has provided the user's right of direct action on the supplier (article 12 of the Government Ordinance 51/1997), the sponsor being expressly exonerated from any liability (article 14, paragraph 2 of the Government Ordinance 51/1997);

b) **If the user fails to fulfill its leasing rate payment obligation for two consecutive months.** (article 15 of the Government Ordinance 51/1997)[6].

It is possible that, for various reasons, the one that uses the asset (the user), property of the leasing company, during the contract, cannot pay the leasing installments, according to the planned staging determined at the time of signing the contract. In these circumstances, most often the sanction of the leasing contract cancelling occurs, which has an immediate effect the sponsor's right to repossess the asset, and to head against the debtor for the damages' recovery. Only the fulfillment of the pecuniary obligations, to which the user was obliged by the leasing contract, in the amount negotiated and on the set deadlines, will allow him to benefit from the use of the asset. If the user does not respect this obligation, the law allows the sponsor to declare the cancellation of the leasing contract (article 15, Government Ordinance 51/1997). The declaration of the leasing contract cancellation by the sponsor, for non-payment of the due installments by the user, will oblige the debtor to the return of the asset and the payment of the due installments. The legislature, to defend the interests of the creditor, granted to the leasing contract the enforceable benefit (article 8, Government Ordinance 51/1997[7]).

Therefore, we retain that upon the leasing contract cancellation for non-payment, the parties will have the following duties:

- The user will have to return the asset, naturally because he is not the owner of the leased asset, but only a regulator of the right to use, the asset will have to be returned to its rightful owner;
- The user is required to pay the amounts due until the cancellation date, amounts actually representing the asset's use value and that the user owes to the sponsor until the contract termination, by default the termination of the right to use, by virtue of the leasing contract cancellation. This fact represents a certain, liquid and due claim.

I think that, clearly, the Ordinance text does not refer in any case to the sponsor's right to enforce, after the cancellation statement date, through the enforceability power of the leasing contract, the return of the asset or recovery of the claim, as we commonly find in the leasing companies' practice. The confusion appears, willingly or not, from the broad and erroneous interpretation of the law text, because the ordinance makes strict reference to the amounts owed, until the date of cancellation, which also results in the obligation of the asset's restitution, amounts that were negotiated and inserted in the contract signed by the parties and representing a use the user benefited from until the contract cancellation date. Through a dubious interpretation, in my opinion, the sponsor shall prevail, after the contract cancellation, of the benefit conferred to the leasing contract by article 8 of the Government Ordinance 51/2006, that of writ of execution[8].

Although in the law we meet countless cases where the courts have declared enforceable cancelled leasing contracts, I believe that in legal terms it is virtually impossible. By cancellation, the creditor waives the benefit conferred by the leasing contract enforceability power, since it practically does not exist anymore, by cancellation of the contract, not producing effects for the future

[4] Stanciu Carpenaru, Tratat de Drept Comercial Român, Publishing House Universul Juridic 2014, page 598.

[5] Gabriel Tita-Nicolescu, Leasing, Publishing House C. H. Beck , Bucharest 2006, page 229.

[6] ARTICLE 15 - *If the contract provides otherwise, if the tenant / user does not perform the obligation to pay the full the leasing rate for two consecutive months, calculated from the due date specified in the leasing contract, the owner / sponsor has the right to cancel the leasing contract, and the tenant / user is obliged to return the asset and pay all the amounts due, until the return date under the leasing contract.*"

[7] "Article 8. – *The leasing contracts, as well as the real and personal guarantees, set up to guarantee the obligations under the leasing contract, are writs of execution*."

[8] "*The contract, being canceled, the issue arises whether the debtor still owes to the creditor the due monthly installments until the date of cancellation, as requested. The court considers that no, since a request to that effect by the creditor is equivalent to a contract performance given that the creditor itself chose to abolish it. Therefore, if the creditor has chosen to abolish the Convention, it can only require from the debtor damages, damages that must, of course, be proved."* Civil Sentence no. 1332/07 April 2010 pronounced by the Court Vaslui in the archive no. 1610/333/2010.

anymore, from the date on which it was declared[9]. So if the user refuses to voluntarily hand over the asset or to pay the due and unpaid installments accrued until the cancellation date, the sponsor will only have available the common law. The sponsor, however, may waive its right to demand the contract cancellation; he may require the contract performance by the user, also forcing him to pay damages for the late performance of his obligations, over the period stipulated in the contract, taking advantage of the enforcement benefit conferred by the leasing contract law. So if the sponsor will choose to keep the contract, he will benefit from its power of enforcement, the asset will remain in the user's possession and the sponsor will be able to execute according to the title held the entire value of the leasing contract, less the residual value, I consider, because until its payment the user has the option right on the purpose the leasing contract will take[10].

c) **If the user is in a state of statutory reorganization and/or bankruptcy** (article 14 paragraph (1) thesis II)[11]. So if, during the execution of the leasing contract, the user is in a state of reorganization or bankruptcy, the sponsor has a right of option between declaring the contract cancellation with damages, registering in the list of creditors or demanding the asset from the debtor[12].

If the sponsor will opt for the contract's cancellation, as provided by the Law 85/2014, article 123, paragraph 1[13], he will have to notify the legal administrator / legal liquidator, in the first 3 months after the initiation, with the intention to terminate the contract. The legal administrator / legal liquidator has the right, within 30 days of receiving the notification, to oppose the leasing contract cancellation, if he decides that the assets covered by the leasing contract are required from the debtor to continue and recover his activity. If he does not send a reply within the period stipulated in the law, the contract is considered terminated, its execution unable to be requested anymore. According to the insolvency regulatory rules, in the event that the leasing contract will be cancelled at the donor's will, he has the possibility to choose between:

- The transfer of ownership to the user, acquiring a legal mortgage on that asset of equal rank with the leasing operation. It will also be registered in the list of creditors with the invoiced amounts and unpaid by the debtor (including their accessories), and with the remaining amount to be paid under the contract, but that will not exceed the market value of the asset determined by an independent assessor.
- The recovery of asset and the registration in the list of creditors with the value of the due invoiced rates value and unpaid by the debtor at the opening of the procedure (including their accessories), and with the remaining amounts to be collected from the leasing contract, from which the market value of the recovered asset will be decreased. The asset value will be determined by an independent assessor.

The new law of insolvency entitles the legal administrator / legal liquidator to unilaterally terminate any leasing contract, if this is in the interest of maximizing the debtor's estate (Law 85/2014, article 123, paragraph 12) or to request the sponsor to maintain the contract, undertaking to specify quarterly in the activity reports if the debtor has the funds necessary to cover the claims arising from the contract execution.

Thus, I conclude that, although by the provisions of the ordinance, only the sponsor has the right to cancel the leasing contract, in conjunction with the provisions of the Civil Code (article 1549) and with the provisions of the Law on insolvency prevention procedures and on insolvency procedures, remains to be appreciated the legislature intention that, by related laws, restores the contract equilibrium. Thus', we retain that, by opting for cancellation, the creditor practically abolishes the enforcement that is the leasing contract, having only available the common law.

Because of the unusual and highly complex character of the leasing contract, and the lack of a clear legislation in this field, the leasing characters are subject to numerous personal interpretations,

[9] The same solution has been retained in the specialized legal literature. Thus, in the work of the industrial, commercial and real estate leasing developed in the Enterprises Law Centre of the University of Lausanne is considered as in case of leasing rates non-payments by the user, the sponsor can choose one of the following options: 1) to request the contract enforcement, demanding payment of the unpaid lease leasing rates; 2) to maintain the contract in force, giving up further claims and demanding damages; in this case he resumes the asset and puts it on sale, requesting from the user the unpaid rates value, with penalties plus the not due rates, from which decreases the net value resulted from the sale of the asset; 3) the cancellation of the contract with damages. Gabriel Tita-Niculescu - Leasing, Publishing House C. H. Beck, 2006, page 208.

[10] Tomescu Raluca, Conditii şi efecte ale pactului comisoriu in contractul de leasing, Perspectives of Business Law Journal, Volume 4, Issue 1, 2015.

[11] Article 14. - *(1) if the tenant / user (...) is in a state of reorganization and/or bankruptcy, the owner / sponsor has the right to cancel the leasing contract with damages.*

[12] Piperea Gheorghe, Drept Comercial - Volume II, Publishing House C. H. Beck, Bucharest 2009, page 115.

[13] Article 123 - "*The legal administrator / legal liquidator must respond, within 30 days of receipt, to the contractor notification, formulated in the first 3 months after the initiation, by which he is required to terminate the contract; in the absence of such a response, the legal administrator / legal liquidator may no longer demand the contract execution, being considered terminated. The contract is considered terminated:*

a) on the expiration of a period of 30 days from the contractual request receipt on the contract termination, if the legal administrator / legal liquidator does not respond;

b) on the date of the termination notification by the legal administrator / legal liquidator".

thus generating a large number of litigations. It is quasi known, or if not, can be verified with a minimum diligence, that the most common disputes arising in the legal practice, in the field of leasing, are generated by the leasing contract cancellation for non-payments. So I considered it appropriate to stop on this issue so controversial lately with the purpose of consolidating the leasing concept and developing a theoretical and methodological knowledge and understanding frame of it.

Perhaps because of the thorough ignorance of the international private law legislation, and also perhaps because of the support some leasing companies enjoyed before the Romanian legislature, I believe that currently the entire Romanian leasing legislation should be reviewed.

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CONSIDERATIONS REGARDING THE SUSPENSION OF THE ENFORCEMENT

Nicolae-Horia ŢIŢ*

Abstract

The enforcement procedure is conducted from the time the enforcement body is seized by the enforcement officer, in order to comply with the provisions of the enforcement order, until the completion of the claim, with its accessoriesthereto, and the recovery of the costs of enforcement. The procedure involves a succession of acts, carried mostly by the enforcement officer. The continuity of the procedure may be affected by certain incidents leading to his timing. Among them, the situations ofenforcement suspension are generally determined by reference to their causes, respectively to the provisions of the law (in relation to specific acts or legal facts that occurred during the enforcement), the will of the creditor or the disposal of the court, at the request of the interested party. The analysis of the causes of suspension is important, in order to establish how they operate in concrete, as well for determining the effects that they produce.

Keywords: *Enforcement, suspension, bail, opposition to enforcement.*

1. Introduction

The suspension of enforcement is one issue that concerns both practitioners, theorists of law, particularly in regard to the regulations included in the new Civil Procedure Code (CPC). Like any procedural matter, the enforcement, perceived as a branch of civil procedural law, analysis the conditions and the terms in which procedural acts must be fulfilled during a procedural activity. Defining the enforcement as an procedural activity through which are achieved the provisions of theenforcement title and transporting these features upon the scholar method which is specific to civil procedural law, we conclude that, in the research onenforcement procedure, we must focus on the formal elements of the acts executed by the parties, on the enforcement bodies, on the enforcement court and on other participants, in order to determine their specific characters and to identify the effects they produce. The suspension of enforcement is an institution with multiple valences, as it can be determined by different reasons. In other words, the suspension has different sources, which prints different characteristics: in some cases, the suspension operates *ope legis*, in others, it is the result of the will of the parties or of one party, and in other cases it has a judicious character, being pronounced by the judge at the request of the interested party or parties, as a result of a analysis involving both formal and substantialcriteria. Therefore, examining the issue of suspension of enforcement is important for at least two perspectives: a practical matter, given the effects that the suspension produces in regard to performingthe enforcement, being necessary to establish the conditions in which it operates and in particular the extent of the effects it produces; in terms of theory, as an institution of procedural civil law which requires conceptualization and classifications expressed in such manner that the knowledge would be easier to achieve.

Given the foregoing facts, we aim in this study to accomplish a brief analysis, but as complete and effective as possible, of the types of enforcement suspension, based on their classification in cases of *ope legis* suspension (legal), voluntary and judicial (optional). We intend to establish, firstly, their applicability in relation to the procedural rules applicable tothe procedural activity of enforcement and to determine the characteristics of each type of suspension separately. Nevertheless, we intend to evaluate a series of doctrinal and jurisprudential views in relation to the suspension of enforcement, bringing arguments in support of some of them and making, where casual, *de lege ferenda* proposals. Therefore, we shall make a brief presentation of the institutions presented and we shall seek to individualize the criteria of classification which makes possible understanding and analyzing the issues that we consider relevant in respect to each case of enforcement suspension.

The suspension of enforcement is one issue addressed consistently and carefully in the doctrine elaborated under both the previous Civil Procedure Code and the new Civil Procedure Code. Matters relating to the suspension of enforcement were analyzed and discussed both in courses or thesis, as well as in monographies dedicated, especially, to the opposition to enforcement or in articles written in regard to the issue of suspension. The authors` attention was concentrated mainly on the issue of judicial suspension of enforcement (optionalsuspension), taking into account the procedural characteristics of this category of suspension. Also, as we shall point out in the article,

* Lecturer, PhD, Faculty of Law, "Alexandru Ioan Cuza" University of Iași (e-mail: **horia.tit@gmail.com**).

two currents of opinion that have been outlined concerning the extent of the effects of admittingthe application ofenforcement suspension,respectively if it has effects until the settlement of the suspension infirst instanceor until the opposition to enforcement is finally settled.

2. Ope legis suspension of enforcement

The law provides certain situations in which the enforcement can not continue because of the occurrence of certain impediments or incidents during the enforcement or of the need to perform acts of enforcement in compliance with the terms and conditions provided by the law. Thus, we identify two broad categories of causes for legal suspension of enforcement: those concerning the need to grant the debtor a period of time in order to achieve or willingly execute the obligation provided in the enforcement title and those which regard the occurrence of unforeseen situations which make the enforcement impossible to continue at least until other formalities would be fulfilled in this respect. Also, must betaken into consideration certain situations in which the law provides suspension cases to protect the debtor, namely to ensure hismeans of living or a decent living.

Thus, a first case of legal suspension of enforcement could be considered the one which regards the fulfillment ofenforcement acts until the date set by the law in which the ordered debtor must execute its obligation (art. 668 CPC). The term prescribed by the law in this respect is prohibitive (delaying) for the creditor and for the enforcement officer, meaning that until its fulfillment,acts of enforcement on the debtor's assetscould not be carried out. However, proceeding formalities can be brought out [e.g., in the procedure for enforcement of real estate, the enforcement officer may issue situation -minutes according to art. 829 par. (1) CPC and before the expiry of the 15 days term provided by art. 820 C.proc.civ, because it only determines the initiation of the sale, according to art. 835 CPC, not the pre-sale formalities]. The violation of the prohibition of carrying out enforcement activities within the period set by the law and which starts to run from the notification to the debtor, attracts their unconditional nullity (art. 176 point 6 CPC), which does not intervene *ope legis*, but only at the request of interested party [art. 185 par. (2) CPC], the procedural means provided by the law in this respect being the opposition to enforcement.

A similar situation is that of suspension of enforcement, for a period of six months, if the debtor is anpublic institution or authority and the enforcement can not start or continue due to the lack of funds (art. 2 and art. 3 of Ordinance no. 22/2002 on the payment obligations of public institutions, established by enforcement titles). The 6-month period begins on the date that the debtor has received notice to pay which is submitted by the competent body ofenforcement, at the request of the creditor [art. 2, second sentence of O.G. no. 22/2002]. In case the public institutions do not fulfill their obligation to pay within this period, the creditor may request an enforcement under the Code of Civil Procedure and / or under other applicable legal provisions. The 6-month is a legal term and has prohibitive (delaying) nature [art. 185 par. (2) CPC], meaning that until its expiry it is forbidden to carry out acts of enforcement on the assets of the debtor – public institution or authority. However, the creditor and the debtor may agree on another period than the 6 months term, as well as on some other obligations set bythe enforcement title(art. 5 of O.G. no. 22/2002). The 6-month term has effects only if the obligation can not be accomplished due to lack of funds. Where, for good reasons, the debtor institution can not fulfill its obligation within the six months required by law, it may request the court to grant, under the law, a period of grace and / or to set deadlines for payment by installments of this obligation [art. 6 para. (1) O.G. no. 22/2002]. In cases where the payment obligation is determined by final judgment, the debtor institution can apply for an additional grace period or for a payment by installment to the court which has pronounced the judgment [art. 6 para. (2) O.G. no. 22/2002]. If the payment obligation is determined by an enforcement title, other than a judgment, the application shall be settled by the competent enforcement court [art. 6 para. (3) O.G. no. 22/2002][1].

Another case of legal suspension regards the enforcement procedures of money provided by court judgmentscovering the grant of rights of salary nature set for the public sector employees, which became effective until December 31, 2011 [art. 1 para. (2) O.U.G. no. 71/2009 on the payment of money provided in enforcement titles regarding rights of salary nature ofpublic sector employees], until the terms of para. (1) art. 1 of the same law are fulfilled.

The Code of Civil Procedure regulates the following situations of legal suspension of enforcement occurred as a result of incidents during enforcement: the suspension enforcement until the appointment of representatives or legal guardian of the debtor`s heirs, if among them there are minors or persons under interdiction, or, where appropriate, until is appointed a special guardian under art. 688 par. (3) CPC;the suspension of enforcement for a period of 10 days from the date the debtor's successors accepting the successionwere informed on the continuation ofenforcement, where the death

[1] N.-H. Țiț, *Executarea silită, partea generală*, București: Hamangiu, 2016, pp. 260-261.

occurred after the commencement of the enforcement (art. 689 CPC);the suspension of issuing/distributingthe priceof the sale of the debtor's pursued assets, if the debtor or a third party guarantor submitted the money with special destination and proves that filed, within the legal term,an opposition to enforcement and it is opposing to the issue/distribution of money [art. 721 par. (4) CPC]; suspension of pursed movable goods, if the debtor is filing with special destination and makes opposition to enforcement [art. 751 par. (1) pt. 2 CPC]; suspension of the pursuitmortgagedreal estate which is subsequently alienated, if the acquirer, which is personally obliged for the mortgage, opposesto the sale of the mortgaged property if other assets remained mortgaged in the possession of the principal debtor [art. 817 par. (2) CPC]; suspension of pursued real estate property regarding which the seller has, under the law, legal mortgage and the right to request or declare rescission for failure to pay the price, if he has declared action in rescission during the enforcement or declares unilateral rescission or when the action in rescission for nonpayment of the price was brought prior the commencement of the forced pursuit, provided that it was noted in the land evidences [art. 841 par. (4) and (5) CPC]; suspension of payment of the claim or part of the contested claim, in case of anopposition against the proposed distribution [art. 876 par. (3) CPC]. Additional to these situations governed by the Code of Civil Procedure, we mention the case of suspension ofenforcement against the professionaldebtor's estate in case of opening of insolvency proceedings [art. 75 para. (1) of Law no. 85/2014 on prevention procedures of insolvency and insolvency][2].

The third category of situations is represented by cases of suspension which are based on the protection of the debtor, in order to grant his income for ensuring his and his family's needs, namely to ensure a home during the winter months. Thus, the Code of Civil Procedure provides the suspension of enforcement throughout garnishment, if it is imposed on amounts related to future salary rights, suspension operating for a period of three months from the establishment of garnishment [art. 781 par. (5) c) CPC]. If upon the same account are set up more garnishments, the period of three months in which payments offuture salary rights are made is calculated only once, from the time of establishing the first garnishment [art. 781 par. (5) c) the second sentence CPC]. Regarding the other case, the law provides that direct real estate enforcement (evacuation) is suspended on buildings used as home, between December 1st to March 1st [art. 896 par. (1) first sentence CPC]. However, evacuation could be carried out during this period if the creditor proves that, according to the housing legal provisions, he and his family have not an adequate home or that the debtor and his family have another suitable home where they could move immediately [art. 896 par. (1) second sentence], as well as the case in which the evacuees occupied abusively, *de facto*, without any title, the real estateor in regard to whom the evacuation has been ordered because they endanger the relations of coexistence or disturb seriously the public peace.

3. The voluntary suspension of enforcement

The voluntary suspension of enforcement intervenesat the request of the creditor [art. 701 par. (2) CPC]. As an expression of the principle of availability, the creditor may require suspension at any time, this measure being ordered by the enforcement officer throughdismissal. The enforcement officer could not refuse to take note of the suspension, as the text of the law does not confer his a right to assessment of the opportunity of the suspension, reported to the time that it occurred in the stage of enforcement or on other facts[3]. However, the suspension of the creditor's request can not affect the rights of others in the enforcement proceedings in relation to the provisions of art. 625 par. 1 C.proc. civ., on the principle of legality of enforcement. According to it, the enforcement is fulfilled in compliance with the law, the rights of other parties and other interested persons. For example, in the tender procedure regarding real estate, once theauction has been opened, the creditor can no longer require the suspension because it would affect the rights of tenderers who have paid the participation guarantee and submitted tenders in this regard (art. 844 par. 1 final sentence CPC). The suspension after this point would appear as an abuse of the right to dispose of enforcement activities (art. 12 par. 1 C. proc.civ.), for which, under his active role, the enforcement officer shall proceed with the auction and the creditor may file an opposition to enforcement[4].

Even if the provisions of art. 701 par. 2 Civil Procedural Coderefer to the creditor`s request, it is not a request that he must motivate and upon which the enforcement officer must decide, analyzing the reasons given, buta manifestation of the will of the creditor, in regard to which the enforcement officer

[2] For details, see A. Tabacu, *Scurte consideraţii asupra actelor de executare silită în contextul insolvenţei debitorului*, în Romanian Review of Compulsory Execution, no. 2/2014, pp. 79-89.

[3] E. Hurubă, în I. Leș (coord.), *Tratat de drept procesual civil. Vol. II, Căile de atac, procedurile speciale, executarea silită, procesul civil internațional*, București, Universul Juridic, București, 2012, p. 568.

[4] V. Bozeșan, *Suspendarea executării silite la cererea creditorului. Probleme și ipoteze practice*, disponibil la adresa http://www.juridice.ro/432511/suspendarea-executarii-silite-la-cererea-creditorului-probleme-si-ipoteze-practice.html (visited at 12.03.2016).

is obliged to take act thorough dismissal. By the dismissal of suspension, the enforcement officer will point out to the creditor, that if he do not request the resumption of enforcement within six months, obsolescence would operate. During voluntary suspension of enforcement,the obsolescence term runs, so that at the expiry of 6 months from the date of the dismissal`scommunicationto the creditor, the obsolescence operates *ope legis*[5]. The term of obsolescence does not run if the creditor was not notified, in writing, that inorder to continue the enforcement, it is necessary to file a request in this regard.

In regard to the formulation of the legal text analyzed (art. 701 par. 2 CPC), the declaration of intent in the sense of suspending the enforcement must be express and expressed in writing, through a request addressed to the enforcement officer, without being required, as noted above, that the request is motivated. Occurring at the creditor's request, voluntary suspension could not have tacit nature, meaning that it could not be deduced from certain acts of the creditor or from his failure to perform them[6]. If the creditor does not bring out an act or a necessary enforcement proceeding, which has been requested in writing by the enforcement officer, the obsolescence term starts to run, but it does not equates to a tacit manifestation of willingness of the creditor in the sense of suspending the trial.

In case there are several creditors pursuing the assets (whether as a result of procedural co-participation, whether as a result of the joinder of multiple enforcements), but only one or some of these request the suspension, theenforcement will continue in terms of the other creditors`enforcement titles. Nevertheless, if multiple requests of intervention were made by other creditors who hold an enforcement title, and the creditor pursuing the assets requests the suspension, the enforcement will continue under the title of interveners, based on the provisions of art. 695 par. 1 C. proc. civ[7].

4. Optional (judicial) suspension of enforcement

The optional (judicial) suspension of enforcement may be requested by the debtor or by the interested person until de opposition of enforcement is settled, of another application of enforcement (including an action of common law which would tend to abolish the enforcement title), until the settlement of an appeal against the judgment which it to be enforceable, respectively until the recusal request of the enforcement officer is resolved. Also, the optional suspension of pursuing real estate may be requested by the debtor under the terms that the enforcement court grants him with the possibility of fully paying the debt, including interest and costs of enforcementfrom the net income of his real estate, even unpursued, or from other income, for 6 months [art. 824 par. (1) CPC].

According to art. 719 par. (1) CPC, the competent court, at the request of the interested party, may suspend the enforcement, for good reasons, until the settlement of the opposition to enforcement or of other application on enforcement[8]. The suspension may be ordered, therefore, in a variety of procedural situations, not only within the settlement of the opposition on enforcement [for example in the event of a request for intervention under art. 692 par. (3) or art. 692 par. (6) CPC or if an action of common law is brought and if it tends to abolish the title of enforcement, according to art. 638 par. (2) CPC], the provisions of art. 719representing the common law, where applicable, either for establishing the bail which the person requesting the must pay, or to establish procedural rules for handling the application for suspension.

The request for suspension of enforcement may be filed along with the opposition to enforcement or as a separate application [art. 719 par. (1) C.proc.civ final thesis], but, in all cases, it has the character of an incidental application [art. 30 para. (6) CPC], meaning that it can never be formulated as a mainapplication[9]. If the request for suspension isfiled as a main application, no pending before the competent court an opposition to enforcement, the application must be dismissed as inadmissible[10], because, in all cases, the effects of the request for suspension are temporary, producing effects until the settlement of the opposition to enforcement, as we shall point out later. The request for suspension must be motivated, not being enough the simplereference to the grounds of the enforcement`s opposition because the suspension measure is based on reasons regarding the harm of the applicant`s right if the enforcement would continue until the settlement of the opposition. Moreover, if in the request for suspension would be invoked the same reasons as those underlying the opposition, the judge would be incompatible with settling the suspension, according to art. 42 para. (1)

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[5] G. Boroi, M. Stancu, *Drept procesual civil*, ediția a 2-a, revizuită și adăugită, București: Hamangiu, 2015, p. 1007.

[6] For the he opposite opinion, see E. Oprina, I. Gârbuleț, *Tratat teoretic și practic de executare silită, Vol. I, teoria generală și procedurile execuționale*, București: Universul Juridic, 2013, p. 467.

[7] V. Bozeșan, *Suspendarea executării silite la cererea creditorului. Probleme și ipoteze practice*, loc. cit.

[8] Regarding this type of optional suspension, see O. Popescu, C. Dobre, *Suspendarea executării silite în condițiile art. 718 C. pr. civ*., in Romanian Review of Compulsory Execution, no. 1/2014, pp. 94-108.

[9] N.-H. Țiț, *op. cit.*, p. 263.

[10] E. Oprina, I. Gârbuleț, *Tratat...*, p. 500-501.

pt. 1 CPC Or, as we shall point out later, the request for suspension shall be settled by the same panel that settles the enforcement opposition, aspect considered by the legislatoralso in regard the fact that the judgment which the court would pronounceconcerningthe suspension is different from the one which implies settling the substantive enforcement opposition: in the suspension, the judge will only make an analysis of the appearance of law and it may take into account facts regarding the effects that the continuation ofchallengedenforcement would have on the heritage or even on the personal situation of the applicant, but also the interests of the creditor or the situation the pursuedassets.

Given his character essentially incidental, the application for suspending theenforcement will always be settled by the court which settles the opposition to enforcement (as determined by the rules laid down in art. 714 CPC), according to art. 123 par. (1) CPC Regarding the panel that resolves the suspension request, this is the same that settles the opposition to enforcement both when requesting the suspension until the settlement of the opposition to enforcement and when it is requested the temporary suspension of enforcement[11].

The application for suspension of enforcement must meet the formal requirements of art. 148 et seq. CPC on requests addressed to the court. The application shall be stamped with 50 lei, according to art. 10 para. (1) b) the O.U.G. no. 80/2013. As extrinsic requirement specific to this procedure, the law requires the applicant requesting the suspension to pay a bail, determined by the value of the opposition`s object[12]. The determination of the value of the bailis made in relation to the value of the enforcement opposition and not necessarily by reference to the value of the enforcement itselfor the amount to the claim enforced. Therefore, it will consider what is requested thorough the opposition to enforcement, if it refers to the enforcement itself or to an asset, if it concerns a procedural act which has been fulfilled or the enforcement officer`s refusal of fulfilling according to the law.

The bail should not be confused with the judicial stamp tax, so that the applicant`s obligation to payit is not subject to the legal provisions on exemption or granting of privileges on payment the juridical stamp tax or the granting of legal aid [art. 6 letter d) the O.U.G. no. 51/2008 on legal aid in civil matters relate exclusively to judicial stamp taxes and not to bail]. This is because if the request for suspension is admitted, the bail would remain unavailable until the settlement of the opposition to enforcement and if it is rejected, the bail will be used to cover the damage caused by the delay in enforcement or the claim from theenforcement title (but not the costs of enforcement). If the request for suspension is rejected, the court automatically refunds the bail (art. 1064 par. 4 CPC)[13].

The law provides certain situations whenthe bail is not mandatory, but the suspension of enforcement is mandatory. According to art. 719 par. (4) CPC these are: the judgment or the document which is enforced is not, by law, enforceable[14]; the document which is enforced was declared false by a judgment given in the first instance; the debtor proves through an authentic document that he has obtained from the creditor a postponement or, where appropriate, has receive a payment deadline. Besides these situations, no bail is required if enforcement costs are disputed, according to art. 670 par. (4) final thesisCPC Also, bail is not required if the suspension application is submitted by a public institution or authority under art. 7 of O.G. no. 22/2002.

A special case is regulated by art. 1045 CPC in the special procedure of evacuation from buildings used or occupied without right. In this case, as a general rule, the enforcement of the judgmentcan not be suspended. Exceptionally, in case of evacuation for nonpayment of rent or lease, the court may suspend the enforcement in settling the opposition to enforcement or in the appeal exercised by the defendant, only if he submits in cash to the creditor, the rent or lease to which he had been forced to, the amount established to ensure rent or lease rates due to the request for suspension, as well as the rent or lease rates which would become due during the trial. The suspension shall cease*ope legis* if, at the deadline until which the rent or the lease had been covered, the debtor does not file and does not submit the amount to be established by the enforcement court to cover the new rates.

The request for suspension is stamped with a judicial stamp tax of 50 lei, according to art. 10 para. (1) b) the O.U.G. no. 80/2013. The stamp tax must

[11]Although, if the request of suspension is admitted on the ground of art. 719 alin. (4) pct. 1 CPC, the judge becomes inconpatible to substantively settled the opposition to enforcement, according to art. 42 alin. (1) pct. 1 CPC.

[12]According to art. 719 alin. (2) CPC, the bai is determined taking into account the follwing valorical limits:

– 10%, if the value is not more than 10.000 lei;

– 1.000 lei plus 5% for what exceeds10.000 lei;

– 5.500 lei plus 1% for what exceeds 100.000 lei;

– 14.500 lei plus 0,1% for what exceeds 1.000.000 lei.

If the object of the opposition cannot be evaluated pecuniary, the bail is 1.000 lei, except the cases in which thalaw provides other wise [art. 719 alin. (3) CPC].

[13] N.-H. Țiț, *op. cit.*, pp. 264-265.

[14] In this case, the judge becomes incompatible to solve the opposition to enforcement, according to art. 42 par. (1) CPC. For details, see N.-H. Țiț, *Considerations with Respect to the Jurisdiction and the Structure of the Court invested with the Application of Suspending the Legal Enforcement in the New Code of Civil Procedure*, în AGORA International Journal of Juridical Sciences, Vol. 7, No. 3/2013, pp. 186-191.

be paid in all cases requiring suspension, including in those covered by art. 719 par. (4) CPC, because in these cases the law provides that bail is not necessary and do not provide an exemption from stamp tax payment.

The request for suspension shall be always settled in adversarial proceedings, summoning the parties, in a short term, even before the deadline set for settling the opposition. The dismissal which solves the suspension request is subject only to appeal separately to the dismissal that settled the opposition to enforcement. The term for appeal is 5 days and it runs from the pronouncement for the present party, namely from the communication for the absent party [art. 719 par. (6) CPC]. In case the request for the suspension is admitted, the decision is communicated automatically, immediately to the enforcement officer, so he would not carry out other acts of enforcement.

Regarding the effects that are produce by the dismissal of admitting the application of suspension, art. 719 CPC is equivocal, stating only that the competent court may order suspension of enforcement until settling the opposition to enforcement. The question is whether the text refers to settling the opposition to enforcement in first instance or settling the opposition to enforcement thorough a final settlement. The problem arises when the application for suspension of enforcement is admitted, but afterwards the first court rejects the opposition to enforcement. In one opinion, the suspension will have effects in this case, pending the final settlement of the opposition[15]. In other words, even if the opposition has been rejected in the first instance, the debtor would still benefit from the effects of the suspension of enforcement pending the resolution of the appeal filed against the judgment dismissing the opposition to enforcement.

In another opinion, with which we agree, the suspension takes effect only until settling the opposition in first instance, since the court`s dismissal rejecting the opposition is enforceable [art. 651 par. (4) C.proc.civ][16]. To benefit for the effect of suspension until the final settlement of the opposition, meaning even during the appeal, the interested party will have to submit an application of suspension of the provisional dismissal of rejecting the opposition to enforcement, under art. 450 CPC[17]In caseof admitting the request for suspension, and subsequently, the opposition by the first instance, the enforcement cannot be continued until the final resolution of the opposition, due to the enforceable nature of the judgment of admitting the opposition. If this solution is final, the enforcement acts performed on the day of resolving the request for suspension, even provisional, are abolished by the effect of the law as a result of admitting the request for suspension and the enforcement opposition [art. 701 par. (4) CPC].

If the pursued assets are subject of destruction, deterioration, alteration or impairment, by dismissal, the competent court may order only the distribution of theprice obtained from valorizing thesegoods [art. 719 par. (5) CPC].

The suspension of enforcement does not affect the obligations of the third partywithheld in the garnishment regarding the amounts and the assets garnished. Therefor, according to art. 784 par. (1) CPC, once the notification of garnishment is communicated to the third party withheldall amounts are frozen and the assets garnished. From garnishment until full payment of the obligations under the enforcement title, including during the suspension of the enforcement through garnishment, the third party withheld will not make any further payments or other transactions that would diminish the goods seized, unless the law provides otherwise. In other words, the suspension of enforcement does not affect the amounts and assets seized and submitted to the enforcement officer, nor those seized, but still not submitted to theenforcement officer, the latter remaining frozen until the end of the suspension. Regarding the sums and assets owed to the debtor by third party withheld after suspension, they are not frozen and can be issued to the debtor because subsequently to the suspension of enforcement cannot be performed any act of enforcement in order to achieve the debt. Therefore, are suspended not only the submitted amounts or the property owed to the debtor by third party withheld to the enforcement officer, but even their unavailability, with the consequence that they should be released to the debtor[18].

The law provides the possibility of filling a request of temporarily suspension of enforcement[19], which is effective only until the settlement of the suspension made in the enforcement opposition [art. 719 par. (7) CPC][20]. In order to file such an application, the appellant must demonstrate an urgent situation (implying that he mustinvoke and prove special grounds, distinct from those on which the opposition to enforcement is based on) and he must pay the bail established according to art. 719

[15] E. Oprina, I. Gârbuleț, *op. cit.*, p. 499.

[16] O. Popescu, C. Dobre, *op. cit.*, p. 106, D. M. Gavriș, în. G. Boroi (coord.), *Noul Cod de procedură civilă*, Vol. II, București: Hamangiu, 2013, p. 211.

[17] G. Boroi, M. Stancu, *op. cit.*, p. 1014.

[18] O. Popescu, C. Dobre, *op. cit.*, pp. 107-108.

[19] For the evolution of the legislation regarding the provisional suspension, see Șt. I. Lucaciuc, *Contestația la executare în reglementarea noului Cod de procedură civilă*, București: Hamangiu, 2014, pp. 318-321.

[20] Regarding the period of the provisional suspension, see E. Oprina, I. Gârbuleț, *op. cit.*, pp. 499-500.

par. (2) or (3) C.proc.civ[21]. Also, to request temporary suspension of enforcement, it is necessary that the interested partyfiles a request for suspension in the enforcement opposition, according to art. 719 par. (1) CPC, as it is not possible to formulate main requests of suspension, without any enforcement opposition pending or other application regarding the enforcement or the validity of the enforcement title[22]. The request for provisional suspension shall be settled by the panel entrusted with settling the opposition to enforcement in a summary procedure, without summoning the parties, in the council chamber, thorough dismissal which is not subject to any appeal. Regardless of the decision on the demand for provisional suspension, the paid bail remains unavailable and will be deducted from the bail payable for processing the application for suspension of enforcement filed according to art. 719 par. (1) CPC.

The law provides special situations of optional (judicial) suspension of the enforcement regarding judgments subject to appeal. We refer to the suspension of the judgment settledin first instance, which is provisionally enforceable by the court of appeal, pending the resolution of the appeal (art. 450 CPC);the suspension of enforcement of the judgment given in the appeal pending the resolution of the recourse (art. 484 para. 2-7 CPC);the suspension of the final judgmentscontested with dispute in annulment (art. 507 CPC) or revision (art. 512 CPC).

Nevertheless, the optional suspension of enforcement is provided by the law in the event of a recusal request ofthe enforcement officer [art. 653 par. (2) CPC][23]. Thus, a recusal request does not suspend the enforcement *ope legis*, the enforcement court may dispose justifiably the suspension pending the resolution of the recusal request. The suspension will be decided by dismissal that is not subject to appeal. In the absence of any provision providing the contrary, the application for suspension until the settlement of the recusal will be settled by summoning the parties. The law requires paying in advance a bail with a fixed value of 1,000 lei, and if the amount of the claim under the enforceable title does not exceed 1,000 lei, the bail will be 10% of the claim amount. Since the text of the law provides that the bail is paid in advance, its proof shouldbe submitted along with the application for suspending the enforcement. The application shall be stamped with a stamp tax of 50 lei, according to art. 10 para. (1) b) the O.U.G. no. 80/2013, the text of the law being applicable to any request for suspension regardless its basis or the procedural framework in which it would be filled. The paid bail will be refunded in accordance to art. 1064 CPC, the special provisions of art. 720 par. (6) CPC being inapplicable in case a request for recusal of an enforcement officer.

Therefore, if the application for suspension of enforcement pending the resolution of the recusal application is rejected, the court will automatically refund the bail, according to art. 1064 par. (3) CPC Also, the bail will be refunded *ex officio* through the dismissal of admitting the application for recusal, given that it is not subject to appeal. If the request for suspension is admitted, but the recusal request is rejected, the bail will be refunded only if the affected party by the suspension measure does not make any request for payment of damagesin 30 days from the date when the dismissal of rejecting the recusal request has remained final [the dismissal in first instance is subject to appeal within 5 days from the notification under art. 10 para. (4) of Law no. 188/2000], respectively if he expressly states that he does not seekto oblige the person who has submitted it to pay the damages caused by suspension pending the resolution of the request for recusal [art. 1064 par. (2) CPC].

Another case of voluntary suspension of judgment is regulated by art. 824 CPC in regard to real estate pursuit. According to the text of law, within 10 days from the communication of the dismissal of granting the proceedings, the debtor may request to the enforcement court toaccept that the entire payment of the debt, including interest and costs of enforcement, to be make from the net income of his real estate, even unpursued, or other income, during 6 months. The application is settled by summoning the parties, in the council chamber, through final judgment. In case the request of the debtor is admitted, the court would suspend the pursuit of real estate, the dismissal being communicatedto the enforcement officer [art. 824 par. (2) CPC]. The suspension of the pursuit willbe communicated by the care of the enforcement officerto the tenants and the lease-holders or other debtors who, from the communication date, will submit all amounts due in the future at the unity prescribed by the law and will file the receipt to the enforcement officer, the affected income serving exclusively to cover the pursuer creditor`s claim [art. 824 par. (3) and (4) CPC]. Unlike other forms of voluntary suspension, the one under art. 824 CPC can be established for a fixed term according to law, of 6 months, following the enforcement to continue *ex officio* if at the end of that period have not been fully covered the main claim, the accessoriesand the enforcement expenses. For good reasons, the creditor may request the court to resume the pursuit

[21] Nevertheless, the party has to pay the judicial stamp tax of 50 lei, accordingto art. 10 alin. (1) lit. b) of O.U.G. nr. 80/2013, different form the stamp tax due to the request of enforcement suspension until settling the opposition to enforcement.

[22] E. Oprina, I. Gârbuleț, *op. cit.*, p. 500.

[23] N.-H. Țiț, *op. cit.*, pp. 268-269.

before the expiry of the six months term, the demand for resumption of enforcement beingsettled in the same manner as the request for suspension [art. 824 par. (5) CPC][24].

Regardless the situation of suspension of enforcement, after its cessation, the enforcement officer, at the request of the interested party shall order the continuation of the enforcement, as far as the acts of enforcement orthe enforcement itself had not been abolished by the court or it has not ceased as an effect of the law [art. 701 par. (5) CPC]. The continuation of theenforcement after the judicial suspension will not be, therefore, ex officio, but only on request, as a disposal act of the creditor. In the absence of such a request, the enforcement officer will ask the creditor, in writing, to clarify whether he persists in enforcement, form the communication of the request runs the term of obsolescence, according to art. 697 par. (1) CPC[25] Exceptionally, in case of the suspension of real estate pursuit under article 824 CPC, since it is decided by the court for a period set by the law (6 months), at the expiry of the term, the enforcement officer continues the pursuit ex officio, if the debt is not entirely paid, as well as the interest and the costs of enforcement. If the enforcement has been resumed after suspension, a new notice to the debtor is not necessary, but only in case of renewal after obsolescence, according to art. 699 par. (2) C.proc.civ[26]. Taking into consideration that the text of law provides that the enforcement officer will continue the enforcement at the request of the interested party, means that such a request can be filed not only by the creditor, but also by other people, such as a creditor intervener who has an enforcement title, given that he may require to carry out acts of enforcement, according to art. 695 par. (1) C.proc.civ final thesis[27]. However, in what concerns the voluntary suspension of the enforcement at the creditor's request, we consider that only he could file such a request, otherwise the possibility conferred by law would be purposeless.

4. Conclusions

The analysis of the situations of suspension of enforcement is of particular importance in the context of civil enforcement law, especially given the effects that this incident during the enforcement procedure has in practice. This is the raison why, on the regulation included in the Civil Procedure Code were made many interpretations and comments. From a theoretical perspective, it is necessary to correct classify the suspension situations, in order to identify the characteristic elements of each case. From a practical perspective, the distinction is necessary both to assess situations in which suspension operates and the reasons why it is ordered, but also to properly identify the effects it produces in relation to the acts of enforcement or other incidents related to enforcement, such as the postponement or obsolescence. In conclusion, the correct determination of the procedural characteristics of each type of suspension is important both theoretically and practically and certain differences of interpretation can be eliminated and wrong tendencies in implementing the legal texts can be corrected.

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[24] N.-H. Țiț, *op. cit.*, p. 269.
[25] M. Dinu, R. Stanciu, *Executarea silită în noul Cod de procedură civilă*, București: Hamangiu, 2015, p. 156.
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[27] M. Dinu, R. Stanciu, *op. cit.*, p. 156.

LATEST AMENDMENTS TO LAW NO 62/2011 ON SOCIAL DIALOGUE ENACTED BY LAW NO 1/2016

Aurelian Gabriel ULUITU[*]

Abstract

Law no 62/2011 regarding the social dialogue is the most important regulation of the collective labor relations. Since 2011, when it was adopted, Law no 62/2011 was modified several times, the last legislative intervention being done by Law no 1/2016. The main modification are regarding the following aspects: method of payment by the trade union's members of their monthly subscription; new rules regarding the possibility of the trade union or employer to affiliate at a higher level organization; the rules regarding the employers and employer's representatives in the collective bargaining.

Keywords: *social dialogue, social partners, collective bargaining, dues paid by union members, representativeness of the trade unions.*

I. Introduction

1. It is indeed salutary that the lawmaker is permanently concerned to identify and legislate the regulatory solutions necessary for improving the manifestation of social dialogue. Traditionally, the social dialogue institution is defined as the voluntary process through which the social partners not only inform and consult one another, but also negotiate in order to establish agreements on issues of common interest[1].

On numerous occasions, legal doctrine has emphasized the role and functions of social dialogue in any democratic society based on a market economy, this institution being qualified as a prerequisite, an axiom of economic and social development[2]. From another perspective, it is stated that social dialogue at national level requires a forum of discussions and negotiations that go beyond issues relating to employment; social dialogue is also manifested in connection with professional relations and social protection, as only in this way the effects of globalization on macroeconomic and social policies[3] can be analyzed, assessed, acquired, or where appropriate, counteracted.

2. Based on this theoretical background, which gives special value to the institution of social dialogue in its effort to mitigate the often divergent positions manifested by the social partners, the Labour Code – Law no. 53/2003[4], stipulates in art. 211 that procedures for consultation and permanent dialogue between social partners are legally regulated so that stability and social peace could be fostered.

The legislative framework the Code refers to currently comprises the following normative acts:

- Law no. 62/2011 on social dialogue[5];
- Law no. 67/2006 on the protection of employees' rights in the event of transferring undertakings, businesses or parts thereof[6];
- Law no. 467/2006 on establishing a general framework for informing and consulting employees[7].

In the future, the lawmaker is to intervene in order to group in a single normative act – *the Labour Code* – all aspects referring to how (individual or collective, respectively) employment relationships, including those relating to social dialogue, start, manifest or terminate.

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[*] PhD in Law, Associate Professor, "Nicolae Titulescu" University of Bucharest, The Faculty of Law, Private Law Department (e-mail: **gabi_uluitu@yahoo.com**).

[1] For further details, consult I. Sorică, *Social Dialogue*, in I.T. Ștefănescu (coordinator), *Labour Law Dictionary*, Universul Juridic Publishing House, Bucharest, 2014, p. 149-150.

[2] For further details, see I.T. Ștefănescu, *Theoretical and Practical Labour Law Treatise*, 3rd Edition (revised and improved), Universul Juridic Publishing House, Bucharest, 2014, p. 102.

[3] For further details, see Al. Țiclea, *Labour law Treatise. Legislation. Doctrine. Jurisprudence*, 8th Edition (revised and improved), Universul Juridic Publishing House, Bucharest, 2014, p. 135.

[4] Republished in *National Gazette of Romania*, Part I, no. 345/18.05.2011, as subsequently amended and supplemented.

[5] Republished in *The Official Gazette of Romania*, Part I, no. 625/31.08.2012, as subsequently amended and supplemented.

[6] Published in *The Official Gazette of Romania*, Part I, no. 276/28.03.2006. Council Directive 2001/23/EC of 12 March 2001 on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of undertakings or businesses, published in *The Official Journal of the European Communities* (OJEC), no. L 82/ 22 March 2001, is transposed into Romanian legislation, via this normative act.

[7] Published in *The Official Gazette of Romania*, Part I, no. 1006/18.12.2006. Directive 2002/14/EC of the European Parliament and of the Council of 11 March 2002 establishing a general framework for informing and consulting employees in the European Community, published in *The Official Journal of the European Communities* (OJEC), no. L 820/ 23 March 2002, is transposed into Romanian legislation, via this normative act.

II. 1. The legal instruments specific to social dialogue are mainly regulated by law no. 62/2011. This normative act was adopted in the context of the legislative changes that marked the economic crisis in Romania (2009-2013). This legal document represented a significant setback in terms of union activity and collective bargaining (especially by suppressing both the level of negotiation and the possibility of concluding the single collective bargaining agreement at national level).

The memorandum of reasons itself points to the following:

- "The way that social relations between employers, on the one hand, and employees, on the other hand, were regulated by Law no. 62/2011 on social dialogue, republished, as subsequently amended and supplemented, practically dismissed the possibility to exercise the fundamental right to collective bargaining for the overwhelming majority of employees in Romania, which contradicts the Constitution of Romania (...)[8]";
- "A drop of almost 40% in the number of collective agreements concluded in a year at business level represents a decrease of paramount importance, demonstrating that the national legislation does not encourage the development of collective bargaining, quite the contrary. There will be major consequences if this situation is postponed indefinitely instead of being remedied as soon as possible.[9]"

Ever since drafting the bill for Law no. 62/2011, in a document entitled 'Memorandum of ILO technical comments on the draft Labour Code and the bill on social dialogue in Romania", the International Labour Office expressed the following view: "Regarding the criteria of representativeness which must be fulfilled for collective bargaining to take place at business level, which for the most part are not consistent with the ratified Conventions no. 98, no. 154, no. 135, according to the current bill, namely art. 132, representativeness threshold increases to 50% + 1 for collective bargaining at business level. This would mean that unions at business level could engage in collective bargaining only if they represent at least 50% + 1 of the employees. In accordance with art. 128 para. (2) and art. 135 para. (4) minority unions that do not meet this threshold shall be able to engage in collective bargaining, only if the members of their federation participated, provided that their business union represents 30 percent of the employees and their federation is acknowledged as representative within the respective field of trade. When unions do not meet these cumulative criteria, neither at business level and nor at the level of their field of trade, collective bargaining will take place only with the elected representatives of the employees, for whom no criterion of representativeness is established. ILO anticipates that it may be difficult to achieve these new thresholds and, therefore, it will mean that, in reality, collective bargaining will take place especially with workers' representatives, thereby undermining unions established in the business. This situation would neither allow the promotion of collective bargaining within the meaning of art. 4 of the Convention no. 98 and nor would it be consistent with the Convention relating to employees' representatives, no. 135/1971 or with the Convention on collective bargaining no. 154/1981, both ratified by Romania, which contain explicit provisions guaranteeing that, when in the same business there are both union representatives and elected representatives, appropriate measures should be taken so as to ensure that the existence of elected representatives is not used to undermine the position of the existing trade unions"[10].

2. The legal doctrine signalled both loopholes and ambiguous solutions that Law no. 62/2011 has instituted. Actually, the lawmaker's intervention was and is still necessary to establish rational normative solutions, to ensure a balance between the parties involved in employment agreements. A first step in this regard is the adoption of Law no. 1/2016 amending Law no. 62/2011.

In the current study, we will comparatively present the rules which were amended, the new rules introduced by the lawmaker, we will try to explain the rationale behind the normative act and to determine the future effects of applying the new solutions.

III. Specifically, amendments and supplements to Law no. 62/2011 refer to the following:

1. Prior to Law no. 1/2016's coming into force, art. 1 (r) defined the sectors of activity (higher maximum level that a collective bargaining agreement can be negotiated and concluded) as sectors of the national economy grouping domains defined in the Romanian Code on the National Classification of Economic Activities (NACE). The activity sectors are established by Government decision, after consulting the social partners.

The normative act which specifically established the sectors of activity was the Government Decision no. 1260/2011 on the sectors of activity established under Law no. 62/2011[11].

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[8] According to art. 41, para. (5) in the Constitution of Romania, the right to collective labour bargaining and the binding force of collective agreements are guaranteed.

[9] Under these circumstances, it is interesting to point out that the bill was filed with the Chamber of Deputies as early as 2013.

[10] See Memorandum of reasons for the bill ammending and supplementing Law no. 62/2011 on social dialogue, http://www.cdep.ro/proiecte/2013/400/60/0/em788.pdf.

[11] Published in *The Official Gazette of Romania*, Part I, no. 933/29.12.2011.

Currently, the sectors of activity are defined as the sectors of the national economy which are established by the National Tripartite Council, and they are approved by Government decision.

The amendment was meant to change the way in which the sectors of activity are established, by involving the National Tripartite Council in this process. This institution – the result of the formalized social dialogue – is an advisory body to the social partners at national level. It is composed of (in accordance with art. 76 of Law no. 62/2011):

− presidents of nationally representative confederations of employers and unions;

− government representatives, appointed by the Prime Minister's decision, at least at the level of secretary of state, from each ministry, as well as from other public sector bodies, as agreed with the social partners;

− the representative of the National Bank of Romania, the chairman of the Economic and Social Council and other members agreed with the social partners.

The National Tripartite Council is chaired by the Prime Minister, and its deputy is the Minister of Labour, Family and Social Protection.

The main tasks of the National Tripartite Council are:

− providing consultation framework for setting the minimum wage guaranteed for payment;

− discussing and analyzing projects for programs and strategies, developed at government level;

− developing and supporting the implementation of strategies, programs, methodologies and standards in the field of social dialogue;

− resolving social and economic disputes through tripartite dialogue;

− negotiating and signing agreements and social pacts, as well as other arrangements at national level and monitoring their implementation;

− analyzing and, where appropriate, approving requests for extending the application of collective bargaining agreements at sectoral level for all the companies in the respective activity sector.

Besides these tasks, the National Tripartite Council is also supposed to establish the activity sectors, which is meant to ensure a better delimitation of these negotiation levels, based on the needs of the social partners who are directly concerned.

2. Art. 24 read as follows: "Dues paid by union members are deductible provided they do not exceed 1% of their gross income, according to the Tax Code".

Currently, art. 24 reads: "(1) At the request of and in agreement with the trade union members, employers will withhold union dues on the union members' monthly payrolls and they will transfer union dues to the union account. (2) Dues paid by union members are deductible, provided they do not exceed 1% of their gross income, according to the Tax Code".

Dues paid by union members represent the main means of financing the activities of trade unions. For this reason, the collection of union dues directly by the employer by withholding and transferring the respective amounts is an advantage for trade unions since, when the employer pays the employees' wages, the trade union will get the union dues paid by their members. In this way, trade unions will no longer need to dedicate a part of their activity to collecting union dues from their members, which might prove a difficult process, as it involves allotting important human and material resources.

3. a) In order to regulate the association forms for trade unions, art. 41 of Law no. 62/2011 was supplemented with a new paragraph numbered (5), reading as follows: "A union may be affiliated to only one trade union federation, at national level. Also, a trade union federation may be affiliated to only one trade union confederation, at national level."

In this manner, a frequent problem in the activity of trade unions – in the past, many of these organizations opted for dual affiliation – was solved. Such an option is no longer possible, as only one affiliation for both unions and union federations is now permitted.

If a trade union affiliated to a trade union federation, or a union federation affiliated to a trade union confederation opts for a new affiliation, to another federation or confederation, it is considered that, by this manifestation of will, the former affiliation to the previous federation or confederation will cease *ipso jure*.

b) The solution was symmetrically regulated for employers' organizations: under the newly introduced paragraph (4^1) of art. 55 of the Law, "an employer may be affiliated to only one employers' federation, at national level. Moreover, an employers' federation may be affiliated to only one high ranking employers' confederation."

4. The main modification made by Law no. 1/2016 refers to the representation of parties in negotiating and concluding the collective bargaining agreement. In this point of law, art. 134 of Law no. 62/2011 read as follows:

"The parties of the collective bargaining agreement are the employers and the employees, who are represented in the negotiations as follows:

A. on behalf of the employers:

a) at business level, by its management body, established by law, articles of association or functional regulations, as applicable;

b) at business group level, by employers who have the same main object of activity, according to NACE code, being set up voluntarily or under the law;

c) at the level of the sector of activity, by the employers' organizations, legally constituted and representative under this law.

B. on behalf of the employees:

a) at business level, by the trade union, legally constituted and representative under this law, or by the representatives of the employees, as applicable;

b) at business group level, by trade union organizations, legally constituted and representative at the level of the businesses, members to the group;

c) at the level of the sector of activity, by trade union organizations, legally constituted and representative under this law. "

Currently, art. 134 reads:

"The parties of the collective bargaining agreement are the employer or the employers' association and the employees, by trade union organizations, represented as follows:

1. The employer or employers' organizations:

a) at business level, by its managing body, established by law, articles of association or functional regulations, as applicable;

b) at the level of sector of activity and business groups, by employers' organizations, legally constituted and representative under the law;

c) at the level of budgetary institutions, public authorities and institutions which have authority over or coordinate other legal persons employing workforce, by the manager of the institution, the managers of the public authorities and institutions respectively, as applicable, or by managers of public institutions and authorities, where appropriate, or by *de jure* deputies thereof;

d) at the level of the sector of budgetary activity, by the legal representative of the competent central public authority.

2. Employees:

a) at business level, by legally constituted and representative unions. If the union is not representative, representation is made by the federation to which the union is affiliated, if the federation is representative for the sector to which the business belongs; in situations where there are no unions by the elected representatives of the employees;

b) at the level of the business groups and the sectors of activity, by trade union organizations, legally constituted and representative under the law;

c) at the level of budgetary institutions, public authorities and institutions which have authority over or coordinate other legal persons employing workforce, by the trade union organizations, representative under the law."

The amendments are mainly aimed at the following aspects:

a) In the case of employers:

- the normative solution concerning the representation of employers at the level of both the business group and the sectors of activity is correlated with the current solution for establishing the sectors of activity (which no longer necessarily relates to the same main object of activity, according to NACE code);
- for the first time, the manner of representation of employers who have the status of budgetary institution or public authority or institution, which has authority over or coordinates other legal persons employing workforce, was expressly regulated (the representation function being assigned to the manager of the institution, the managers of public authorities and institutions respectively, as applicable, or *de jure* deputies thereof);
- moreover, for the first time, the manner of representation of employers belonging to the level of the sector of budgetary activity was expressly established (the representation function being assigned to the legal representative of the competent central public authority).

b) In the case of employees:

- the rule referring to the uniqueness of the trade union representativeness at the level of the employer was repealed; currently, the legal text refers to "representative trade unions" (the plural is used), a circumstance that is likely to allow the existence of two or more representative unions with the same employer;
- as far as the representativeness of the union constituted at the employer's level, at present this status can be obtained just as previously, by meeting the condition of the minimum number of members (at least 50% + 1 of the total number of employees of the respective employer); however, under the current wording, art. 134 para. B(a) states that unless the union is representative, representation is made by the federation to which the union is affiliated, if the federation is the representative at the level of the sector the business belongs to. Thus, the text seems to introduce a *sui generis* form of representativeness, by means of the loan which the union takes out under these circumstances from the federation to which it is affiliated;
- at the level of budgetary institutions and public authorities and institutions, which have authority over or coordinate other legal persons employing workforce, the employees' representation is made by trade union organizations representative under the law.

Unfortunately, the lawmaker has not solved *de plano* the issue of representativeness (as, indeed, it was stated in the memorandum of reasons accompanying the bill), keeping the solution provided by art. 51 (1) (C) (c) of Law no. 62/2011, referring to the necessity of the representative union to have at least half plus one of the employees of the business as members.

5. For certain special categories of employers, art. 138^1 of Law no. 62/2011, newly introduced by Law no. 1/2016 provides the following solutions:

− collective bargaining agreements are also negotiated at the level of autonomous administrations, state-owned companies, assimilated as business groups, as well as at the level of public authorities and institutions, which have authority over or coordinate other legal persons employing workforce. In the case of public authorities and institutions, which have authority over or coordinate other legal persons employing workforce, the collective bargaining agreement is concluded between the manager of the public authority or institution and the unions legally constituted and representative, under the law;

− in the collective bargaining agreements concluded at the level of the sector of activity, for the employees belonging to the budgetary sector, the parties will expressly establish the ways of negotiating the collective bargaining agreements at the level of public authorities and institutions, which have authority over or coordinate other legal persons employing workforce, authorities/institutions being under coordination or subordination with central public authorities.

IV. Conclusion

It is obvious that the legislative intervention enacted by Law no. 1/2016 does not solve the fundamental problems that Law no. 62/2011 generated in the regulatory field of social dialogue. Major shortcomings, ambiguities, contradictions, which hinder the enforcement of the law, still remain and duly occur.

Nevertheless, we consider that the adoption of Law no. 1/2016 represents a first step towards normalizing the regulation of the institution of social dialogue, so necessary for fostering social peace between the parties involved in employment relationships.

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MODERNIZING THE PRIVATE LAW. SOME KEY ISSUES IN THE RECENT DRAFT OF THE SPANISH COMMERCIAL CODE

Dan VELICU[*]

Abstract

The last decades were dominated by the idea that an authentic process to modernize the private law means generally the unification of it by renouncing the distinction between civil and commercial law. A few European countries and some American states or provinces followed this path of the unification.

However, beyond the will to change and improve the system one may reflect if this kind of modernization is actually really proper.

Of course, there are lots of reasons for unification and reasons against it. Is there a possible and real alternative to this wave of unification?

The draft of the Spanish commercial code could be a beginning point in order to settle this controversy.

For the first time, the lawmakers are trying to replace the actual code with a new modernized one without renouncing the above mentioned distinction.

Without claiming that we have entirely analyzed the topic, we propose a brief critical presentation of the major key issue of the draft.

Keywords: *commercial code, Spanish law, codification, entrepreneurship, specific contracts.*

1. Introduction

On 30 May 2014, the Council of Ministers of Spain approved the Commercial Code draft as it was proposed by the ministers of Justice and Economy.

The *anteproyecto* have been prepaired since 2006 by the General Codification Committee and has suffered some alterations, containing at that moment about 1,726 articles.

Its authors compiled and updated commercial laws in force today, and regulated other matters that lacked legal regulation up to now, beeing obvious that the Commercial Code from 1885 is not very up to our day.

As we may intuit the draft contains more institutions and rules as compared to the actual code and many of them were in fact improved and transfered from the special laws or were elaborated for the first time.

As time and space don't permit us to make an exhaustive analysis, we shall try to extract and comment on short some of the main institutions that are relevant, in our opinion, as modenization factors of the future Spanish commercial code.

That's why we have choose in the frame of a preliminary analysis the criteria of commerciality, the concept of entrepreneur and as a consequence the enterprise, the introduction of the concept of hardship – related to the well-known *theorie de la imprevision* – and, finally the regulation of some new specific contracts.

2. The criteria of commerciality

The actual *anteproyecto* maintains the same two criteria of commerciality of the actual Code[1].

Therefore, it maintains the principle that the commercial transactions are governed by the commercial code whether carried out by people having or not having the status of merchant[2].

What seems to be an innovative element consists in offering priority to the subjective criterion.

In that sense, the article 001-2 – which is entitled *Ámbito subjetivo* – states that the provisions of the code are generally applicable to all persons called "operadores del mercado".

Who are these "operadores del mercado"?

First of all, as the text clearly points, these are – as we may intuit – "los empresarios" in short, the entrepreneurs.

So, at this point, we have to retain that the traditional concept of "merchant" was substituted with the more economic one, that of the entrepreneur.

Secondly, "operadores del mercado" are also "las personas físicas que ejerzan profesionalmente y en nombre propio una actividad intelectual, sea científica, liberal o artística, de producción de bienes o de prestación de servicios para el mercado".

[1] See the articles 631 and 632 as traditional model in the Napoleonic *Code de commerce*, (Paris: Didot, 1807), 158. See also in the frame of the French doctrine George Ripert and René Roblot, *Traité elementaire de droit commercial*, I, (Paris: Librairie Generale de Droit, 1974), 32-33.

[2] Regarding the status of merchant see the actual article L121-1 of the French commercial code: Sont commerçants ceux qui exercent des actes de commerce et en font leur profession habituelle. See also René Rodière and Roger Houin, *Droit commercial*, I, (Paris: Dalloz, 1970), 51.

Practically, the rule includes in this large socio-professional sector every person who provides various products or services to the public.

Thirdly, in the same way, we have to add to both categories the non-lucrative organizations defined as "personas jurídicas que, aun no siendo empresarios y con independencia de su naturaleza y objeto, ejerzan alguna de las actividades expresadas en este artículo" together with the actors without juridical personality implied in the above mentioned activities on the market or "los entes no dotados de personalidad jurídica cuando por medio de ellos se ejerza alguna de esas actividades".

Regarding the concept of the "empresarios" the article in analysis defines these primarily as "personas físicas que ejerzan o en cuyo nombre se ejerza profesionalmente una actividad económica organizada de producción o cambio de bienes o de prestación de servicios para el mercado, incluidas las actividades agrarias y las artesanales".

Therefore, an entrepreneur could be considered any individual who works or in whose name somebody is professionally engaged in an organized economic activity regarding the production or change of goods or provision of services **offered on the market, including agricultural and artisanal activities**.

Obviously, all the juridical persons having one or more of the above mentioned activities as the commercial societies, no matter their activity, will be considered entrepreneurs.

Finally, as an exception, all societies which are not created according to the Spanish law, but are acting in Spain, in the same way, will be considered also entrepreneurs.

The objective criterion was retained by the article 001-3 entitled *Ámbito objetivo*.

According to this there are three hypothesis when the commercial relation is ruled by the commercial code even if that is carried out by people not having the status of "operador del mercado".

The first hypothesis takes into account all the acts and contracts which involves an "operador del mercado", when the content of the act or fact supposes one of the above mentioned activities.

The second hypothesis regards the acts and contracts which are considered by the code as commercial because of their substance while the third hypothesis placed under the commercial law the acts related to the competition law.

However, all this rational mechanism in order to identify the applicable law is limited when the act or fact involves a person as consumer and the consumers' legislation will have priority on the commercial code.

Regarding the relation between the civil law and the commercial code the authors of the *anteproyecto* have maintained the traditional principles that the rules of the commercial code have suppletory function and the commercial code will be completed if necessary with the commercial customs.

3. The entrepreneur and the enterprise

Another concept to take into analysis is that of entrepreneurship. It is known that in the frame of modern civil codes the replacing of the traditional concept of "merchant" by the economic concept of "entrepreneur"[3] was followed by the introduction also of the key concept of the "enterprise"[4].

On this way, the article 131-1 of the draft states that "la empresa es el conjunto de elementos personales, materiales e inmateriales organizados por el empresario para el ejercicio de una actividad económica de producción de bienes o prestación de servicios para el mercado".

In other words, the "enterprise" supposes a set of elements – personal, tangible and intangible – organized by the entrepreneur in order to develop an economic activity which consists in producing goods or services destinated to the market.

Practically, in a redundant way, the authors of the draft considered the "enterprise" as the organization of the manpower and the means of production.

The following text, the article131-2 points that not only the goods as means of production or the inherent right on them but also the juridical relations or facts of the entrepreneur and the goodwill are part of the "enterprise": "Integran la empresa los bienes y derechos afectos a la actividad empresarial, las relaciones jurídicas y de hecho establecidas por el empresario para el desarrollo de dicha actividad y el fondo de comercio resultante de la organización de los elementos anteriores".

The article 131-3 defines the place of business or *establecimiento mercantil* which is formed by properties and facilities used by the entrepreneur.

Of course, the draft points also a normal distinction between the principal place of business and all other forms of representation (branch offices). According to the article 131-3 – *Establecimiento principal y sucursal* – "se considera establecimiento mercantil principal el lugar donde el empresario ejerce la dirección efectiva de su actividad económica, y centraliza la gestión administrativa". The same paragraph defines branch office as "el establecimiento secundario dotado por el empresario de representación permanente y de autonomía de gestión a través del cual se desarrollan total o parcialmente las actividades de la Empresa".

[3] See article 2082 of the Italian civil code.

[4] See Gustavo Minervini, *L'imprenditore. Fattispecie e statuti*, passim; Massimo Montanari, *Diritto Commerciale*, I, (Milan: Giuffrè, 2001), 7-40. Also the Italian supreme court explied recently the concept of entrepreneur. See decision no. 16612/19.06.2006 published in *La giurisprudenza sul Codice civile coordinata con la dottrina*, (Milan: Giuffrè, 2012) 21.

Obviously, the entrepreneur will assume all responsibility for the action of his employees deployed in anyone of his establishments (para. 2) and the headquarters as the branch offices have to be mentioned in the *Registro mercantil*.

4. The concept of hardship and its principal efects

As it is known the concept of hardship in common law or the theory of imprevision in the continental private law seems to take advantage on the principle *pacta sunt servanda* even if there are national systems - like the French one - which are refusing in accepting it.

The necessities and the volatility of the commercial relations on long terms determined the lawyers to reflect on the vivacity of the the clause known even in the public law of the Medieval Age as *rebus sic stantibus*[5].

The theory was received by the Italian civil code of 1942[6] and spread after the World War II also in Germany under the profile of the *Wegfall der Geschäftsgrundlage* and also in other countries or in the international commercial relations. Even the Convention on the International Sale of Goods (CSIG) didn't received it in 1980, the UNIDROIT principles 2003 version received it in the content of the article 6.2.2.

The Spanish courts received it but in a very restricted manner[7].

In the context of the last wave of globalization seems normal that the theory be received even in the comercial relations between national subjects.

As a consequence, there is no surprise that the authors of the draft received the theory and inserted in the chapter VI – *De la extinción y excesiva onerosidad* – rules regarding the effects of the hardship state.

According to the article 416-2. *Excesiva onerosidad del contrato* the person who suffered an event qualified as hardship has the traditional option between modifing the contract – if the counterpart agrees – or to provoke the extinction of the contract without any damages.

The first paragraph defines clearly the efects: En caso de excesiva onerosidad sobrevenida, la parte perjudicada no podrá suspender el cumplimiento de las obligaciones asumidas, pero **tendrá derecho a solicitar sin demora la renegociación del contrato, acreditando las razones en que se funde.**

Si no se alcanzara un acuerdo entre las partes dentro de un plazo razonable, cualquiera de ellas **podrá exigir la adaptación del contrato para restablecer el equilibrio de las prestaciones o la extinción del mismo** en una fecha determinada en los términos que al efecto señale.

The second paragraph defines the contexto or the state of hardship if we use the English legal concept: "Se considera que existe onerosidad sobrevenida cuando, **con posterioridad a la perfección del contrato**, ocurran o sean conocidos **sucesos que alteren fundamentalmente el equilibrio de las prestaciones, siempre que esos sucesos no hubieran podido preverse por la parte** a la que perjudiquen, escapen al control de la misma y ésta no hubiera asumido el riesgo de tales sucesos".

5. The option to terminate the contract as an exception case

Beyond the hipothesis of the act of God (or *force majeure*) or hardship the draft states another possibility to terminate the agreement without damages if there is an obvious risk that one party not fulfill its main obligation.

In the terms of article 417-1. *Conducta ante el temor fundado de incumplimiento*, "cuando exista un riesgo notorio de incumplimiento esencial del contrato por una de las partes y ésta no cumpla ni preste garantía adecuada de su cumplimiento, la otra parte podrá resolver el contrato".

6. New specific contracts

In the field of the specific contracts regulation, at first sight, three innovations seem to be relevant for a comparative scientific research.

First of all, some contracts which were traditionally considered as civil contracts were replaced in the frame of the draft.

A visible example is the contract for work on goods either the building contract.

The concept is promoted by the article 521 which states as follows: "Por el contrato mercantil de obra por empresa el contratista, que deberá ser un empresario o alguno de los sujetos contemplados en el artículo 001-2 de este Código, se obliga frente al comitente a ejecutar una obra determinada a cambio de la prestación convenida o, en su defecto, de la que resulte de los usos" (para.1).

The second paragraph explains that the "obra" – or work litteraly – means "la construcción,

[5] See in this sense the pioneer work of Giuseppe, Osti, "La cosi detta clausola rebus sic stantibus", *Rivista del diritto civile*, 4, (1912): 1-50, Candil, *La clausula rebus sic stantibus*, (Madrid, 1946) passim. To make distinction to other institutions see Manuel García Caracuel, *La alteración sobrevenida de las circunstancias contractuales,* 282.

[6] See article 1467.

[7] See Susana Quicios Molina, "La ineficacia contractual", in *Tratado de los contratos*, ed. Rodrigo Bercovitz Rodríguez-Cano et al. (Valencia: Tirant lo Blanch, 2009), 1376. The author gives as examples the several decisions of the supreme court: that of 15.11.2000 (Repertorio jurisprudencial Aranzadi, 9214) and that of 10.02.1997 (Repertorio jurisprudencial Aranzadi, 665).

reparación o transformación de una cosa, así como la consecución, por cualquier medio o actividad, de otro resultado convenido por las partes", that is to say the construction, repairement or conversion of one thing, and the achievement, by any means or activity, other outcome agreed by the parties.

We have to observe that, on one hand, in order to aplly the special rules, the contractor must have the status of the entrepreneur, and on the other hand, the definition does not suppose as compensation the payment of money.

In the same direction, the article 531 para. 1 defines the agreement in order to provide services as a contract which supposses that "el prestador, que deberá ser un empresario o alguno de los sujetos contemplados en el artículo 001-2 de este Código, se compromete a realizar, a cambio de una contraprestación en dinero, una determinada actividad destinada a satisfacer necesidades de la otra, el ordenante".

Secondly, the draft, as I have mentioned above, regulates new specific contracts.

As it is obvious, some of these contracts are in fact contracts world wide known as the license contract, the discount bank contract or the factoring.

On short, according to the article 536 para. 1, "por el contrato de licencia, el titular de un derecho sobre un bien inmaterial, denominado licenciante, autoriza a un tercero, denominado licenciatario, para utilizarlo o explotarlo durante un tiempo determinado a cambio de un precio, manteniendo el licenciante la titularidad del derecho".

The discount banking contract is regulated by the article 577 para. 4 as follows: "Por el contrato de descuento un empresario, el descontante, abona el importe de un crédito dinerario no vencido al operador de mercado titular del mismo, el descontatario, a cambio de los intereses y comisiones pactados y de la cesión salvo buen fin del crédito descontado".

We must emphasis that it is a very important choice to regulate the discount banking contract in order to make distinction to the traditional credit transfer but also the fact that the definition has retained the well known clause "salvo buen fin". This clause has as purpose the protection of the party who receive the credit – the transferee – when at the date of payment the debtor doesn't pay the money or is insolvent[8]. In that very case the receiver of the credit will have the right to ask the return of the money – and in our opinion with interest – from the initial creditor.

Unfortunately, as we have point in other occasion[9], the actual Romanian civil code failed to regulate such an important banking contract despite the extension of the special chapter which covers the banking contracts.

Finally, the article 577 para.10 defines the factoring agreement as a contract through which un "operador de mercado", "el proveedor, se obliga a ceder uno o varios créditos de los que sea o pueda ser titular en el futuro, a un empresario el factor, que, a cambio de los intereses y comisiones que se pacten, asume respecto de los créditos cedidos, la gestión de su cobro de los créditos, pudiendo también asumir las obligaciones siguientes:

a) Financiar al proveedor.

b) Asumir el riesgo de insolvencia de los deudores".

More, according to the rule the factor could assume more obligations: "Asimismo el factor podrá asumir otras obligaciones tales como la llevanza de la contabilidad, realizar estudios de mercado o investigar y seleccionar la clientela".

Another innovative choice consists in regulating the so called financial contracts or "los contratos financieros".

The article 571 para. 1 states that these have as material object an amount of money and as purpose the financing another person, in direct or indirect way, with a financial compensation: "Son contratos financieros aquéllos por los que, teniendo por objeto una cantidad o suma de dinero de curso legal, en adelante suma monetaria, una o ambas partes conceden o facilitan a la otra directa o indirectamente financiación monetaria en la forma, plazo o términos que estipulen, a cambio de un precio".

Relevant for the modernization processus can be considered the regulation of some contracts related to the improvement of the technology.

On one hand, art. 532-2 regulates the contract that supposes providing means of electronic communications. According to article mentioned above "por el contrato mercantil de servicio de comunicación electrónica el prestador, a cambio de una remuneración, se obliga frente al cliente a suministrarle el acceso a la red pública de comunicaciones electrónicas para la transmisión de datos o información".

On the other hand, according to the article 532-12 "por el contrato de alojamiento de datos el prestador, a cambio del pago de una remuneración, se obliga frente al cliente a poner a su disposición una determinada capacidad de almacenamiento en un sistema de información bajo su control, a conservar los datos o la información almacenados,

[8] See Fatima Lois Bastida, El contrato de descuento, 692. See also Joaquin Garrigues, Contratos bancarios, p.285-6 and Garcia-Pita y Lastres, El Contrato bancario de descuento, Contratos bancarios, (Madrid, 1992) 727,735.

[9] See Dan Velicu, "Los contratos bancarios en el nuevo Código Civil rumano. Un análisis crítico de la reciente reforma" in *Revista Electrónica de Derecho de la Universidad de La Rioja* (11, 2013), 147.

así como, en su caso, a permitir el acceso de terceros a los mismos en las condiciones pactadas en el contrato o, en su defecto, conforme a lo previsto en el presente Código o en disposiciones especiales".

Finally, the draft retains also the definition of the "contrato de publicidad", which supposes that "un anunciante encarga a una agencia de publicidad, mediante una contraprestación, la ejecución de publicidad y la creación, preparación o programación de la misma".

3. Conclusions

It is obvious as we have anticipated that a complete and matured analysis of draft is impossible taking into account the time or the space we dispose and also the length of the draft.

On short, we have tried to mention only some key concept which can be very useful in every debate on the modernization or the reform of the commercial legislation.

The Spanish draft is, in our opinion, a good example which proves that it is possible to reform or modernize the commercial code without renouncing to the dualistic character of the private law.

As a preliminary observation, we consider that the draft offers a more coherent system and vision in comparison with the Romanian reform, conclusion that doesn't mean the draft has to be considered perfect as never a code was and never will be.

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ROLE OF THE INSOLVENCY ADMINISTRATOR AND OF THE OFFICIAL RECEIVER IN THE DYNAMICS OF THE CONTRACTS OF DEBTOR IN INSOLVENCY, IN THE REGULATION OF THE INSOLVENCY CODE

Eugenia VOICHECI[*]

Abstract

On 25 June 2014, the Law no.85/2014 was published in the Official Gazette, that sets forth the rules in the field of preventing insolvency and in the insolvency field itself.

A special attention needs to be paid on to the insolvency administrator and the official receiver, deemed by the doctrine in the former doctrine and in the former regulation, as participants in the insolvency procedure participants in the insolvency procedure.

This study does not aim to make an exhaustive inventory of the tasks of the duties of the two participants in the insolvency procedure.

This study starts from the premises that the insolvency procedure targets the covering of the debtor liabilities, by granting, where possible, the chance of redressing its activity.

It starts from an evident ascertainment: namely that, on the date of initiating the insolvency procedure, the debtor's activity is not interrupted ex abrupto and finally, that it may continue during the observation time, during the reorganization period and even after falling bankrupt.

Or, an ongoing activity implies the development of some previously concluded contracts, their denunciation and even the conclusion of some new contracts. Therefore, during the procedure, such dynamics of the debtor contracts is vitally important.

In the doctrine focused on the former regulation, the two participants in the procedure were deemed as "justice attorneys", and in this recent doctrine they were appreciated as "justice representatives".

This study proposes also another approach of the quality of representative of both participants in the procedure, an approach that would emphasize the legal relationships between the insolvency administrator and the official receiver, on one hand and the debtor in insolvency, on the other hand.

On other words, the study wants to emphasize where the insolvency administrator and official receiver, depending on the incumbent legal tasks, in relationship with the debtor.

Keywords: *Insolvency Code, debtor, opening the insolvency procedure, insolvency administrator and official receiver, contracts.*

Introduction

The study proposes an incursion in the matter of insolvency, as it is defined by the Law no. 85/2014 concerning the insolvency prevention procedures and the insolvency, regarded from a constructive perspective, respectively from the point of view of the contracts that ceases, continues to develop or is concluded during these procedures.

The importance of the study resides in the analysis of the role of the two practitioners in insolvency in the contracts' dynamics, as well as of the way in which their position is towards the debtor, the creditors, towards the third parties in the procedure, as well as towards the syndic judge, such a specific research being somehow faulty at this time in the specialty doctrine.

The analysis will consider an examination of the duties of each practitioner in insolvency, depending on the stages of the procedure, an examination of the institution of representation in the contractual and procedural matter, of the institution of the consent and of the company's will, as well as an examination of the authority relationship between the participants in the procedure in the contracts' dynamics.

This study topic is not found as being and examination subject in the specialty literature. It is unquestionable that both in the conditions of the Law no. 64/1995, and in the conditions of the Law no. 85/2014, the doctrine was concerned in details to emphasize the rile of the insolvency administrator and of the official receiver in the insolvency procedure, a particular and quasi-unanimous emphasis being put on the inventory of the legal tasks that fall upon them.

It must be underlines, under such aspect, the weight of the works representing comments on articles or annotations to the Insolvency Code[1].

[*] PhD Candidate, "Nicolae Titulescu" University, Faculty of Law (e-mail: **eugenia_voicheci@yahoo.com**).

[1] Turcu, Ion - *Codul insolvenței – Legea nr. 85/2014. Comentariu pe articole*, București, Ed. C.H. Beck, 2015; Cărpenaru, Stanciu D., Hotca, Mihai Adrian și Nemeș, Vasile - *Codul insolvenței comentat*, București, Ed. Universul Juridic, 2014; Țăndăreanu, Nicoleta - *Codul insolvenței adnotat*, București, Ed. Universul Juridic, 2014.

To an equal extent, there are studies that deal with the matter of the participants in the insolvency procedure and that focuses mainly also on the inventory of the duties of both participants in the insolvency procedure[2], as there are individual studies relating to the liability of the participants in the insolvency procedure.[3]

There are not, however, as far as we know, studies that would concentrate over the matter which we approach and that would emphasize particularly the role of the insolvency administrator and of the official receiver in the current contractual nexus in the insolvency procedure, raising multiple and particularly complex problems in this critical period of the debtor and that presents interest both for the debtor that tend to rehabilitate and to obtain the reinsertion in the economic circuit, and for the creditors motivated by the acute imperative of covering the unpaid debts.

The study will attempt to underline to what extent the practitioners in the insolvency designated in the procedure may be deemed representative of debtor, of creditors or justice attorneys as well as the multivalence of their activity in the procedure, as it will try to emphasize the degree of autonomy of their activity in the fulfilment of the legal provisions or as established by the syndic judge.

The content itself

General considerations over the insolvency prevention procedures and over the insolvency, over the bodies that apply the procedure and over the participants in the procedure.

The Law no. 85/2014 regulates the insolvency prevention procedures and the insolvency applicable to debtors mentioned in the art. 3 of the Law, corroborated with the art. 3 para. 2 Civil Code.

Insolvency prevention procedures are regulated in the Title I of the Law and are applicable to debtors that are found in financial difficulty, as it is defined by the art. 5 point 27 of the Law no. 85/2014. Art. 6 of the Law no. 85/2014 do not provide, as a condition for the enforcement of these procedures, the existence of the debtors' insolvency state.

The insolvency prevention procedures are the ad-hoc mandate and the arrangement with creditors.

According to the provisions of the art. 10 para. 1 and of the art. 23 para. 1 of the Law no. 85/2014, the ad-hoc attorney and the administrator appointed by the arrangement with creditors are proposed by the debtor and appointed by the Court President, respectively by the syndic judge, between the practitioners in insolvency certified according to the law. These legal provisions are fully compliant with the provisions of the art. 1 of GEO no. 86/2006, providing that the insolvency procedures, voluntary winding up procedures, as well as the insolvency prevention procedures provided by the law, including the financial supervision measures or special administration measures, are led by compatible practitioners in insolvency.

The insolvency procedure applies to debtors in insolvency, as it is defined in the art. 5 point. 29 of the Law no. 85/2014 and is regulated by the Title II of the same regulating act.

Law no. 85/2014 refers to the bodies that apply the procedure and to participants in the procedure in the Title II – Chapter I – Section II, without defining them, limiting to listing them and stating over their role, rights and duties in different stages of the procedures.

A part of the doctrine's opinions[4] were expressed in the meaning that the bodies enforcing the procedures are the courthouses, syndic judge, insolvency administrator and the official receiver. This appraisal is in accordance with the provisions of the art. 40 para. 1 of the Law no. 85/2014.

Other authors deemed[5], expressly or implicitly, that the bodies enforcing the procedure are part of the generic category of participants in the procedure, their relationship being from species to gender.

We appreciate as grounded the first opinion. Although the legal text quoted above don't make a firm distinction between the bodies enforcing the procedure and the participants in the procedure, none of them include the bodies enforcing the procedure in the category of participants in the procedure, but on the contrary, a clear dichotomy operate between the two categories.

In addition, it is ascertained that the provisions of the art. 40 para. 1 of the Law no. 85/2014 lists distinctly the bodies that enforce the procedure, while the title of the Section II represents a juxtaposition of the two categories, without making reference to "other participants in the procedure", as it is retained by the doctrine, an expression that

[2] Nemeș, Vasile - *Drept comercial,* Ediția a 2-a revizuită și adăugită, București, Ed. Hamangiu, 2015; coord. Bufan, Radu - *Tratat practic de insolvență*, București, Ed. Hamangiu, 2014; Sărăcuț, Mihaela - *Participanții la procedura insolvenței*, București, Ed. Universul Juridic, 2015.

[3] Popa, Carmen - "Natura juridică și limitele răspunderii civile a administratorului judiciar" http:/www.juridice.ro/341569/natura-juridica-si-limitele-raspunderii-civile-a-administratorului-judiciar/html

[4] Țăndăreanu, Nicoleta, op. cit., pag. 93-94; Turcu, Ion, op. cit., pag. 135-138 ; Cărpenaru, Stanciu D., Hotca, Mihai Adrian și Nemeș, Vasile, op. cit., pag. 115-119.

[5] Sărăcuț, Mihaela, op. cit., pag.8-10; Nemeș, Vasile, op. cit., pag. 496; Gheorghe, Cristian - *Drept comercial român,* București, Ed. C.H. Beck, 2013, pag. 708-718; coord. Bufan, Radu, op.cit., pag. 163; Cărpenaru, Stanciu D. - *Tratat de drept comercial român- Ediția a IV-a, actualizată*, București, Ed. Universul Juridic, 2014, pag. 721, corelat cu pag. 735.

would bind us to include the bodies enforcing the procedure in the category of the participants in the procedure.

An additional argument for supporting this orientation is grounded on the provisions of the art. 180 of the Law no. 85/2014, that, providing the discharge of any duties and obligations at the closing of the procedure for the syndic judge, the practitioners in insolvency and the assisting persons, marks undoubtedly the difference between the bodies enforcing the procedure and the participants in the procedure.

In conclusion, we appreciate that the Title II – Chapter I – Section II of the Law no. 85/2014 sets forth a clear difference between the *bodies enforcing a procedure* – that are the legal courts (court of law, syndic judge and the court of appeal), the insolvency administrator and the official receiver – and the *participants in the procedure* – that are the debtor through the special administrator and the creditors by the creditors meeting and the creditors meeting.

Insolvency administrator and official receiver –common general considerations

Provisions of the art. 1 of the GEO no 86/2006 concerning the organization of the activity of the practitioners in insolvency provide that the insolvency procedures, voluntary winding-up procedures, as well as the insolvency prevention procedures provided by the law, including the financial supervision measures or the special administration measures, are led by compatible practitioners in insolvency.

As a first remark over the mentioned legal text, we appreciate that the provision related to ”the management” of the procedure is, at least as concerns the insolvency procedure, not correlated in the text of the articles 2 and 3 of the Ordinance, where it is not provided that the insolvency administrator and official receiver lead to the procedure, but that they exercise tasks provided by the law or established by the courthouse, respectively *leads the debtor's activity* (s.n.) and exercises the activities provided by the law or those established by the legal court.

Law no. 85/2014 does not define the insolvency administrator and the official receiver. In addition, the provisions of this regulatory act makes reference to the official receiver (s.n.), while the art. 3 of GEO no. 86/2006 make reference to the receiver (terminology in accordance with the one used nowadays, in the Law no. 85/2006). Taking into account the principle of the law's supremacy, as well as that the Law no. 85/2014 represent the common law in the matter of insolvency and is subsequent to GEO no. 86/2006, we appreciate that the correct phrasing in terminological terms, is that of *official receiver*, that will be found in this entire study.

As it was also shown before, the Law no. 85/2014 does not have its own definitions for the insolvency administrator and nor for official receiver, the two practitioners in insolvency being defined, in exchange, by GEO no. 86/2006.

According to the provisions art. 2 of the GEO no. 86/2006, the insolvency administrator is the compatible practitioner in insolvency, authorized under the law, designated to exercise the duties provided by the law or established by the legal court, in the insolvency procedure, in the observation period and during the reorganization procedure.

Art. 3 of the GEO no. 86/2006 defines the receiver (hereinafter referred to as official receiver for the considerations mentioned above) as the compatible practitioner in insolvency, authorized by the law, designated to lead the activity of the debtor in the bankruptcy procedure, both in the general procedure, and in the simplified procedure, and to exercise the tasks provided by the law or those established by the legal court.

The legal text mentioned emphasized the two conditions which the practitioner in insolvency must fulfil mandatorily and indispensably, in order to be able to develop activity in one of the two mentioned qualities, conditions that, if analysed logically, refer to the authorization according to the law and to compatibility.

Law no. 85/2014 does not refer to any of the two conditions, and in the law silence, we deem that, as show also in the doctrine[6], that they must be checked according to the provisions of GEO no. 86/2006.

Thus, we deem that the fulfilment of the requirement of ”authorization according to the law” must be checked in relation with the provisions of the art. 30-35 of GEO no. 86/2006. Accordingly, we appreciate that the authorization must be made in accordance with the Statutes concerning the organization and exercising of the profession of practitioner in insolvency, issued by the National Union of Practitioners in Insolvency from Romania, entity that is a public utility legal person, autonomous and without lucrative purposes, with duties provided by the art. 46-48 of the Ordinance and that has self-regulating competence.

Similarly, we appreciate that the requirement of the compatibility of the practitioner in insolvency must be observed in relation with the provisions of the art. 27-28 of GEO no. 86/2006, that provide both cases of incompatibility themselves and interdictions of exercising the profession in certain situations and in front of certain courts.

It must be underlines the fact that, although the art. 2 and art. 3 of GEO no. 86/2006 refer to the

[6] Sărăcuț, Mihaela, op. cit., pag. 52-54.

duties established by the court of law, at least in the insolvency procedure, these legal provisions must be construed as making reference to the syndic judge, in consideration of the provisions of the art. 44 of the Law no. 85/2014, that provide that the distribution of causes, having as subject the procedure provided by this title (s.n. Title II Insolvency Procedure), to the judge designated as syndic judge is made randomly in a computerized system…[7]

Finally, as concerns the same legal texts examined previously, it is required also note that they contain a phrasing that is somehow inadequate, in connection with the obligation incumbent to each one of the two practitioners in insolvency. In real facts, both the insolvency administrator, and the official receiver must exercise also the tasks provided by the law, and those established by the syndic judge, they not being entitled to choose between the two types of tasks, that are, in this way, mandatory in equal extent. This aspect result from the interpretation of the provisions of the art. 58 para. 1 and 2, and of the provisions of the art. 63 of the Law no. 85/2014, legal provisions that don't confer to the practitioner in insolvency the right to choose between the duties established according to their legal and jurisdictional nature.

From this point of view, we appreciate that the text of the art. 2 and of the art.3 of GEO no. 86/2006 had to consecrate the obligation of the practitioner in insolvency to exercise their tasks provided by the law and (not **OR**) those established by the syndic judge.

The relationships between the insolvency administrator and the official receiver – on one hand– and the syndic judge, debtor and creditors – on the other hand.

In the fulfilment of the position and of the role for which they were designated, the insolvency administrator and the official receiver develops a specific and autonomous activity but which does not escape to the control exercised by the syndic judge and by the participants in the procedure.

Specific activity

This activity is circumscribed to the tasks conferred *in terminis* by the law – the art. 58 of the Law no. 85/2014 for the insolvency administrator and the art. 64 of the same regulatory act for the official receiver -, as well as to those established by the syndic judge.

Art. 58 para. 2 of the Law no. 85/2014 entitles the syndic judge to establish in duty of the insolvency administrator and other tasks besides those provided for by the para.1 of the same article, but excludes those from the sphere of these additional tasks those provided for the exclusive competence of the syndic judge, tasks provided by the art. 45 of the Law, which leads to the conclusion that the law ruler did not understand to delegate in favour of the insolvency administrator, even if they deem it to be a body enforcing the procedure, prerogatives of the ultimately judicial activity.

It is ascertained that the provisions of the art. 64 letter l of the same regulatory act, concerning the right of the syndic judge to establish also in the duty of the official receiver any other tasks that provided at the letters a-k ale of the same article, are no more excepted from the art. 58 para. 2 of the final thesis, that was referred to as previously.

We appreciate, however, that the interdiction of delegation to the official receiver of some strictly jurisdictional tasks is fully applicable also in case of this practitioner in insolvency for reason identity, Law no. 85/2014 not conferring to such practitioner a different status, but only tasks different from those of the insolvency administrator; consequently, it is applicable the legal principle of *ubi ratio, ibi semper solutio.*

The fulfilment of the legal tasks and of those set forth by the syndic judge must be made by the practitioners in insolvency in compliance with the following principles: the tasks must be achieved in compliance with the law, for the purpose for which the insolvency procedure was regulated, under managerial and optimal opportunity conditions, and considering the type of procedure that is developed.

There relevant under the aspect of conformity of the tasks with the law, the provisions of the art. 4 of the Law no. 85/2014, setting forth principles on which the insolvency procedure is based, these principles being imperiously necessary to be observed by the bodies enforcing the procedure and fully opposable to the participants in the procedure.

In addition, the provisions art. 182 of the Law no. 85/2014 are also relevant, regulating the matter of liability of the insolvency administrator and of the official receiver for exerting their duties with bad faith or with serious negligence, the two forms of guiltiness being related to the violations of the material or procedural law norms or to the faulty fulfilment of a legal obligation, that case the harming of a legitimate interest (para.1).

The same article provides in the second paragraph also the possibility of engaging the civil, penal, administrative or disciplinary liability of the insolvency administrator or of the official receiver for the acts performed during the procedure according to the common law regulations.

The conclusion that may be drawn by force of evidence is that, in the fulfilment of tasks that are conferred to them, the insolvency administrator and the official receiver must fully observe this law.

[7] For developments see Sărăcuț, Mihaela, quoted work, pages 34-35.

In the same way must be construed also the provisions of the art. 45 para. 2 thesis I of the Law no. 85/2014, providing that the tasks of the syndic judge are limited to the court control of the activity of the insolvency administrator and/or of the official receiver, which implies a control of legality, not of the opportunity of the measures adopted by these practitioners in insolvency.

Art. 45 para. 2 thesis II of the Law no. 85/2014 brings into first plan the managerial side of the activity of the two practitioners in insolvency, consisting of the decisions of opportunity which they adopt in connection with the activity of the insolvent debtor, the law text providing also here a type of control, this time coming from the creditors, through their bodies.

It must be underlines the fact that the activity which the insolvency administrator and the official receiver performs must be subsumed *ab initio and in* necessarily for the purpose for which the insolvency procedure was set up, as it is set forth in the art. 2 of the Law no. 85/2014: setting-up of collective procedures for covering debtor liabilities, by granting where possible, of a chance of redressing of its activity.

From the examination of the legal text involved, two ideas are depicted that constitute the same many imperatives for the activity of the two actors, whose activity we deal in this study: exercising the tasks which are incumbent thereto, must create the conditions of development of a collective procedure, to follow with priority the covering of the debtor liabilities, and to grant to the later, when the situation is favourable, the chance of redressing the activity, with the consequence of its reintroduction in the economic, commercial circuit.

In this context, the activity of these two practitioners in insolvency seems to have a difference nuance. Thus, if the purpose of exercising the incumbent tasks is the same– setting up of a collective procedure for covering the liabilities of the debtor in insolvency -, the insolvency administrator must observe also an additional imperative – granting of a change of redressing of the debtor's activity, when the analysis of its activity and of its patrimonial and financial state make possible such redressing.

That is why we appreciated that the fulfilment of the tasks incumbent to the two practitioners in insolvency must take into account also the type of procedure in which the debtor is and in which must be equally protected, of the situation allows it, both the creditors' interests, by covering the debtor's liabilities, and those of the debtor, when it is able to redress.

Autonomous activity, but not non – censorable

The insolvency administrator and the official receiver are free to appreciate the way in which they follow to develop their activity in the procedure, as they also have the initiative of the undertaken enterprises, depending on the assessment which they make in legal, economic and financial terms to the debtor's activity and to its patrimonial standing. Also, it may be asserted with fair grounds, that the activity of the practitioners in insolvency within the procedure is an autonomous one, that may be imposed but, which, following the exercised control a control mainly *a posteriori*), may be infirmed, therefore corrected.

It may be ascertained that the provisions of the art. 45 para. 2 of the Law no. 85/2014 contain the norm of principle, according to which the syndic judge exerts the legal control (n.n. of the legality of acts) of the activity of the insolvency administrator and of the official receiver, and the control of the managerial activity (n.n. opportunity control) is achieved by the creditors, by their bodies.

Also with value of norm of principle, it must be outlines also the provision of the art. 45 para. 1 letter j and m of the Law, that, interprets *per a contrario*, but also in corroboration with other legal provisions (*exempli gratia* art. 59 para.5, art. 111, art. 113 etc. of the Law), sets forth that the debtor, creditors or other interested persons may challenge the taken measures, as well as the reports drawn out by the insolvency administrator and by the official receiver.

Similarly, it must be shown also that the proposals formulated by the insolvency administrator or by official receiver of the starting by the debtor in procedure of the bankruptcy are not effect producing by themselves. According to the provisions of the art. 92 para. 3 and 4, that also the provisions of the art. 97 para. 4 and art. 98 of the Law no. 85/2014, these proposals are subject to the parties' debate, respectively to the approval by the creditors' meeting, and their validity is made by meeting passed by the syndic judge (art. 92 para. 5 and art. 98 para. 3 of the same regulatory act).

The control is not however unequivocally; at their turn, the insolvency administrator and the official receiver may request the censorship for reasons of illegality of the decisions of the creditors' meeting, through actions for annulment, under the conditions of the art. 48 para. 7 of the Law no. 85/2014, save the decisions by which they were appointed.

Equally, we appreciate that at least the insolvency administrator may censor those acts and operations undertaken by the debtor who was not taken off the management right – through the special administrator – by violating or exceeding the limits of the art. 84 and 85 para. 1 and 2 of the Law no. 85/2014, through actions for annulment, under the conditions of the art. 45 para. 1 letter i final thesis of the Law.

In conclusion, we deem that in the insolvency procedure there is a bi-univocal control of the actions undertaken by the bodies enforcing the procedure and of those of the participants in the procedure, with the mention that the decisions passed by the syndic judge may be strictly appealed by the legitimate procedural active persons, under the conditions and with the limits provided by the law for the judicial control.

Role of the insolvency administrator and of the official receiver in the dynamics of the contracts concluded by the debtor

The aforementioned presentation, although apparently ample developed, was deemed as necessary precisely in order to determine the position of the two practitioners in insolvency in procedure, of their role in this procedure and of the relationships in which they stand in relation with the courts of law and with the participants in the procedure.

The examining of the role which they play in the complex network of contracts concluded by the debtor in insolvency proves to be a challenge and implies a laborious action, that emphasize not only the multitude of contracts concluded before opening the procedure but also those that arise, develop and denounced during the procedure, as the capacity or on the contrary, a true incapacity of the debtor to manage them may outline.

It is of interest as well, the position in which the practitioner in insolvency stands in this dynamics of the contracts, respectively its capacity of representative of the debtor or of the creditor as well as the purpose aimed by him in his action to conclude, develop or denounce certain contracts.

A first relevant issue for choosing this topic consist in the multitude and variety of contracts that may be developed in the insolvency procedure.

As a first note, it must be underlined also the fact that the Law no. 85/2014 does not contain an inventory, not even illustrative, but the less exhaustive of the contracts of the debtor in insolvency.

A second note aims to the fact that a careful examination of the art. 5 of the Law no. 85/2014 outlines the multitude of contracts for which the law ruler felt the need of some definitions.

It is required to specify that the law ruler treated the contractual issue to which we refer exclusive for the situation in which a law subject, named debtor and being part of the categories especially provided in the art.3 of the law, is in state of financial difficulty, as it is defined by the art.5 pct.27 of the Law, or in insolvency, as it is defined by the art.5 point 29 of the same regulatory act.

By examining the Law no.85/2014 it may be concluded that the law mentions and in certain cases defines a series of contracts specific to the procedure, a part provided by special laws or by the common law, part proper for the insolvency prevention procedures.

From the first category, we remind the compensation agreement (netting), qualified financial contracts, bilateral compensation contract, service agreements, raw materials, materials or utilities contracts, guarantor agreement, other contracts concluded by the debtor (sale, leasing, labour contracts, service agreements, consignation agreements, etc.).

The second category also comprise the contracts specific for the insolvency prevention procedures.

For instance, specific for the procedure of ad-hoc mandate is the "understanding" (art.13 para.2) which the ad-hoc attorney proposed by the debtor and appointed by the president of the court, must be made between the debtor and one or more creditors of the later, in order to exceed the state of financial difficulty, of safeguarding the debtor, of keeping the jobs and covering the debts over the debtor. If the "understanding" is concluded, the ad-hoc mandate ends.

Analysing the art.13 para.3 of the Law no.85/2014 it may be concluded that the "understanding" made by the ad-hoc attorney has the vocation of representing in reality, a complex convention, similar to a redressing plan, as long as it is based on the proposals of the ad-hoc mandate in connection with remissions, spreading in instalments, or partial duty reduction, with the continuation or cessation of some ongoing contracts, with staff reduction or with any other measures deemed as necessary.

In the same way, specific to the other procedures of preventing insolvency is the conclusion of an arrangement with creditors, on the basis of the offer submitted and notified by the temporary administrator appointed under the arrangement with the creditors, approved by the creditors representing at least 75% of the value of the debts accepted and unchallenged and homologated by the syndic judge.

This arrangement with creditors having a status and value of contract results from the circumstances that the meeting of creditors may request taking of a specific penalty – termination - in case of failure of the debtor to observe the undertaken obligations, as well as from the analysis of the provisions of the art.36 of the law, referring *in terminis* to " the term provided for in contract".

The particular variety of the types of contracts provided by the Insolvency Code cannot have but one meaning: contracts are the economic instrument and the legal means indispensable both to redressing of debtors found in financial difficulty or in

insolvency, and also their winding up, that is why also this detailed regulation of contracts.

It is no less relevant that although the Law no. 85/2014 dos not clearly define the debtor subject to the insolvency procedure, as it was made by the Law no. 85/2006, from the corroborated analysis of the provisions at. 38, art. 52, art. 53, art. 54, art. 55, art. 67 para. 1 letter i – n, art. 68 etc. it results that there may be subject to the insolvency procedure the professionals who are freelancers or legal entities that must register in an advertising system, most of them being trading professionals. From here as well the variety and complexity of the contracts that must be managed in the procedure, being obvious that the trading activity is basically focused on contractual legal relations.

The approach of the issue of the contracts of the debtor in insolvency implies their grouping in two large categories depending on the time of opening the insolvency procedure: contracts concluded before opening the insolvency procedure and contracts concluded after that moment.

As concerns the contracts concluded before opening the insolvency procedure, it must be noticed that it is not taken into question the quality of representative or of supervising body of the practitioner in insolvency, such contracts being concluded by the debtor by statutory representative.

In this case, it must be considered also that the insolvency administrator or the official receiver may decide, in case that the debtor was not taken off the management right, if it maintains one or more contracts, of it /they may continue in the same terms, if the amendments of some clauses is required, may supervise the execution, but also may decide their assignment, or it may decide if the termination of denunciation is required.

With reference to the contracts concluded in the same period the practitioner in insolvency is entitle to submit actions for annulment under the conditions of the art. 117-122 of the Law no. 85/2014.

As concerns the contracts concluded after opening the insolvency procedure, it must be underlined that they may be concluded by the debtor through the special administrator, under the conditions of the art. 87 para.1 letter a of the Law no. 85/2014, if the debtor was not taken off the management right, by the debtor through the insolvency administrator, under the conditions of the art. 87 para. 1 letter b of the Law if the debtor's management right was taken off and by the debtor through the official receiver, in the bankruptcy procedure, when the debtor is mandatorily take off the management right.

Against the legal acts concluded by the debtor after opening the procedure, by the violation of the legal interdictions, the insolvency administrator and the official receiver may formulate an action for annulment, as it results from the interpretation *per a contrario* of the provisions of the art. 45 para. 1 letter i final thesis of the Law no. 85/2014.

We deem that understanding of the role of the practitioner in insolvency in relation with the competences that are granted thereto in the management of the contracts of the debtor must be approached in considering the quality of the representative of the debtor, which the law confers thereto, and on the other hand, in considering each operation undertaken in connection with these contracts.

Quality of representative of the insolvency administrator and of the official receiver

Preliminary, and of special importance, it is due to underline the fact that in the contents of the Law no. 85/2014 the law ruler speaks about the quality of the practitioners in insolvency of the debtor's representatives and never as creditors' representative.

The law does not make the difference– and nor we think that it would be necessary– between the procedural and material plans, and that is because the Law no. 85/2014 concerning insolvency prevention procedures and insolvency itself is, in its essence, a law of procedure.

In this study it is of interest only the quality of representative of the debtor acquired after the opening of the procedure, because before this time, it is absolutely clear that the representation cannot be but the statutory one.

In the suit proceedings, the attention is drawn by an unfortunate provision being ambiguous: according to the art. 41 para. 5 of the Law no. 85/2014, in litigations that were promoted based on the common law, after opening the insolvency procedure the summoning of the debtor is made at his registered seat and at the registered seat of the insolvency administrator/official receiver, without mentioning who is the representative through which the summoning takes place as procedural act. The legal text presents a significant minus compared to the former regulation contained in the art. 87 point 5 of the Code of civil procedure since 1865, that provided that the persons subject to the procedure are summoned through the administrator or as applicable through the official receiver, thus conferring to the practitioner in insolvency the quality of representative in the suit.

From the corroboration of the provisions of the art. 56 and art. 57 from the Law no. 85/2014 it results that, in case that, after opening the procedure, the debtor does not have his management right taken off, he has the quality of representative of the debtor, since the date of appointing of the special administrator in this situation ending the mandate of the statutory directors (art. 54 thesis II of the Law). Under the same issue, we have to underline that,

although the pre-quoted article makes general reference to the mandate of the statutory directors, it is relevant in the meaning of the analysis that it is taken into account inclusive the representation mandate granted to the statutory director/directors.

In relation to the provisions of Article 56(2) of the Law no. 85/2014, it is beyond any doubt that the insolvency administrator and official receiver have the capacity of representative of the debtor after the latter was withdrawn the right of administration.

The issue related to the involvement of the debtor in the management of the contracts concluded before the start of the procedure and not terminated after this moment, as well as to those concluded after the start of the procedure can be settled as the representation of this contracting party, namely they are managed and concluded by the special administrator when the right of administration was not withdrawn, and by the insolvency administrator, respectively by the official receiver when this right was withdrawn.

The issue is only apparently settled.

We emphasize, in the first place, that the issue of representation by special administrator is present only during the period of time during which the debtor benefits of the right to manage its activity, so that it is about only the competencies of the special administrator and those of the insolvency administrator, in the case of appointment of an official receiver, ceasing the mandate of the special administrator as the representative of the debtor.

By continuing the analysis, we must emphasize that the mandate of the special administrator is defined by Article 56(1)(d) of the Law no. 85/2014, providing that this representative of the debtor manages the debtor's activity under the supervision of an insolvency administrator, after confirming the plan, only if the debtor was not withdrawn the right of administration.

During the supervision period, pursuant to Article 87 of the Law no. 85/2014, the debtor, by the special administrator, may continue the performance of current activity and to make payments under the supervision of the insolvency administrator, if the debtor submitted a reorganization request and was not withdrawn the right of administration, and under the management of the insolvency administrator, if the was it was withdrawn the right of administration.

The analysis of the two legal texts identifies the fact that the right of representation granted to the special administrator is not pure and simple, but conditional on the surveillance performed by the insolvency administrator.

Current activities are defined by Article 5(1)(2) of the Law no. 85/2014, and the surveillance activity performed by the insolvency administrator is defined by section 66 of the same paragraph of the same article. This latter operation, as configured, involves that the insolvency administrator, after permanently analysing the debtor's activity, gives its approval related to the measures involving the debtor from patrimonial point of view, as well as those aimed to lead to its restructuring/reorganization.

The law does not provide *in terminis*, but the analysis of the abovementioned legal provisions leads to the firm conclusion that this is about an approval limiting the decision-making powers of the special administrator and rending useless its representation power, conditioning it on the approval of the insolvency administrator.

Fate of the insolvent debtor's contracts

As it was shown above, the insolvency administrator and official receiver have a right to life and death related to the contracts concluded by the debtor before the start of the insolvency procedure.

Pursuant to Article 123 and Article 129 of the Law no. 85/2014, the practitioners in insolvency appointed in the procedure can terminate contracts in progress.

Pursuant to Article 130 of the same law, they can request the liquidation of the debtor's rights being partner in an agricultural company, unlimited company, limited partnership, limited liability company or shareholder in a joint-stock company.

Pursuant to Article 123(5) of the Law, the insolvency administrator can, with the agreement of the co-contractors, change the clauses of the contracts concluded by the debtor.

Article 123(10) of the Law gives to the insolvency administrator the right to transfer, under certain conditions, contracts in progress concluded by the debtor to third parties.

Article 128 also gives to both practitioners in insolvency the right to refuse to fulfil certain obligations undertaken under contracts.

Even if there are no express provisions for this purpose, we consider that the insolvency administrator and official receiver have the right, at least in connection with the capitalization of the debtor's assets (as sale), to conclude contracts with third parties.

The only limitations of the quasi discretionary right to manage of the practitioners in insolvency, as representatives of the debtor, are those provided by Article 89(4) and (5) of the Law no. 85/2014, aiming the special case of certain types of contracts (qualified financial contracts, netting agreement, operations with qualified financial instruments).

Representation or… much less?

Analysing the provisions of Article 54 and Article 55 of the Law no. 85/2014 providing the cessation of the statutory directors' mandates and the suspension of the activity of the general assembly of partners/shareholders/members of the debtor entity, we deem that, in this case, it is not about a temporary or final transfer of the statutory powers of representation to the insolvency administrator or

official receiver, but a true transfer of the deliberative and executive attributes, after a true annihilation of the company's will, the legal entity's agreement, in the favour of the practitioner in insolvency.

This transfer is temporary or final, as the debtor in insolvency succeeds to finalize the reorganization plan and to re-enter the economic flow or ends in bankruptcy.

Conclusions

In this paper, we have tried to identify the role, functions and characteristics of the insolvency administrator's activities and those of the official receiver in insolvency procedure.

We have also aimed to identify the way in which the bodies applying the procedure perform their activity in relation to the other bodies applying the procedure and participating in the procedure, focusing on the obligation to perform an activity in accordance with the law, the purpose and principles of the insolvency procedure. From this point of view, we believe that, in relation to the legal responsibilities they are given, the principles they have to comply with and the responsibilities set out by the syndic judge, the two practitioners in insolvency can be deemed "representatives" or "agents" of justice.

We have argued the capacity of representative of the debtor of the insolvency administrator and the official receiver, listing the powers they are given from procedural point of view, but also the roles they play in the management of the contracts concluded by the debtor.

We end by concluding that these practitioners in insolvency are clearly true representatives of the debtor in the insolvency procedure, not having this capacity in relation to the creditors, who are represented by their own bodies.

We also believe that the practitioners in insolvency assure a balance of the interests of all parties involved in the insolvency procedure, which they have to implement in accordance with the spirit and letter of the law.

We believe that the analysed issues must be deepened, and the stated purpose if this paper is to start a debate on these issues.

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THE LEGAL PROTECTION OF REFUGEE: WESTERN BALKANS

Elena ANDREEVSKA*

Abstract

States have been granting protection to individuals and groups fleeing persecution for centuries; however, the modern refugee regime is largely the product of the second half of the twentieth century. Like international human rights law, modern refugee law has its origins in the aftermath of World War II as well as the refugee crises of the interwar years that preceded it.

The refugee in international law occupies a large space characterized, on the one hand, by the principle of State sovereignty and, on the other hand, by competing humanitarian principles deriving from general international law and from treaty. The study of refugee protections invites a look not only at States' obligations with regard to admission and treatment after entry, but also at the potential responsibility in international law of the State whose conduct or omissions cause an outflow. The community of nations is responsible in a general sense for finding solutions and in providing international protection to refugee. This special mandate was entrusted to UNHCR.

At the start of the 21st century, protecting refugees means maintaining solidarity with the world's most threatened, while finding answers to the challenges confronting the international system that was created to do just that.

The aim of this article is to describe the foundations and the framework of international refugee law, to define refugees and protection of refugees; as well as to provides a brief analysis of the changing migration and asylum dynamics in the region and outlines some of the main challenges arising in this context..

Keywords: *Legal Protections; Refugee; Freedom of Movement; Western Balkan; Managing Borders.*

1. Introduction

The term "refugee" is a term of art, that is, a term with a content verifiable according to principle of general international law. In ordinary usage, it has a broader, looser meaning, signifying someone in flight, who seeks to escape conditions or personal circumstances found to be intolerable. The destination is not relevant; the flight is to freedom, to safety.[1] Implicit in the ordinary meaning of the word "refugee" lies an assumption that the person concerned is worthy of being, and ought to be, assisted , and, if necessary, protected from the causes and consequences of flight.

Refugees have existed as long as history, but an awareness of the responsibility of the international community to provide protection and find solutions for refugees dates only from the time of the League of Nations and the election of Fridtjof Nansen as the first High Commissioner for Russian refugees in 1921.[2] The League of Nations defined refugees by categories, specifically in relation to their country of origin.[3]

A further international legal instrument of that period is the resolution which the Intergovernmental Committee on Refugees (IGCR) adopted in Evian on 14 July 1938 to define its functions.[4] Its primary objective,"facilitating involuntary emigration from Germany (including Austria)".[5] A major review at the Bermuda Conference in April 1943 expanded the mandate to include "all persons, wherever they may be, who, as a resultant of events in Europe, have had to leave, or may have to leave, their country of residence because of the danger to their lives or liberties on account of their race, religion or political beliefs".[6]

* Professor, PhD, Faculty of Public Administration and Political Science, SEE-University, Tetovo (e-mail: **e.andreevska@seeu.edu.mk**).

[1] The reasons for flight may be many; flight from oppression, from a threat to life or liberty, from prosecution, from deprivation, flight from war or civil conflict, from natural disasters, flood, food crisis.

[2] The International *Nansen Office for Refugees* was created by the *League of Nations Resolution* of 30 September 1930 began active operations on April 1931. See League of Nations, *Treaty Series*, Vol. LXXXIX, No. 2005.

[3] Nansen's mandate was subsequently extended to other groups of refugees, including Armenians in 1924, as well as Assyrian, Assyro-Chaldean, and Turkish Refugees in 1928. During the League of Nations period (1921-1946) several institutions were created to perform some or all of the tasks of the High Commissioner for Refugees: the Nansen International Office for Refugees (1931-1938), the Office of the High Commissioner for Refugees coming from Germany (1933-1938), the Office of the High Commissioner of the League of Nations for Refugees (1939-1946) and the Intergovernmental Committee on Refugees (1938-1947). By adhering to the Convention relating to the International Status of Refugees, of 28 October 1933, States Parties for the first time undertook real obligations on behalf of Russian, Armenian and assimilated refugees. See League of Nations, *Treaty Series*, Vol. CLIX, No. 3663. Assimilated refugees were Assyrians, Assyro-Chaldeans, Syrians, Kurds and a small number of Turks.

[4] League of Nations, *Official Journal*, XIXth Year, Nos 8-9, August-September 1938, pp. 676 and 677; C. 244 M. 143.1938 XII, annex. In February 1939 the Member States of the IGCR appointed as Director the newly appointed High Commissioner for Refugees, whose headquarters were likewise in London. The IGCR ended its activities on 30 June 1947, six months after the Office of the High Commissioner closed. During that time the IGCR also protected the "Nansen refugees".

[5] 1938 19 (8-9) LNOJ 676-7. Also see UN Press Release SG/REF/3, 23 Jul. 1979.

[6] See UN doc. A/C.3/5, annexed to GAOR, Third Committee, 1 st. Sess., 1 st Part, 1946, Summary Records: UN doc. A/C.3?SR.1-11. UNRRA.

Up until 1950 the League of Nations, and thereafter the UN, established and dismantled several international institutions devoted to refugees in Europe. The International Refugee Organization (IRO) was the last to precede the United Nation High Commissioner for Refugees (UNHCR). The IRO was created in 1947 to deal with the problem of refugees in Europe in the aftermath of the Second World War and was to be terminated by June 30, 1950.[7]

The Office of the UNHCR succeeded the IRO as the principal UN agency concerned with refugees, taking account of the impact of developments within the UN, such as article 14(1) of the Universal Declaration of Human Rights,[8] and the 1967 Declaration on Territorial Asylum.[9] The bases for an international legal concept of the refugee are thus to be found in treaties, State and United Nation practice, and in the Statute of the UNHCR.[10]

In the 1980s and '90s, substantial changes came about in the environment in which international refugee protection was to be realized. The number of refugees grew exponentially— no longer as a product of colonialism but due to the steep rise in internal interethnic conflicts in the newly independent states.[11] And the refugee population steadily increased from a few million in the mid-1970s to some ten million by the late 1980s. In 1995 the number of persons needing assistance rocketed to around twenty-five million.

The field of UNHCR competence, and thus the field of its responsibilities, has broadened considerably since the Office was established. Briefly, the movement has been from the Statute through good offices and assistance, to protection and solutions. The class of beneficiaries has moved from those defined in the Statute, through those outside competence assisted on good offices basis, those defined in relevant resolutions of the General Assembly and directives of the Executive Committee, arriving finally at the generic class of refuges, displaced and other persons of concern to UNHCR. [12]

Finally, Migration dynamics in the Western Balkans[13] have undergone fundamental changes during the past years. Countries in the region still have to cope with the consequences of large-scale displacement of the 1991-95 conflicts. Social and economic challenges continue to trigger the movement of nationals from the Western Balkan countries within and from the region. However, the gradual political stabilization has transformed the Western Balkans into a region of transit and increasingly also destination of migrants and refugees from outside the region, including vulnerable groups such as victims of trafficking, unaccompanied and separated children or women at risk.[14]

2. The Legal Framework of the International Refugee Protection System

The refugee in international law occupies a large space characterized, on the one hand, by the principle of State sovereignty and the related principles of territorial supremacy and self-preservation; and, on the other hand, by competing humanitarian principles deriving from general international law and from treaty.[15]

The controlling international convention on refugee law is the 1951 Convention relating to the Status of Refugees (1951 Convention)[16] and its 1967 Optional Protocol relating to the Status of Refugees

[7] The Constitution of the IRO continued to practice of earlier instruments, and specified certain categories to be assisted. The IRO was also competent to assist 'displaced parsons', including those deported or expelled from their own countries, some of whom had been sent to undertake forced labor. See Journal of Law & Policy [Vol. 5:129), The Evolution of the International Refugee Protection, Regime Erika Feller, pp. 129-30, available at: http://law.wustl.edu/harris/documents/p129_Feller.pdf

[8] "Everyone has the right to seek and to enjoy in other countries asylum from persecution". The Declaration was proclaimed by the United Nations General Assembly in Paris on 10 December 1948 General Assembly resolution 217 A. Subsequent regional human rights instruments have elaborated on this right, guaranteeing the "right to seek and be granted asylum in a foreign territory, in accordance with the legislation of the state and international conventions." American Convention on Human Rights, art. 22(7); African [Banjul] Charter on Human and Peoples' Rights, art. 12(3), OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982).

[9] Adopted at the 1631st plenary meeting, 14 Dec. 1967; In: Resolutions adopted by the General Assembly during its 22nd session. Volume I, 19 September-19 December 1967. - A/6716. - p. 81. - (GAOR, 22nd sess., Suppl. no. 16)

[10] UNGA res.(V), annexed, pares. 1,2.

[11] The conflicts were fuelled by superpower rivalry and aggravated by socioeconomic problems in developing countries. Solutions to refugee problems became even more elusive— whether in Afghanistan, in the Horn of Africa, or in Southern Africa. To give some examples, 2.5 million people were displaced or fled to Iran from Northern Iraq in 1991; in former Yugoslavia the number of refugees, displaced and others assisted by UNHCR, exceeded four million; and the Great Lakes crisis of 1994 forced three million people to flee their countries.

[12] See Guy S. Goodwin – Gill, *The Refugee in International Law* (Clarendon Press, 1996),15; UNGA res. 36/148, 16 Dec. 1981; UN doc. A/41/324 (May 1986). Despite the protest of individual governments, the international community at larger has not hitherto demurred when UNHCR has exercised its protection and assistance functions in cases of large-scale movements of asylum seekers.

[13] For the purpose of this paper, the Western Balkans includes Albania, Bosnia and Herzegovina, Croatia, Kosovo (UNSCR Resolution 1244/99), Montenegro, Serbia and the Republic of Macedonia.

[14] See the concept note on Refugee Protection and International Migration in the Western Balkans: Suggestions for a Comprehensive Regional Approach, September 2013, available at: http://www.unhcr.org/531d88ee9.html

[15] Refugee law nevertheless remains an incomplete legal regime of protection, imperfectly covering what ought to be a situation of exception. It is incomplete so far as refugees and asylum seekers may still be denied even temporary refuge or temporary protection, safe return to their homes, or compensation. See UN doc. E/CN.4/1503, para. 9.

[16] United Nations General Assembly resolution 429(V) of 14 December 1950, available at http://www.unhcr.org/refworld/docid/3b00f08a27.html., has lost much of its significance.

(1967 Optional Protocol).[17] The 1951 Convention establishes the definition of a refugee as well as the principle of non - refulgent[18] and the rights afforded to those granted refugee status.[19]

The 1967 Refugee Protocol is independent of, though integrally related to, the 1951 Convention. The Protocol lifts the time and geographic limits found in the Convention's refugee definition. Together, the Refugee Convention and Protocol cover three main subjects:

The basic refugee definition, along with terms for cessation of, and exclusion from, refugee status;

The legal status of refugees in their country of asylum, their rights and obligations, including the right to be protected against forcible return, or refulgent, to a territory where their lives or freedom would be threatened; and

States' obligations, including cooperating with UNHCR in the exercise of its functions and facilitating its duty of supervising the application of the Convention.[20]

Convention refugees are thus identifiable by their possession of for elemental characteristics: (1) they are outside their country of origin; (2) they are unable or unwilling to avail themselves of the protection of that country, or to return there; (3) such inability or unwillingness is attributable to a well-founded fear of being persecuted; and (4) the persecution feared is based on reasons of race, religion, nationality, membership of a particular social group, or political opinion.[21]

The States which acceded to or ratified the 1951 Convention agreed that the term 'refugee' should apply, first to any person considered a refugee under earlier international agreements; and, secondly, to any person who, broadly speaking, qualifies as a refugee under UNHCR Statute.[22] Despite differences at the national and regional levels, the overarching goal of the modern refugee regime is to provide protection to individuals forced to flee their homes because their countries are unwilling or unable to protect them.[23]

The 1951 Convention and the 1967 Protocol remain the principal international instruments benefiting refugees, and their definition has been expressly adopted in a variety of regional arrangements aimed at further improving the situation of recognized refugees. It forms the basis for article I of the 1969 OAU Convention on Refugee Problems in Africa.[24]

Moreover, the refugee crisis in Central America during the 1980s led in due course to one of the most encompassing approaches to the refugee question. The 1984 Cartagena Declaration[25]proposed a significant broadening, analogous to that of the OAU Convention.[26]

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[17] The Convention enabled States to make a declaration when becoming party, according to which the words "events occurring before 1 January 1951" are understood to mean "events occurring in Europe" prior to that date. This geographical limitation has been maintained by a very limited number of States, and with the adoption of the 1967 Protocol , has lost much of its significance. The Protocol of 1967 is attached to United Nations General Assembly resolution 2198 (XXI) of 16 December 1967, available at http://www.unhcr.org/refworld/docid/3b00f1cc50.html

[18] The principle of non-refoulement prescribes, broadly, that no refugee should be returned to any country where he or she is likely to face persecution or torture. The possible application of non-refulgent or an analogous principle of refuge to those outside the 1951 Convention/1967 Protocol is also considered, as is the relationship between non-refulgent and asylum.

[19] Although the 1951 Convention definition remains the dominant definition. The regional human rights treaties have since modified the definition of a refugee in response to displacement crises not covered by the 1951 Convention.

[20] By acceding to the Protocol, States agree to apply most of the articles of the Refugee Convention (Articles 2 through 34) to all persons covered by the Protocol's refugee definition. Yet the vast majority of States have preferred to accede to both the Convention and the Protocol. In doing so, States reaffirm that both treaties are central to the international refugee protection system.

[21] "The Executive Committee reaffirms that the 1951 Convention relating to the Status of Refugees and the 1967 Protocol remain the foundation of the international refugee regime." See UNHCR Executive Committee Conclusion N° 87(f), 1999.

[22] Art. 1A(2) of the Convention. The 1951 Convention does not define how States Parties are to determine whether an individual meets the definition of a refugee. Instead, the establishment of asylum proceedings and refugee status determinations are left to each State Party to develop. This has resulted in disparities among different States as governments craft asylum laws based on their different resources, national security concerns, and histories with forced migration movements.

[23] Governments normally guarantee the basic human rights and physical security of their citizens. But when people become refugees this safety net disappears. Refugees fleeing war or persecution are often in a very vulnerable situation. They have no protection from their own state - indeed it is often their own government that is threatening to persecute them. If other countries do not let them in, and do not protect and help them once they are in, then they may be condemning them to an intolerable situation where their basic rights, security and, in some cases their lives, are in danger.

[24] Adopted by the Assembly of Heads of State and Government at its Sixth Ordinary Session. See Text United Nations, Treaty Series, No. 14691, entry into force 20 June 1974 in accordance with Article XI, Addis-Ababa, 10 September 1969. While incorporating the existing 1951 Convention refugee definition, the OAU Convention added a paragraph specifying that the term "refugee" shall also apply to every person who, owing to external aggression, occupation, foreign domination, or events seriously disturbing public order in either part or the whole of his country of origin or nationality, is compelled to leave his place of habitual residence in order to seek refuge in another place outside his country of origin or nationality. In other words, the notion of "refugee" was broadened beyond victims of generalized conflict and violence. The OAU Convention was also a significant advance from the 1951 Convention in its recognition of the security implications of refugee flows, in its more specific focus on solutions— particularly on voluntary repatriation, in contrast to the integration bias of the 1951 Convention— and through its promotion of a burden-sharing approach to refugee assistance and protection.

[25] See Regional Refugee Instruments & Related, *Cartagena Declaration on Refugees, Colloquium on the International Protection of Refugees in Central America, Mexico and Panama*, 22 November 1984, available at: http://www.refworld.org/docid/3ae6b36ec.html

[26] The Cartagena Declaration on Refugees bases its principles on the "commitments with regards to refugees" defined in the Contadora Act on Peace and Cooperation (which are based on the 1951 UN Refugee Convention and the 1967 Protocol).It was formulated in September 1984 and includes a range of detailed commitments to peace, democratization, regional security and economic co-operation. It also provided for

A key step in establishing the governance – and governability – of refugee is the establishment of national law based on and in compliance with international law. This is usually accomplished through ratification by states of relevant international human rights instruments and international labor standards, followed by their effective implementation.

The 1951 Convention also protects other rights of refugees, such as the rights to education, access to justice, employment and other fundamental freedoms and privileges similarly enshrined in international and regional human rights treaties. In their enjoyment of some rights, such as access to the courts, refugees are to be afforded the same treatment as nationals while with others, such as wage-earning employment and property rights, refugees are to be afforded the same treatment as foreign nationals.[27]

Despite these rights being protected in the 1951 Convention and under human rights treaties, refugees in various countries do not enjoy full or equal legal protection of fundamental privileges. Ethiopia, for example, made reservations to Articles 22 (public education) and Article 17, treating these articles as recommendations rather than obligations.[28] Although not a party to the 1951 Convention, Lebanon is host to a large population of refugees, predominately Palestinians. Restrictive labor and property laws in Lebanon prevent Palestinians from practicing professions requiring syndicate membership, such as law, medicine, and engineering, and from registering property. [29]

The adjudication of asylum claims is reserved to individual States. Although some States, namely those that comprise the Council of Europe, have made an effort to adopt a uniform asylum system, international and regional bodies lack the jurisdiction to adjudicate individual asylum claims.[30] International and regional bodies do, however, adjudicate claims asserting violations of the human rights of refugees and asylum seekers.

Furthermore, the municipal law practice of non-extradition of political offenders is one antecedent to current principles protecting refugees from return to a State in which they may face persecution. In some countries, the principle of asylum for refugees is expressly acknowledged in the constitution.[31] in others, ratification of the 1951 Convention and the 1967 Protocol has direct effect in local law, while in still other cases, ratifying States my follow up their acceptance of international obligations with the enactment of specific refugee legislation or the adoption of appropriate administrative procedure.[32]

Finally, refugees within the mandate of UNHCR, and therefore eligible for protection and assistance by the international community, include not only those who can, on a case-by-case basis, be determined to have a well-founded fear of persecution on certain grounds (so-called 'statutory refugees'), but also other large groups of persons who can be determined or presumed to be without, or unable to avail themselves of, the protection of the government of their State of origin.[33] The agency does this in several ways: it ensures the basic human rights of uprooted or stateless people in their countries of asylum or habitual residence end that refugees will not be returned involuntarily to a country where they could face persecution. Longer

regional committees to evaluate and verify compliance with these commitments. See more at: http://www.refugeelegalaidinformation.org/cartagena-declaration-refugees#sthash.eIijr0C9.dpuf. See also Executive Committee Conclusion No. 22 (1981) on the protection of asylum seekers in situations of large-scale influx.

[27] 1951 Convention, art. 16 (refugees are to be granted equal access to the courts), art. 17 (refugees are to be afforded the same access to wage-earning employment as foreign nationals), art. 13 (refugees are to be afforded the same rights to moveable and immoveable property as foreign nationals).

[28] See United States Committee fir Refugees and Immigrations, *World Refugee Survey 2009 –Ethiopia, 17 June 2009*, available at: http://www.refworld.org/docid/4a40d2a594.html

[29] See Human Rights Watch, World Report 2011: Lebanon (2011).

[30] *See* Dublin Regulation (REGULATION (EU) No 604/2013 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 26 June 2013, Official Journal of the European Union, L 180/31. Together with the recast Dublin Regulation, three other legal instruments constitute the "Dublin System" .Regulation (EU) No. 603/2013 concerning the establishment of "Euro act". for the comparison of fingerprints for the effective application of the recast Dublin Regulation and Regulation (EU) No. 118/2014 which amends (EC) No. 1560/2003laying down detailed rules for the application of the recast Dublin Regulation. Also see Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted (commonly known as the Qualification Directive).

[31] See UN doc. ST/GENEVA/LIB/SER.B/Ref.9, 68-74.

[32] The Preamble to the Constitution of France acknowledges the principle of asylum, while a 1952 law declares that refugees within the competence of the Office shall include those within the mandate of UNHCR, as well as those within article 1 of the 1951 Convention. Canada also adopted the Convention definition in the 1976 Immigration Act (*Canada: Immigration Act, 1976-77, c. 52, s. 1, 1976*, available at: http://www.reworld.org/docid/3ae6b5c60.html. The Federal Republic of Germany has both constitutional and enacted law provisions benefiting refugees, both of which were amended in 1992/93. In other countries, the admission of refugees and special groups is often decided by the government in the exercise of broad discretionary powers. There are a number of States who host large refugee populations but who are either not a party to the 1951 Convention and 1967 Optional Protocol or who do not have laws or policies in place to address asylum claims. These States include a large number of countries in the Middle East and Asia with significant refugee populations, including Egypt, Jordan, Syria, India, Malaysia, Lebanon, and Pakistan. *See* U.N. Treaty Collection, Ch. V Refugees & Stateless Persons (listing countries that are party to the 1951 Convention); *see* also, UNHCR, Country Operations Plans (explaining the legal framework of countries where UNHCR operates), available at: http://www.unhcr.org/pages/49e456f96.html. In such cases, refugee status determinations are carried out by field offices of the UNHCR.

[33] Now often referred to as 'displaced persons' or 'persons of concern.

term, the organization helps refugees find appropriate durable solutions to their plight, by repatriating voluntarily to their homeland, integrating in countries of asylum or resettling in third countries.[34]

3. International Migration: The Western Balkans

International migration is the movement of people across borders to reside permanently or temporarily in a country other than their country of birth or citizenship.[35] The United Nations (UN) estimates that in 2013 some 232 million people were living outside their country of birth or citizenship for more than one year. This represents just over three per cent of the world's population and would rank such migrants, if living within the same territory, as the world's fifth largest country. While the number of international migrants has grown steadily, that three per cent proportion of world population has remained stable over the past 40 years.[36]

In current rates of international migration continue, the number of international migrations worldwide could reach 405 million by 2050.[37] While South-North movement patterns previously dominated the migration landscape, today international migrants move in equal share from developing to developed countries and between developing countries.[38] Migration is also no longer only unidirectional and permanent; it is increasingly multiphase and multidirectional, often occurring on temporary or circular basis.[39]

Migration today is motivated by a range of economic, political and social factors. Migrants may leave their country of origin because of conflict, widespread violations of human rights or other reasons threatening life or safety. The UN global estimates of international migrants count those living outside their country of birth or citizenship for more than one year. While this estimate includes migrant workers, migrants in an irregular situation and refugees, it does not account for the millions of persons worldwide who migrate on a short-term temporary or seasonal basis to and from another, usually neighboring country for a few weeks or months each year. However, many of these persons are included in legal definitions of "migrant workers".[40] ICRMW is very clear that states have the right to control their borders**,** including the establishment of criteria governing admission of migrant workers and members of their families. [41]

With international migration increasing in scope, scale and complexity, more countries are now simultaneously countries of origin, transit, and destination for migration. New forms of partnership and cooperation have emerged to govern migration, including in the context of South-South cooperation[42] and engaging private as well as non-governmental actors.

In the context of globalization, migration brings both development opportunities and challenges. While many migrants are able to move, live and work in safety and dignity, others are compelled to move as a result of poverty, lack of decent work, and environmental degradation. Human rights violations, including generalized violence, armed conflict, and persecution too often result in forced migration. Closing the gap between humanitarian and development aid by ensuring a more effective transition in the context of the return

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[34] In many countries, UNHCR staff work alongside other partners in a variety of locations ranging from capital cities to remote camps and border areas. They attempt to promote or provide legal and physical protection, and minimize the threat of violence - including sexual assault - which many refugees are subject to, even in countries of asylum. They also seek to provide at least a minimum of shelter, food, water and medical care in the immediate aftermath of any refugee exodus, while taking into account the specific needs of women, children, the elderly and the disabled.

[35] **Migration** - The movement of a person or a group of persons, either across an international border, or within a State. It is a population movement, encompassing any kind of movement of people, whatever its length, composition and causes; it includes migration of refugees, displaced persons, economic migrants, and persons moving for other purposes, including family reunification.

[36] See http://esa.un.org/migration/index.asp?panel=1; A World Bank Fact Sheet 2010: http://siteresources.worldbank.org/INTPROSEPECTS/Resources/334934-1199807908806/World.pdf; United Nations Development Program (UNDP). 2009. Human Development Report 2009: Overcoming barriers: Human mobility and development. http://hdr.undp.org/en/media/HDR 2009 EN Complete.pdf; Conference on Migration and Development, 2006. Background information, http://www.belgium.iom.int/international conference/becgroundlinfo.htm

[37] See IOM, (2010), The World Migration Report 2010: The Future of Migration: Building capacities for change, Geneva, available at: http://publications.iom.int/bookstore/free/WMR 2010 ENGLISH.pdf

[38] United Nations Population Division/DESA, Presentation at the Tenth Coordination Meeting on International Migration, New York, 9-10 February 2012, available at: http://www.un.org/esa/population/meetings/tenthcoord2012/V.%20Sabine%2OHenning%20-%20Migration%20trends.pdf

[39] Ibid, Supra 36.

[40] See Article 2(1) and 5 of the UN International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families (ICRMW)**,** United Nations, *Treaty Series*, vol. 2220, p. 3; Doc. A/RES/45/158, entry into force on 1 July 2003.

[41] This balance is reflected in Article 79 of ICRMW: "*Nothing in the present Convention shall affect the right of each State Party to establish the criteria governing admission of migrant workers and members of their families. Concerning other matters related to their legal situation and treatment as migrant workers and members of their families, States Parties shall be subject to the limitations set forth in the present Convention".* Under Article 34 of ICRMW, migrants also have a duty to comply with the laws and regulations of the states of transit and destination as well as respect the cultural identity of the inhabitants of the states of transit and destination.

[42] South-South cooperation is a broad framework for collaboration among countries of the South in the political, economic, social, cultural, environmental and technical domains. Involving two or more developing countries, it can take place on a bilateral, regional, sub regional or interregional basis. See UN Office for South-South Cooperation: http://ssc.undp.org/content/ssc.html

of refugees and Internally Displaced Persons and their reintegration in places of origin could help reduce the incidence of forced or involuntary migration.

In the absence of sufficient regular migration opportunities, migrants resort to irregular migration channels which place them at risk during transit and upon arrival in countries of destination. Many migrants, particularly those who are in an irregular situation and those working in precarious sectors, encounter human rights violations, labor exploitation including poor working conditions and low wages, trafficking and sexual abuse, violence, lack of social protection, discrimination and xenophobia. Thus, for too many migrants, their human development aspirations and potential remain unfulfilled, and their important contributions to the host society go unrecognized. Regardless of status, migrants, and in particular those who are most vulnerable, therefore require equal and specific inclusion in the development agenda at global, regional and national levels. [43]

Migration dynamics in the Western Balkans[44]have undergone fundamental changes during the past years.[45] However, the gradual political stabilization has transformed the Western Balkans into a region of transit and increasingly also destination of migrants and refugees from outside the region, including vulnerable groups such as victims of trafficking, unaccompanied and separated children or women at risk.[46] In 2012 the asylum applications from the Western Balkan region in the EU27+ (including Switzerland and Norway) amounted to more than 30,000 which constituted almost 9% of all asylum applications.[47] The recognition rates are low[48]and rejected asylum-seekers are returned to their countries of origin under readmission agreements the EU and its Member States concluded with the countries in the Western Balkans.

Largely owing to its strategic geopolitical location, the Western Balkans has become an important hotspot on one of the main migration routes to the EU. An increasing number of refugees and migrants from outside the region, in particular Afghanistan, Pakistan, Palestine, Syria, Somalia and North Africa, are arriving from Turkey and/or Greece and transiting the region using what is known as "the Western Balkan route." Many lodge asylum claims in one or more of the Western Balkans countries, but often depart before having their asylum claims processed and their protection needs determined.[49]

All countries in the region have adopted relevant legislation for regulating entry and stay of aliens[50], as well as are parties to the 1951 Convention relating to the Status of Refugees and its 1967 Protocol[51]. Also, they have established national migration management system and national asylum systems. However, shortcomings in the implementation of the legislation and gaps in institutional capacity do not always guarantee that asylum-seekers can access fair and efficient asylum procedures and enjoy the basic standards of treatment. [52] Moreover, Readmission agreements concluded between the EU and Western Balkans countries do not cover only nationals, but also allow for the return of third country nationals who had transited through the Western Balkans to an EU Member State. With regard to the latter, there is no system in place to ensure that returned asylum-seekers whose claims have not been examined on substance in the returning country are protected

[43] See *A life of dignity for all: accelerating progress towards the Millennium Development Goals and advancing the United Nations development agenda beyond 2015*, Report of the Secretary General, UN doc. A/68/202 (26 July 2013), e.g. pares. 93 and 111.

[44] The Western Balkans includes Albania, Bosnia and Herzegovina, Croatia, (UNSCR Resolution 1244/99), Montenegro, Serbia and Republic of Macedonia.

[45] Countries in the region still have to cope with the consequences of large-scale displacement of the 1991-95 conflicts. Social and economic challenges continue to trigger the movement of nationals from the Western Balkan countries within and from the region.

[46] Predominant drivers of migration from the region are poverty, low living standards, unemployment and social exclusion. The liberalization of visa policies in the context of the EU accession process has reportedly been an important contributing factor facilitating legal movements.

[47] The former Yugoslav Republic of Macedonia and Serbia continue to be the main countries of origin. In October 2012 the number of Serbian and Macedonian citizens submitting asylum claims reached almost 6,000 in one month. With almost 15,000 asylum applications lodged in 2012 Serbian nationals remain one of the highest ranked nationalities of asylum applicants in the EU. Source: Euro stat, Asylum Applications in EU27+ from Southeast Europe, 2008-12. 7 February 2013.

[48] See Western Balkans Annual Risk Analysis 2013, Front ex. Available at http://frontex.europa.eu/assets/Publications/Risk_Analysis/WB_ARA_2013.pdf

[49] See UNHCR, Asylum Levels and Trends in Industrialized Countries, 2011, available at http://www.unhcr.org/4e9beaa19.html. The recent accession of Croatia to the EU has made it an EU Member State with the longest external land border. This may impact the nature and scale of the migration flows passing through the region, including by leading to an increase in the number of irregular migrants trying to enter the EU through Croatia and of those readmitted from Croatia under the existing readmission agreements. The future accession of Romania and Bulgaria to the Schengen zone as well as changes in the socio-political development in Northern Africa, Central Asia and the Middle East are likely to also affect migratory flows in the region.

[50] Laws on foreigners, legislation on border control etc.

[51] Except for Kosovo. See UNSCR 1244/99

[52] For example, recognition rates are extremely low despite the fact that many extra-regional asylum-seekers come from refugee-producing countries. In 2012 the recognition rate; in Montenegro 0.12%; in Serbia less than 1% and 0% in the Macedonia. In Croatia the total refugee recognition rate was 16.75%. See UNHCR data, available at: http://www.unhcr.org/pages/4a013eb06.html

against refulgent and can access the asylum procedures in the country of return.

It should be noted that Countries of the region have developed a number of good practices at national and regional level which can serve as a basis for further initiatives. These include for instance the creation of the Balkans Asylum Network (BAN) to facilitate regional cooperation and build the capacity of non-governmental organizations active in the field of asylum and migration, the implementation of the border monitoring project in Croatia (2008-present), the establishment of migrant service centers in the Western Balkan countries (62 are currently operational in the region), the elaboration of standard operating procedures for identification and referral of victims of trafficking in Albania, or the monitoring of arrivals of returned migrants at the Pristina airport in Kosovo. Initiatives aimed at regional cooperation and exchange of information on migration issues among law enforcement actors are also undertaken by the Southeast European Law 6 Enforcement Centre (SELEC), the International Law Enforcement Cooperation Unit (ILECU) or under the framework of Police Cooperation Convention for Southeast Europe (PCC). Of particular note is the Migration, Asylum, Refugees Regional Initiative (MARRI) which was created under the former Stability Pact for South Eastern Europe to promote dialogue and closer regional cooperation on migration and asylum related issues among the Western Balkan countries. [53]

The challenges described above will require new and cooperative approaches building on the region's humanitarian tradition and existing good practices. Against this background, this UNHCR/IOM initiative will assist States in the Western Balkans in establishing and operationalizing a protection-sensitive migration and asylum management system that meets the legitimate concerns of States to protect their borders and territories, reach their migration management objectives and fulfil their obligations under international human rights and refugee law.[54] The initiative will focus on those areas where more coordinated and joint action at both national and regional levels can contribute to resolving the region's particular challenges. These areas include: Protection-sensitive entry systems; Enhancing mechanisms for information sharing; Improvement of reception arrangements; Recognizing refugees; Solutions for refugees; Identifying and providing assistance to persons with specific needs and vulnerable migrants; and Providing assisted voluntary return and reintegration.[55]

4. Conclusion

Taking stock of where we came from, UNHCR's perception is that refugee protection stands at a crossroads. Its most important tool— the 1951 Convention— sets out a basic framework that remains directly relevant to many, but not to all, displacement situations.[56] Furthermore, alliances on protection are shifting.

The Convention has a legal, political and ethical significance that goes well beyond its specific terms: legal in that it provides the basic standards on which principled action can be founded; political in that it provides a truly universal framework within which states can cooperate and share the burden resulting from forced displacement; and ethical in that it is a unique declaration by the 140 States Parties of their commitment to uphold and protect the rights of some of the world's most vulnerable and disadvantaged.

Assertions that the Convention is no longer relevant are belied by encouraging recent developments. At the Inter-Parliamentary Union meeting in Amman in May 2000,[57] 648 parliamentarians from 124 countries around the world reaffirmed the centrality of the Convention to asylum systems today; EU leaders meeting in Tampere, Finland,[58] followed suit as have the 56 government members of the UNHCR's Executive Committee. States continue to accede to the Convention and State Parties continue to promote accession.

There is no doubt that the Convention regime has gaps. We have to be able to admit this without blaming the Convention for problems to which it was never designed to respond. Recently critics have alleged that the Convention is outdated, unworkable, irrelevant and inflexible, a complicating factor in today's migration environment. Several states have deemed it an instrument unresponsive both to the interests of states and to the real needs on the ground. The Convention was never conceived only as an instrument for permanent settlement, much less for migration control. The Convention, together with its 1967 Protocol, was drafted to become the global,

[53] See Refugee protection and International Migration in the Western Balkans, Suggestions for a Comprehensive Regional Approach, UNHCR and International Organization for Migration (IOM), available at: http://www.unhcr.org/531d88ee9.pdf

[54] Ibid.

[55] Ibid. See also Meeting on the Western Balkans Migration Route: Leaders Agree on 17-point plan of action, European Commission – Press release, Brussels, 25 October 2015.

[56] Concerns about the 1951 Convention, specifically for what it does not address, have led some states to go so far as to question its continuing value. A great many more states increasingly disregard it or find ways around it, even in situations it directly addresses.

[57] See Press release of the Inter-Parliamentary Union Geneva, 12 April 2000 N° 1, available at: http://www.ipu.org/press-e/amman1.htm.

[58] See Tampere Kick-start to the EU's policy for justice and home affairs, European Commission , available at : http://ec.europa.eu/councils/bx20040617/tampere_09_2002_en.pdf

multilateral, standard-setting agreement on how to protect individuals in need of protection. [59]

Primary responsibility for protecting refugees and all persons within their own country rests with the national authorities of the country. National responsibility is a core concept of any response to refugees It is a fundamental operating principle of the international community and is routinely emphasized by governments themselves, as a function of their sovereignty.[60]

The international obligation not to return refugees to danger is absolute, and applies to all countries regardless of their level of economic development. Meeting the life-saving needs of refugees, setting up fair and efficient asylum procedures, helping refugees return home or integrate in host communities all have a financial cost, met by receiving States, as well as by the international community in a spirit of international solidarity.

The right to seek and enjoy asylum enshrined in the Universal Declaration of Human Rights, and reflected in the 1951 Refugee Convention provides the legal basis for protecting people fleeing persecution, conflict and violence related to their race, religion, nationality, social group or political opinion.

In UNHCR's view, constructive and visionary immigration policies could result in an easing, or at least a balancing, of the pressure on asylum systems. There would be a positive switch in approach to managing migration through migration tools and managing the asylum system through asylum tools. Where there are linkages, and trafficking and human smuggling is a case in point, special additional approaches are called for.

In 2015, UNHCR issued Guidelines on International Protection[61], in conjunction with Article 35 of the 1951 Convention relating to the Status of Refugees and Article II of its 1967 Protocol, to help clarify why the Convention applies to people fleeing conflict and violence in such situations. These Guidelines complement the UNHCR Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees (1979, reissued, Geneva, 2011) and the other Guidelines on International Protection.[62]

In UNHCR's view, constructive and visionary immigration policies could result in an easing, or at least a balancing, of the pressure on asylum systems. There would be a positive switch in approach to managing migration through migration tools and managing the asylum system through asylum tools. Where there are linkages, and trafficking and human smuggling is a case in point, special additional approaches are called for.

Today's conflicts are often driven by racial, ethnic, religious and/or political divisions. In the Central African Republic, South Sudan and the Syrian Arab Republic (Syria), and more recently in Iraq, what may appear at first glance to be indiscriminate violence often targets particular populations on the basis of their perceived support for one of the parties to the conflict.

Therefore, the UNHCR initiative will focus predominantly on the common needs and challenges of the countries in the Western Balkans including Croatia which became the first country in the region to join the EU. Practical cooperation with other countries along the migratory route (such as Austria, Italy, Slovenia, Hungary, Romania, Greece and Turkey, etc.) will be sought as well.

In order to assist States in the region in achieving the objectives outlined above, the joint initiative will seek to develop a sustainable, comprehensive and cooperative framework for concrete action in the area of refugee protection and migration management, at national and regional levels.

On the basis of priority areas identified above, UNHCR, with input from other relevant stakeholders, will work with the Governments in the region towards development of a comprehensive roadmap/framework for action, outlining short and long-term objectives for the region, including concrete proposals for activities at both national and regional levels.

As a final point, the humanitarian situation of migrants along Western Balkans route calls for urgent action using all available EU and national means to alleviate it. To this end, the European Council considers it necessary to now put in place the capacity for the EU to provide humanitarian assistance internally, in cooperation with organizations such as the UNHCR, to support countries facing large number of refugees and

[59] The Convention at 50: the way ahead for refugee protection by Erika Feller, available at: file:///C:/Users/Dell-PA-D/Downloads/02%20(1).pdf

[60] Yet, it is sometimes the very governments responsible for protecting and assisting their internally displaced populations that are unable or even unwilling to do so and, in some cases, they may even be directly involved in forcibly uprooting civilians. Even then, however, the role of international actors is to reinforce, not replace, national responsibility. This requires a two-pronged approach to encourage States and other authorities to meet their protection obligations under international law while also supporting the development of national and local capacities to fulfill these protection responsibilities.

[61] See UNHCR, Guidelines on International Protection No. 11: Prima Facie Recognition of Refugee Status, HCR/GIP/15/11, 24 June 2015.

[62] These Guidelines, having benefited from broad consultation, are intended to provide legal interpretative guidance for governments, legal practitioners, decision-makers, as well as UNHCR staff carrying out refugee status determination under its mandate and/or advising governments on the application of a prima facie approach. The UNHCR Handbook on Procedures and Criteria for Determining Refugee Status and the Guidelines on International Protection, available at: http://www.unhcr.org/refworld/docid/4f33c8d92.html

migrant, building on the experience of the EU Humanitarian Aid and Civil Protection Department.[63]

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STABILITY AND CONSTITUTIONAL REFORM NORMATIVE CONTENTS OF CONSTITUTION

Marius ANDREESCU[*]

Abstract

The modification of the fundamental law of a state represents a very special political and juridical act with major significances and implications in the political social system as in the state's one, but also at each individual level. That's why such an approach needs to be well justified, to answer to some juridical and political social needs well defined, but mainly to correspond to the principles and rules specific to a constitutional and state's democratic system providing to the state the stability and functionality it needs.

In this study we analyze the necessity of such a constitutional reform in Romania, and also some provisions from the report of the Presidential Commission for the analysis of the political and constitutional regime in our country. We formulate our opinions in relation to the justifying some constitutional regulations. In this context, we consider that there are arguments for the maintaining of the bicameral parliamentary system and an eventual revising of the fundamental law needs to consider the measures needed to guarantee the political and constitutional institutions specific to the lawful state.

Keywords: *Revising of the Constitution, limits of the constitutional revising, bicameral system, power excess, guaranteeing of the fundamental liberties, constitutional norms.*

I. Introduction

One of the most controversial and important juridical problems is represented by the relationship between the stability and innovation in law. The stability of the juridical norms is undoubtedly a necessity for the predictability of the conduct of the law topics, for the security and good functioning of the economical and juridical relationships and also to give substance to the principles of supremacy of law and constitution.

On the other hand it is necessary to adapt the juridical norm and in general the law to the social and economical phenomenon that succeed with such rapidity. Also the internal juridical norm must answer to the standards imposed by the international juridical norms in a world in which the 'globalization" and "integration" become more conspicuous and with consequences far more important in the juridical plan also. It is necessary that permanently the law maker be concerned to eliminate in everything that it is "obsolete in law", all that do not correspond to the realities.

The report between stability and innovation in law constitutes a complex and difficult problem that needs to be approached with full attention having into consideration a wide range of factors that can determine a position favorable or unfavourable to legislative modification[1].

One of the criterions that help in solving this problem is the principle of proportionality. Between the juridical norm, the work of interpretation and its applying, and on the other hand the social reality in all its phenomenal complexity must be realized with an adequate report, in other words the law must be a factor of stability and dynamism of the state and society, to correspond to the scope to satisfy in the best way the requirements of the public interest but also to allow and guarantee to the individual the possibility of a free and predictable character, to accomplish oneself within the social context. Therefore, the law included in its normative dimension in order to be sustainable and to represent a factor of stability, but also of progress, must be adequate to the social realities and also to the scopes for which a juridical norm is adapted, or according to the case to be interpreted and applied. This is not a new observation. Many centuries ago Solon being asked to elaborate a constitution he asked the leaders of his city the question:" Tell me for how long and for which people" then later, the same wise philosopher asserted that he didn't give to the city a constitution perfect but rather one that was adequate to the time and place.

II. Paper content

On the other hand a constitution is not and cannot be eternal or immutable. Yet from the very appearance of the constitutional phenomenon, the fundamental laws were conceived as subjected to the changes imposed inevitably with the passing of time and dynamics of state, economical, political and social realities. This idea was consecrated by the French Constitution on 1971 according to which "A people has always the right to review, to reform and modify its Constitution, and in the contemporary period included the "International Pact with regard

[*] Judge-Court of Appeal Pitesti, university lecturer Ph. d.-University of Pitesti (e-mail: **andreescu_marius @yahoo.com**).

[1] Victor Duculescu and Georgeta Duculescu, Revizuirea constituţiei (Bucharest: Lumina Lex, 2002), 12.

to the economical, social and cultural rights" as well as the one regarding the civil and political rights adopted by U.N.O. in 1966 - item 1 - is stipulating:"All nations have the right to dispose of themselves. By virtue of that right they freely determine their legal status.

The renowned professor Constantin G. Rarincescu stated on this meaning:" A constitution yet is meant to regulate in future for a longer or a shorter time period, the political life of a nation, is not destined to be immobile, or perpetuum eternal, but on the other hand a constitution in the passing of time can show its imperfections, and no human work is being perfect, imperfections to whose some modifications are being imposed, on the other side a constitution needs to be in trend with the social necessities and with the new political concepts, that can change more frequently within a state or a society". [2] Underlying the same idea the professor Tudor Drăganu stated: "The constitution cannot be conceived as a perennial monument destined to outstand to the viccisitudes of the centuries, not even to the ones of the decades. Like all other juridical regulations, the constitution reflects the economical, social and political conditions existing in a society at a certain time of history and aims for creating the organizational structures and forms the most adequate to its later development. The human society is in a continuous changing. What it is valid today tomorrow can become superannuated. On the other side, one of the characteristics of the juridical regulations consists in the fact that they prefigure certain routes meant for chanelling the society's development in one or another direction. These directions as well as the modalities to accomplish the targeted scopes may prove to be, in their confronting with the realities, inadequate. Exactly for this very reason, the constitutions as all other regulations, cannot remain immutable but must adapt to the social dynamics"[3].

In the light of those considerents we appreciate that relationship between the stability and the constitutional revising needs to be interpreted and solved by the requirements of principle of proportionality[4]. The fundamental law is viable as long as it is adequated to the realities of the state and to a certain society at a determined historical time. Much more – states professor Ioan Muraru – "a constitution is viable and efficient if it achieves the balance between the citizens (society) and the public authorities (state) on one side, then between the public authorities and certainly between the citizens. Important is also that the constitutional regulations realize that the public authorities are in the service of citizens, ensuring the individual's protection against the state's arbitrary attacks contrary to one's liberties"[5].In situations in which such a report of proportionality no longer exists, due to the imperfections of the constitution or due to the inadequacy of the constitutional regulations to the new state and social realities, it appears the juridical and political necessity for constitutional revising.

Nevertheless in the relationships between the stability and constitutional revising, unlike the general relationship stability – innovation in law the two terms have the same logical and juridical value. It is about a contrariety relationship (and not a contradiction one) in which the constitution's stability is the dominant term. This situation is justified by the fact that the stability is a requirement essential for the guaranteeing of the principle of constitution supremacy with all its consequences. Only through the primacy of the stability against the constitution's revising initiative one can exercise its role to provide the stability, equilibrium and dynamics of the social system's components, of the stronger and stronger assertion of the principles of the lawful state. The supremacy of the constitution bestowed by its stability represents a guarantee against the arbitrary and discretionary power of the state's authorities, by the pre-established and predictable constitutional rules that regulate the organization, functioning and tasks of the state authorities. That's why before putting the problem of constitution's revising, important is that the state's authorities achieve the interpretation and correct applying of the constitutional normative dispositions in their letter and spirit. The work of interpretation of the constitutional texts done by the constitutional courts of law but also by the other authorities of the state with the respecting of the competences granted by the law, is likely to reveal the meanings and significances of the principles for regulating the Constitution and thus to contribute to the process for the suitability of these norms to the social, political and state reality whose dynamics need not be neglected. The justification of the interpretation is to be found in the necessity to apply a general constitutional text to a situation in fact which in factum is a concrete one"[6].

The decision to trigger the procedure for revising a country's Constitution is undoubtedly a political one, but at the same time it needs to be juridically fundamented and to correspond to a historical need, of the social system stately organized from the perspective of its later evolution. Therefore, the act for revising the fundamental law needs not be subordinated to the political interests of the moment,

[2] Constantin G. Rarincescu, *Curs de drept constituţional* (Bucharest, 1940), 203.
[3] Tudor Drăganu, quotted works pp. 45-47.
[4] For development see Marius Andreescu, *Principiul proporţionalităţii în dreptul constituţional* (Bucharest: CH Beck, 2007).
[5] Ioan Muraru, *Protecţia constituţională a libertăţii de opinie* (Bucharest: Lumina Lex, 1999), 17.
[6] Ioan Muraru, and al., *Interpretarea Constituţiei* (Bucharest: Lumina Lex, 2002), 14.

no matter how nice they will be presented, but in the social general interest, well defined and possible to be juridically expressed. Professor Antonie Iorgovan specifies on full grounds:" in the matter of Constitution's revising, we dare say that where there is a normal political life, proof is given of restraining prudence, the imperfections of the texts when confronting with life, with later realities, are corrected by the interpretations of the Constitutional Courts, respectively throughout the parliamentary usance and customs, for which reason in the Western literature one does not speak only about the Constitution, but about the block of constitutionality" [7].

The answer to the question if in this historical moment is justified the triggering of the political and juridical procedures for the modifying of the fundamental law of Romania can be stressed out in respect with the reasons and purpose targeted. The revising of Constitution cannot have as finality the satisfying of the political interests of the persons holding the power for a moment, in the direction of reinforcing of the discretionary power of the Executive, with the inacceptable consequence of harming certain democratical constitutional values and principles, mainly of the political and institutional pluralism, of the principle of separation of powers in the state, of the principle of legislative supremacy of the Parliament.

On the other hand, such as the two decades lasting history of democratical life in Romania has shown, by the decisions taken for many times, were distorted the constitutional principles and rules by the interpretations contrary to the democratical spirit of the fundamental law, or worse, they didn't observe the constitutional dispositions because of the political purposes and their support in some conjunctural interests. The consequences were and are obvious: the restraining or violation of some fundamental rights and liberties, generating some political tensions, the nonobservance of the constitutional role of the state's institution, in a single word, due to political actions, some dressed in juridical clothes, contrary to the constitutionalism that needs to characterize the lawfull state in Romania. In such conditions, an eventual approach of the revising of the fundamental law should be centered on the need to strengthen and enhance the constitutional guarantees for respecting the requirements and values of the lawfull state, in order to avoid the power excess specific to the politician subordinated exclusively to a group interests, many time conjunctural and contrary to the Romanian people, which in accordance to Constituion item 2 paragraph (1) of the one who is the holder of the national sovereignity.

In our opinion, the preoccupation of the political class and state's authorities in the current period, in relation to the actual contents of the fundamental law, should be oriented not so for the modification of the Constitution, but especially into the direction of interpreting and correct applying and towards the respecting of the democratical finality of the constitutional institutions. In order to strengthen the lawfull state in Romania, it is necessary that the political formations, mostly those that hold the power, all authorities of the state to act or to exercise its duties within the limits of a *loyal constitutional behavior* that involve the respecting of the meaning and demoratical significances of the Constitution.

Currently, the political and juridical reality in Romania is confronting with an extensive political approach for the revising of the fundamental Law, substantied throughout the results of the referendum organized on 2009 having as objective the reducing of the number of parliamentarians and with the passing to a unicameral parliamentary system, in the "Report of the Presidential Commission for the Analysis of the Political and Constitutional regime in Romania" [8] that was published on April 28th 2010, the initiative of the President of Romania for revising the fundamental law at the Government proposal and the decision no. 799/17.06.2011 of the Constitutional Court targeting the law draft for Romania's Constitution revising[9].

This is up to now the only political initiative that has been materialized in a legislative draft for revising the fundamental law that was submitted to the Parliament. In the present social and political context other proposals, ideas for the modifying of the Constitution are being expoxed by the governing ones yet without being materialized in a new legislative initiative.

Our scientific approach has into consideration, from a critical perspective, mostly the political initiative for the Constitution revising that has already the form of a legislative project, though it is not on the Parliament 's roll for debating. We wish at the same time to underline few important themes which in our opinion need a more serious consideration, included in regard to the normative contents of the Constitution. In this epoch of political class' intense preoccupations for the modifying of the fundamental law it is important to reflect in the light of the political exigencies of the constitutional law, upon the normative content of the Constitution. The establishing based on some scientific criterions to what exactly needs to contain the fundamental law of a state, is essential to avoid that throughout political enthusiasm be ignored the basic aspects regarding the specific of the normative contents of

[7] Antonie Iorgovan, "Revizuirea Constituţiei şi bicameralismul", *Public Law Journal* 1(2001): 23.
[8] Published by C.H. Beck Publishing House, Bucharest, 2009.
[9] M.Of. no. 440/23.06.2011.

the Constitution that explains thus last one's supremacy.

The proposals for the Constitution's revising have as an obvious finality the passing of Romania's constitution system from bicameral to unicameral and the strengthening of the executive power, mostly of the presidential institution.

The doctrine in specialty underlines the fact that in the unitary states, such as Romania, both the unicameral system, as the bicameral system have advantages and disadvantages [10]. There is no ideal constitutional solution on this meaning. Important is the fact that the Parliament's structure which the Constitution consecrates be adequate to the social, political and economical realities of a country, be functional and to integrate harmoniously within the system of authorities of the state with the observance of the principle of constitutional democracy principles and of the lawfull state. Nevertheless, prestigious authors such as professor Herbert Schambeck remark the importance of the parliamentary system: "From the second chamber of this type, it is expected to emanate *auctoritas*, which in a specific way grants personal fame, in plus to *potestas* or the political power. The second Chamber or the superior chamber has always existed in the area of tensions between the tradition inherited and the present political reality. It represents a part of the basic constitutional organization and a political reality of the state"[11].

Coming back to the essence of the problem, besides other authors[12], we appreciate that in Romania, the bicameralism is adequate to the state and social system at this historical moment, corresponding better to the necessity to achieve not only the efficiency of the parliamentary legislative procedures but also the "norming ponderation" and quality of the legislative act. The bicameralism is a necessity for Romania because the Parliament represents a valid counterpondering against the Executive, in the context of the exigencies and balance of the powers in a democratic state. With good reason the regretted professor Antonie Iorgovan underlined: " It would have been a very high political risk, in that post revolutionary tension, that in Romania to have designed a unicameral Parliament and such a risk exists still at present, considering that one cannot speak about a political life settled on natural pathes of the democratical doctrines accepted in Occident (the social-democratic doctrine, the democratic-Christian doctrine, liberal doctrines and ecologist doctrines)"[13]. The unicameralism in a semi-presidential constitutional system such as the one of Romania, in which the powers of the head of the state and in general those of the Executive are significant, having into consideration the excesive politicianism of the moment, would have as a consequence the severe deterioration of the institutional balance between the Legislative and Executive, with consequence the increase of the discretionary power of the Executive and the minimizing of the role of Parliament as a supreme representative organism of the Romanian people, as a unique law maker authority of the country, such as the provisions of item 61 paragraph (1) of the Constitution foresee.

The transition to a unicameral Parliament needs not be treated simplistic such as unfortunately comes out from the contents of the Law draft regarding the revising of Constitution elaborated by the Government, it rather needs a general modification of the Romanian constitutional system, a reconfiguring of the role and duties of the state authorities so that the balance between the Legislative and Executive be maintained and not create the possibility of an evolution towards an exaggerated preponderance of the institution of the head of the state in respect to the Parliament.

We underline the fact that all states with a unitary structure of Europe that have a unicameral Parliament have at the same time a constitutional system of parliamentary type in which the duties of the head of the state regarding the governing are being reduced. We do not wish to do a thorough analysis of this constitutional problem, we stress only the conclusion that the unicameralism may have be political and constitutionally justified in Romania and adequate to the democracy values in a lawfull state only if the legitimacy and the role of Romania's President as a constitutional institution, will be fundamentally be changed. The election of the President needs to be by the Parliament. At the same time in case of a unicameral structure of the Parliament it is necessary to reduce significantly the responsibilities of the President in respect to the Executive and the governing ones. In such a reconfiguring of the institutions of the state needs to be increased the role and duties of the Constitutional Court and those of the Justice, these ones being guarantees of the supremacy of the law and Constitution and for avoiding the power excess coming from the other authorities of the state. In one word, in our opinion the unicameralism cannot be associated in Romania other than with the existence of a constitutional system of parliamentary type.

[10] For development see Ioan Muraru and Mihai Constantinescu, *Drept parlamentar românesc* (Bucharest: All Beck, 2005), 72-79.

[11] Herbert Schambeck, „Reflections on the Importance of the Bicameral Parliamentary System", *Public Law Review* 1(2010):3.

[12] Ioan Muraru, Mihai Constantinescu, quotted works., pp. 2-37; Antonie Iorgovan, quotted works., pp. 3-7; Florian Vasilescu, „Questions about Bicameralism", Romanian Public Law Review 3(2010): 28-51; Ioan Alexandru, "Reflections regarding the bicameralism and asymmetry of the distribution of competences" *Public Law Review* 3(2010): 51-60.

[13] Antonie Iorgovan, quotted works., pp. 18-19.

The legislative proposal for the Constitution revising is of a nature to create a disproportion between the Parliament and Executive by the fact that the unicameral structure of the Parliament does not represent a guarantee sufficient to make an efficient counterponderance in respect to the Executive, mainly as the responsabilities of the President are obviously enhanced. The dispute between unicameralism and bicameralism with applying to the conditions of Romania is well characterized by the regretted professor Antonie Iorgovan: „...any bicameral or unicameral parliamentary system can lead into severe disfunctionalities such as professor Tudor Drăganu states, no matter how successful may be the constitutional solutions, if in the parliamentary practice evidence is given of politicianism, demagogy and lack of responsibility"[14].

Does the present Parliamentary system of Romania correspond to the exigencies of the democratic traditions of bicameralism and is it really adequate to the fulfilling of the role and functions of the Parliament? Professor Tudor Drăganu, in a flawless argumenting logic, in an extensive study answered to this question:"The revised Constitution establishes a system that claims to be bicameral but it functions currently like a unicameral system, condemned being to violate by certain of its aspect the most elementary principles of the parliamentary regime and which contains in itself the danger of producing in future of severe disfunctionalities in accomplishing the legislative activity"[15].The illustrious professor had into consideration that the law for the Constitution's revising does not contain references with regard to the number of deputies and senators it sets the matter of legitimacy of substance of the two chambers, because their members are appointed by the same election body and by the same type of system and election ballot; the responsibilities of the chambers in legislative matter are not sufficiently well differentiated; the exercising of the right to the legislative initiative of the senators and deputies, such as regulated, generates constitutional contradictions.

Together with other authors[16], we state that in the perspective of a future constitutional revising, to regulate the differentiation between the two chambers also by special types of representation. The law compared offers sufficient examples of this kind (Spain, Italy, France) and even the election law of Romania on March 27th 1926 offers a landmark on this meaning. The Senate may represent the interests of the local collectivities. Thus, the senators may be elected from an electoral college made of the local councils' chosen members. Interesting to underline is the fact that in the Constitution draft on 1991 the Senate was designed as a representant of the local collectivities, grouped on the country's counties and Bucharest municipality.

It is reasonable the critic of Professor Tudor Drăganu according to which the current constitutional regulation does not achieve a functional differentiation between the two chambers. This aspect was also noticed by the Constitutional Court that, referring to the parliamentary legislative procedure introduced in the draft for the Constitution revising, stressed: "The examining in cascade of the law drafts, in a chamber in the first lecture, and in the other one in the second lecture transforms the bicameral Parliament in a unicameral one"[17]. Therefore a new initiative for the modification of the fundamental law should have into consideration this aspect also and should achieve a real functional differentiation of the two chambers.

The Constitution is a law, but in the same time through it juridical force and its contents it distinguishes itself from any other laws. At the same time, the supremacy of the fundamental law grants to this one the quality of a main formal spring for all other law branches. Consequently, there are specific features of the normative contents of the Constitution in respect to the other normative acts, included compared to the existing codes. The normative specific of the Constitution makes an important criterion for explaining scientifically this one's supremacy and the structurant role of the fundamental law, not only by the system of law but also for the entire social, political and economical system of a state. Thus such as it is mentioned in the literature in specialty, the supremacy of the Constitution is a quality of the last one expressed throughout the supreme juridical force but also through its normative contents. As a first observation we specify that the norms forming the content of a constitution have the features of the constitutional law which I analyzed above. This observation is not enough to determine the normative content of the fundamental law because the sphere of the constitutional law norms is wider, including other formal sources specific to this branch of law.

The constitutional contemporary reality that is stressing also the diversity of the normative content removes the idea of general uniform standards valid for the contemporary constitutions. In this regard it is enough to remember that there are some states and constitutions whose provisions are inspired by the religious precepts. The diversity in the normative content is a consequence of the fact that the

[14] Antonie Iorgovan, quotted works., p. 16.

[15] Tudor Drăganu, "Few critical remarks about the bicameral system established by the Law for Constitution's revising adopted by the Deputies Chamber and in the Senate", *Public Law Review* 4(2003): 55-66.

[16] Dan Claudiu. Dănișor, quotted works, p. 23-24.

[17] Decision no. 148/16.04.2003 (M.Of. no. 317/12.05.2003).

fundamental law of a state is determined in view of the aspect of the content of the social, political and economical realities, by the characters and attributes of the respective state historically expressed and in the same time by the will of the constituent law maker, in essence the political will, at a certain historical moment.

Besides other authors, we consider that the scientifical definition of the constitution is the main criterion for the identifying of the normative content. Such a criterion provides the generality necessary to give a scientific character to the scientific elaborations in the matter and at the same time it explains the existence of the differences between the fundamental laws of the contemporary states. The space allocated to this study, does not allow an extensive analysis of the definitions proposed in the literature in speciality. For the purpose of this scientific approach we bear in mind the essence of any attempt to define the fundamental law, namely "The constitution is the political and juridical fundamental foundation of any state"[18].

In juridical acceptation, the fundamental law is the act through which it is determined the statute of the power and at the same time all the juridical rules, having as regulating objective the establishment of exercising and maintaining of the power, as well as the regulation of the basis of the power, of the bases for power organizing. The juridical concept on the constitution can be expressed in two different meanings, respectively in the material meaning and in the formal one.

In the "material" acceptation, the constitution contains all the law rules, no matter of their nature and form, having as regulating objective the organizing and functioning of state power, the relations between the state's organs and society. Therefore they are part of the constitution body not only the so called constitutional regulations but also the norms contained in the ordinary laws and normative acts of the executive powers if through these are being regulated the social relations specific to state power. In such a conception has preeminence the regulating objective of the constitutional norm and not its form of expression. The theory above stated was accepted by the Constitutional Council of France which elaborated the concept of "the constitutionality block".

In the formal acceptation, the constitution is all the law rules, no matter of their regulating objective, elaborated in a form different from other normative acts, by a state authority namely established (the constituent assembly) following a specific procedure, derogatory from the usual legislative procedure. This way of defining the constitution starts from the correct idea that a certain "procedure" defines a juridical form or a normative category. Consequemtly the categories of normative acts can be differentiated by the adopting procedures.

Analyzed separately, the formal acceptation and respectively the material one cannot be a criterion enough to identify the normative content of the fundamental law. The accepting of the formal criterion has as a consequence the fact that the law fundamental may regulate any kind of social relations, no matter of their importance or regulating objective. [19] The material criterion is also unilateral because it excludes the procedural elements, necessary for a scientific characterization of the fundamental law.

The scientific approach regarding the identifying of the normative content of the constitution needs to have into consideration cumulated both the formal acceptation as the material one to which adds the political dimension to which we referred to above. Therefore, we consider that three critera can be identified in view to establish the normative contents of a constitution:

The establishing of the normative content of the constitution is fulfilled depending on the specific, importance and value of the regulated social relations. We concur to the opinion stated by the literature in speciality according to which, unlike other normative act categories, the norms contained in the constitution must regulate the fundamental social relations that are essential for the establishment, maintaining and exercising of the power, but also those referring to the bases of the power, respectively the power organizing bases. There are three such categories of social relations, that can form the regulating objective of the norms contained in the constitution that allow their identification such as follows:

The constitutional norms, some having values of principle, having a determining role in the establishing and functioning of the governing organs and in the establishing of the form of the state, respectively of its characters and attributes;

the norms for the consecration and guaranteeing of the fundamental righs and liberties and those that regulate the citizens' fundamental duties;

constitutional dispositions that have no direct connection with the governing process and regulate the bases for power organizing (sovereignity, territory, population) and the bases of the power (economy, social and cultural aspects etc).

The form for adopting the constitution or of the constitutional laws have a solemn character and are achieved according to a procedure derogatory from the usual legislative procedure and by a state authority specially established or by the Parliament, that acts as a constituent power and not as a usual legislative power;

[18] Ion Deleanu, quotted works p.88.

[19] For example the Switzerland Constitution by item. 25 bis establishes rules for cattle cutting.

III. Conclusions

It is important to underline the constitutional dynamism. The fundamental law is a dynamic and opened act, in a continuous crystallization process. The constitutionality status is achieved in a continuous and complex process for interpreting and applying by state's authorities of the texts contained in the body of the constitution. A special role in this wide process of interpretation and concrete fulfilling of the constitutional provisions is in the charge of the constitutional authorities. The activity for interpreting the fundamental law texts is justified because in the normative content of the constitution there are categories and concepts whose sphere cannot be defined by the constituent law maker. Thus, the constitutional norms cannot and must not offer definitions. For example in Romania's constitution there are such concepts that are defining by interpretation way and have formed the objective of analysis of the Constitutional Court: " spirit of tolerance and mutual respect" (item 29, paragraph 3); "identity" (item 30, paragraph 3); "private life" (item 30, paragraph 6), " the principles of the lawfull state" (item 48 paragraph 2); "public utility" (item 44, paragraph 3); "public and moral proportionality" (item 116, paragraph 4).

The normative contents of the constitution must be understood and determined with having into consideration the teleological criterion emphasized in the above stated definition. Namely the fundamental law's structuring role for the entire social, political and state system, guarantor of the fundamental rights and liberties.Noticing a political and juridical reality yet present, G. Bourdeau stated:" The written constitution is the work of the theoreticiens preoccupied more by the elegance and juridical balance of the mechanism they construct, than by its political efficiency [20]" Such a finding, we consider valid also for the Constitution, respectively the contemporary Romanian constitutionalism.

The fair determination of the normative contents of a constitution is expressed by its political and juridical efficiency. The fundamental law must achieve the social dynamic balance but also the stability and institutional harmony, the efficient guaranteeing of the fundamental rights, in essence the requirements of a real constitutional democracy based on the values of the state, of the institutional and social balance and of the proportionality[21]. Ion Deleanu noticed very well that: "the success of the constitution and constitutionalism is always a political one as far as it is the result of a transaction, of a relationship between what the constitution offers in a formalizing and objectiving term of the political matters and what the political actors ask or search for at a certain time in order to fulfill their own objectives. [22]

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[20] George Bordeau, *Traite de science politique* (Paris: LGDJ, 1969), 59.

[21] For developments regarding the applying of the constitutional principle of proportionality at the state power organizing see Marius Andreescu, *Principiul proporţionalităţii în dreptul constituţional* (Bucharest: CH Beck, 2007), 267-298.

[22] Ion Delenu, quotted works p.89.

THE LIMITS OF STATE POWER IN A DEMOCRATIC SOCIETY

Marius ANDREESCU*

Abstract

The coding is not only the expression of the political will of the law maker, it firstly is a complex juridical technique for the choosing and systematization of the normative content necessary and adequate to certain social, political, economic, institutional realities. Since Constitution is a law, yet it nevertheless distinguishes itself from the law, the problem is to establish which juridical norms it contains. The solving of this problem needs to consider the specific of the fundamental law and also of the requirements of the coding theory. The determining with all scientific stringency of the normative content of the Constitution is indispensible both for the removal of any inaccuracy in delimiting the differences from the law, for the stability and predictability of the fundamental law and last, but not the least, for the reality and effectiveness of its supremacy.

In our study we realize an analysis based on compared criterions of the techniques and exigencies for the choosing and systematization of the constitutional norms with reference to their specific, to the practice of other states and within a historical context. The analysis is aiming to the actual proposals for the revising of the Constitution.

Keywords: *Constitutional norms, constitutional norm establishing criterions, technical - juridical structure, supremacy of Constitution, normative content.*

I Introduction

From the beginning up to the present the human society is marked by two constants that have ontological value: *the struggle for power* and on the other hand *the fight against the power*, both in situations where it is illegitimate because it takes the form of dictatorship or tyranny, also in the versions of apparent legitimacy, especially in democratic societies, such as for example the legitimate political activity of the opposition to come to power or the actions of civil society and individuals against abuse of power.

These ontological constants of any human society are inevitable no matter of the social form of organization or characteristics of political regimes, including in democratic societies because the existential and functioning essence of any social system is the expression of the contradictory difference between governors and the governed, between society as a whole and on the other hand, the man in his concrete and personality, between the normative order and moral values, between law and liberty, between public interest and private interest and of course between the vocation of human intangible fundamental rights, and on the other hand the public interest of the state to condition, limit and restrict their exercise.

These contradictions, if they remain in their absolute form, by antagonist excellence can be destructive to an organized state society, as history has shown. History shows the political and legal solutions which, especially in the modern period, were devoted to avoid dictatorial forms of power exercising. Here are some of them established since the first written constitution in the world - the US Constitution, adopted in 1787 - Declaration (French) of human and citizen rights on 1789, up to the internal and international contemporary political and legal instruments: supremacy of the Law and Constitution, separation and balance of powers within the state, proclamation and guarantee of the fundamental rights and freedoms, constitutional and judicial control.

Incontestable these principles in fact and the features of the lawful right materialized and guaranteed constitutionally define the contemporary democratic societies and virtually eliminates totalitarian, dictatorial forms of state power.

However the differences and contradictions mentioned above, because they are ontological constants of society, they exist in any democratic society. In addition there is a subtle situation, namely the difference between the legality of state decisions and on the other hand the state legitimacy. These realities may cause or encourage excess of the power of authorities in societies built upon the principles of modern constitutionalism.

In this context remains a problem of essence, not only theoretical but also practical to determine the limits of state power in a democratic society in concrete in România and to find solutions in cases of excessive form of manifestation of state authority.

II. Paper content

The doctrine, in its majority reveals an insurmountable contradiction that exists between the

* Judge-Curtea de Apel Pitești, University Lecturer Doctor-Faculty of Law and Administrative Sciences, University of Pitești (e-mail: **andreescu_marius@yahoo.com**).

democratic political regimes and, on the other hand those considered to be dictatorial, or simply between dictatorship and democracy.

Dictatorship means centralization and concentration of power, denial of pluralism in all its forms, absolute or discretionary power of the governors, coercion and excessive limitations of individual liberties, rigid separation of the governors from the governed, inexistence or formal existence of constitutional guarantees of human rights, inexistence or fictitious, formal character of principles essential to the state organization of society, such as principle of supremacy of law and constitution. For a synthetic manner of speech, dictatorship represents the annulment, dissolution or in the best case, the minimizing of the individuality of the singular, of diversity and affirmation of unity as abstract and constraining generality.

Unlike this, democracy is associated with the idea of a lawful state, focused on the principle becoming real and applicable of the supremacy of law and constitution. The centralization and concentration of power is replaced, as a modality of organizing of state powers, with the principle for their separation and balance. Pluralism in all its forms is institutionalized and guaranteed. The individual freedoms are also consecrated and guaranteed, while their exercise is governed by the rule according to which: the limit of any individual freedom is the need to respect others' similar freedoms. The legitimacy of state power involves the distinction between the being or essence of power and on the other hand, its exercise. In a democratic regime is not necessary to demonstrate the legitimacy of power as such because the axiom according to which " the holder of power is the people or nation" does not require demonstration, being a prerequisite for the entire political and legal construction of the state organized society Instead, any democratic government must find ways through which the exercising of power, in other words, the phenomenality of power be legitimate and lawful. Such a legitimacy is achieved when between essence (power in itself owned by the people) and forms of exercising (the phenomenon of power) there are no irreconcilable contradictions. The legitimacy of the exercise of power in case of democratic political regimes means reflecting the essence of power in its phenomenality, respectively in the organizing and exercising manner. Therefore, in case of democracy there is always a conceptual distinction, and a real one between the legitimacy of the essence of power that requires no demonstration, this results as such by the mere proclamation of the principle that the power has as its holder the people and on the other hand, the phenomenal legitimacy of organizing and exercising of power, that is not a "given" but a construction, firstly constitutional, realized in the concrete forms of institutional organization and exercising of state power. The legitimacy of the organizing and exercising of power is outside the power's phenomenality, in the meaning that the phenomenality is not the source of its legitimacy, but this is constructed in a relation whose content is the correspondence between the essence of power and the manifestation forms.

The power, in its essence, can be considered a "thing in itself", in the Kantian sense, because the full knowledge of the essence will never be possible. Reality of the state power considered in the relationship between essence and phenomenon reveals another aspect: the phenomenality of power can never fully correspond to the essence of power. The object of knowledge for the legal or political science is the phenomenon of power and not its essence. Therefore, the legitimacy of power phenomenal manifestation represents an ideal of which, the concrete forms of organization and exercising of power, get closer without ever touching it.

The legitimacy of power's phenomenality lies among others in achieving the principle of representation. This principle highlights very well the distinction between the being or essence of power and on the other hand the phenomenon of power. The holder of power cannot exercise it directly, only in exceptional circumstances. The essence is not the manifestation of power. The exercise of power reflects the being of power without containing it. Thus, the state institutions exercise the power without holding it, therefore, they need a recognition of the legitimacy of the acts of power, actually conferred mainly by applying the principle of representation.

The power and its phenomenality are undoubtedly at the heart of democracy. If the phenomenal legitimacy of power is an ideal of which the concrete forms of institutional embodiment through the principle of representation can get closer, results thus that democracy in its essence is still an ideal related to which the social and political reality is constructed and manifested, without letting the democratic ideal to coincide with the social and political reality. It is relevant in this regard the statement of Professor Ion Deleanu: "Democracy is a form of moral perfection. It dimensions the organization and operation of a power to humanize it and also the way of life of citizens to shape it."

It is necessary to distinguish between the *ideal democracy* that is a purely speculative construction based on the possible coincidence between the essence and the phenomenality of power, but also an ethical imperative that should mean the unity of will between the individual and society, and on the other hand, the *real democracy*, characterized through the contradictory dichotomy between the essence and the phenomenality of power, between the individual and society. Real democracy takes concrete forms,

multiple manifestations (such as the form of "parliamentary or representative democracy "), is not an immutable given, but is in a continuous evolutionary process, in considering the historical progress as a finality, never possible to be achieved, the ideal democracy. The science of law has as a study topic the real democracy, or more precisely its forms of manifestation and for its implementation. Paradoxically, however, the legitimacy of any form of real democracy is conferred by the values and principles of ideal democracy, the latter forming mainly the studying topic for metaphysics.

Unlike dictatorship, democracy involves the rehabilitation of the individual, of the particular that is no longer absorbed and dissolved into the social abstract general or of the concentrated power. In democracy the individual has ontological value and manifests into existential coexistence with the social general. In other words, the individual has the meaning and power of the general, the latter being legitimate, precisely because it recognizes to the individual the existential and ontological dimension. The power, even in its concrete manifestations is the expression of the general as such, reflected for example in the notion of "public interest". In a democratic society the legitimacy of the act of power lies not in reflecting own generality (of public interest) but in respecting the individuality of diversity in all forms specific to existential pluralism. In constitutional terms, this evokes the relation between "majority and opposition".

The issue of democracy cannot be reduced to the phenomenon of power as it seems to result from the constitutional definition of democracy that we find in Article 2 of the Constitution of French Republic: "government of the people by the people and for the people". The essence of democracy, in our opinion, is the forms and content of the concrete relation between society and individual. The relation expresses a unilateral contradiction because the society can contradict the individual (particularity and diversity), which is proper to dictatorship, but the individual does not contradict the society, situation particular to democracy. Furthermore, the dialectic report between the individual and society specific to democracy is an affirmative one, not containing a negation, such as Hegel argued. It is proper to democracy so that society asserts the individual (individuality and diversity), not to deny, therefore, to consecrate and guarantee the individuality and diversity. Any further analysis of the phenomenon of democracy involves references to the concepts of civilization and culture, the relationship between civilization, society and the individual.

In our opinion between dictatorship and democracy is obviously a contradiction, but one-sided: dictatorship is inconsistent and excludes democracy, yet democracy does not exclude the forms of dictatorship. The space and scope of this study do not allow further analysis of this interesting problem. However we mention that in doctrine are made referrals to forms of dictatorship that can characterize any democratic regime: parliamentary dictatorship, dictatorship of masses or the dictatorship of the majority. In all these situations the democratic reality, contradictions highlighted above become negative (majority excluded or ignoring the minority). Consequently, it gets to the exercising of authority in discretionary forms, which obviously contradicts the essential values of ideal democracy.

John Stuart Mill, in his works "Civilization," published in 1836 believes that civilization is contrary to the nature status or barbarism. A nation is civilized when the social conditions in which lives gives sufficient safety guarantees, so that social peace be a reality. Among consequences of higher civilization the most striking one, is the philosopher's opinion that the power tends to move from individuals and small communities to the masses. The importance of masses increases when that of individuals decreases. With the decreasing of individual's role, decreases the power of individual beliefs and the public opinion acquires supremacy. In this ideational context Stuart Mill pointed out that "the drawbacks of democracy lie precisely in this tyranny exercised by the masses, the majority of public opinion. Therefore, the political organization of representative governing must contain all guarantees for the individual against the tyranny of the masses. Among other measures, Stuart Mill suggested the representation of opinions minority in the Parliament.

The great philosopher findings are, in our opinion, fully valid also for the contemporary forms of real democracy or representative. That's why the realization of the principle of representation in any of the types of electoral system should allow as much as possible, the reduction or even elimination of the forms of dictatorship in a real democracy through enhancement of individualities, of the political minorities or otherwise. In this way, the progress of a democratic society becomes a balanced one based on a unilateral affirmative contradiction in which the masses affirm and do not deny individual, and the majority affirm the minorities. Thus, the *famous parliamentary principle "the minorities express and the majority decides"* should become*: legitimacy of the decision is given by the representativeness and power to express of minorities.*

Legality, as a feature that must characterize the legal acts of public authorities, has as central element the concept of "law". Andre Hauriou defined the law as a written general rule established by the public powers after deliberation, entailing direct or indirect

acceptance of the governors[1]. Ion Deleanu defines just the "document that contains general and mandatory rules sanctioned through the coercive force of the state, when its application is not done out of conviction and is prone to produce application whenever arise the conditions foreseen in its hypothesis[2]."

In a broader meaning, the concept of law includes all legal acts that contain legal norms. The law in its restricted sense is the legal act of parliament drawn up in accordance with the constitution, according to an established procedure and which regulates the most important and general social rules. A special place in the legal system administered has the constitution defined as fundamental law, located on the top of legislative system, which includes legal rules of a higher legal force, which regulates fundamental and essential social relations, especially those concerning the establishment and exercising of state power.

The state of legality in the work of public authorities is based on the concepts of supremacy of the constitution and supremacy of law. The supremacy of constitution is a quality of the fundamental law that basically expresses its supreme legal force in the legal system. An important consequence of fundamental law supremacy is the compliance of entire law with the constitutional norms[3]. The notion of juridical supremacy of law is defined as "its feature that finds expression in the fact that the norms it establishes must not meet either of other norms, apart from the constitutional ones and the other legal acts issued by state bodies are subordinated to it in terms of their legal effectiveness[4]".Therefore, the supremacy of law in the sense above is subsequent to the principle of supremacy of constitution. Important is that the legality, as a feature of the legal acts of state authorities involves the observance of the principle of supremacy of the constitution and law. The observance of these two principles is a fundamental constitutional obligation consecrated by the provisions of article 1 paragraph 5 of the Constitution. Failure to observe this obligation attracts the appropriate sanction of unconstitutionality or illegality of legal documents.

The legality of the legal acts of public authorities involves the following requirements: legal document to be issued in compliance with the competence prescribed by law; legal act to be issued in accordance with the procedure prescribed by law; legal act to respect the rules of law as superior legal force.

The "Legitimacy" is a complex category with multiple meanings and which is the topic for research for the general theory of law, philosophy of law, sociology and other disciplines. There are multiple meanings of this concept. We mention a few: legitimacy of power; the legitimacy of the political regime; legitimacy of governance; the legitimacy of the political system, etc. Referring to this concept Jean Leca said: "The term legitimacy designates the quality which enables the holder to a power to order or prohibit the ability to be heard without resorting to physical violence explicit or, what is meaning the same thing, an option recognized as normal to successfully use coercion if necessary[5]".The concept of legitimacy can be applied in case of legal acts issued by public authorities being related to the" margin of appreciation" recognized to them in the exercise of their prerogatives.

The application and observance of the principle of legality in the work of state authorities is a complex issue, because the exercise of state functions assumes the discretionary powers with which state bodies are invested or otherwise said, the right for appreciation of authorities regarding the moment of adoption and the contents of the measures ordered. What is important to note is that discretionary power cannot be opposed to the principle of legality, as a dimension of the lawful state.

In our opinion, the legality represents a particular aspect of the legitimacy of the public authorities' legal acts. Thus, a legitimate legal act is a lawful legal act, issued within the margin of appreciation recognized by the public authorities, which does not generate discriminations, unjustified privileges or restrictions of the subjective rights and is appropriate to the situation in fact that determines its legal purpose. The legitimacy distinguishes between the discretionary power recognized by the state authorities, and on the other hand, the excess of power.

Not all legal documents which satisfy the legality conditions are legitimate. A legal act that complies with the formal legality, but is generating discriminations or privileges or unduly restricts the exercising of some subjective rights, or is not appropriate to the situation in fact, or to the purpose pursued by the law, is an illegitimate legal act. The legitimacy, as a feature of the legal acts of public administration authorities must be understood and applied in relation to the principle of supremacy of the Constitution.

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[1] André Hauriou, *Droit constitutionel et institution politiques* (Paris: Montchrestien, 1972), 137.

[2] Ion Deleanu, *Drept constituţional şi instituţii politice* (Bucharest: Europa Nova, 1996), 509.

[3] For developments see Marius Andreescu and Florina Mitrofan, *Drept constitutional. Teoria generală* (Piteşti: Publishing House of Piteşti University, 2006), 61-68.

[4] Tudor Drăganu, *Drept constituţional şi instituţii politice. Tratat elementar* (Bucharest: Lumina Lex, 1999), 362.

[5] Dictionary of Sociological thinking, Bucharest: Polirom, 431.

Antonie Iorgovan says that a problem of the essence of the lawful state is to answer the question: "where ends the discretionary power and where starts the abuse of law, where ends the legal behavior of administration, materialized through its right of appreciation and where it begins the infringement of a subjective right or a legitimate interest of the citizen? [6] "

Addressing the same issue, Leon Duguit in 1900 is doing an interesting distinction between the "normal powers and the exceptional powers" conferred by the Constitution and laws to the administration, and on the other hand the situations where state authorities act outside the legal framework. The latest situations, are divided by the author into three categories: 1) the excess of power (when the state authorities go beyond the legal powers); 2) misappropriation of power (when the state authority accomplishes an act which falls within its jurisdiction following another purpose, other than the one prescribed by law); 3) the abuse of power (when the state authorities act outside their powers, but through acts that have no legal character) [7].

Therefore, the application and observance of the principle of legality in the work of state authorities is a complex issue because the performance of the state's functions assumes the discretionary power with which the state bodies are invested, in other words "the right of appreciation" of the authorities regarding the moment of adoption and the contents of the measures ordered. What is important to highlight is that discretionary power cannot be opposed to the principle of legality, as a dimension of the lawful state.

In the administrative doctrine, that is primarily studying the issue of discretionary power, it was emphasized that the opportunity of administrative acts may not hinder their legality, and the conditions of legality can be divided into: general conditions of legality and specific conditions of legality on expediency[8]. Consequently, the legality is the corollary of validity conditions, and the opportunity is a requirement (size) of legality[9]. However, the right of appreciation is not recognized by the state authorities in exercising all the prerogatives they have. One needs to remember the difference between the *competence* of state authorities that exist when the law imposes on them a certain strict behavioral decision, on the other hand the *discretionary power*, in which situation the state authorities may choose the means for achieving a legitimate aim or in general, when the state body can choose between several decisions, within the law and its jurisdiction limits. We will remember the definition proposed in the literature to the discretionary powers: "there is a margin of freedom at the discretion of the authorities, so in order to achieve the purpose indicated by the law maker to have the possibility of use any means of action within its jurisdiction. [10]"

Although the problematic of the discretionary power is studied mainly in the administrative law, the right of appreciation in exercising some prerogatives represents a reality that is encountered in the work of all state authorities. [11] The Parliament, as the supreme representative body and the sole legislative authority, has the broadest limits to manifest discretionary power, which identifies itself through the characterization of the legislative act. Since the period between the two world wars I.V. Gruia pointed out: "The need to legislate in a particular matter, the choosing of enactment timing, the choosing of the timing for implementation of the law by fixing by the legislator of the date of application of the law, revising of previous legislation, which may not restrict and compel the activity of future Parliament, limitations of the social activities from the free and uncontrolled way of carrying out and their subjecting to law rules and sanctions, the contents of the legislative act etc, prove the sovereign and discretionary appreciation of the legislative body's function." [12]

That is the case today, because every Parliament has the freedom to exercise its powers almost unlimited. The legal limit of this freedom is shaped only by the constitutional principles applicable to the legislative activity and the mechanism for controlling the constitutionality of laws.

The discretionary power exists also in court's activity. The judge is required to decide only when it is noticed, within the referral's limits. Beyond that is manifested *the sovereign right of assessment* of the facts, the right to interpret the law, the right to set a minimum or a maximum punishment, to grant or not extenuating circumstances to determine the amount of compensation etc. The exercise of these powers means nothing else but discretionary power.

Exceeding the limits of the discretionary powers means breaching of the principle of legality

[6] Antonie Iorgovan. *Forward to:* Dana Apostol Tofan, *Puterea discreţionară şi excesul de putere al autorităţilor publice* (Bucharest: All Beck, 1999).

[7] Leon Duguit, *Manuel de Droit Constitutionnel* (Paris, 1907), 445-446.

[8] Antonie Iorgovan, *Tratat de drept administrativ* (Bucharest: Nemira, 1996), 301.

[9] Ibidem, pg.292.

[10] Dana Apostol Tofan, *quoted works,* 22.

[11] In doctrine, Jellinek and Fleiner claimed the thesis according to which the discretionary power is not specific only to the administrative function, but it appears in the activity of other functions of the state, under the form of a liberty of appreciation on the contents, on the opportunity and covering of the juridical act. (see Dana Apostol Tofan, *quoted works*, 26).

[12] I.V.Gruia, "Puterea discreţionară în funcţiunile Statului", *Weekly Pandectales* (1934): 489.

or what in legislation, doctrine and jurisprudence is called to be "abuse of power". The excess of power in the activity of state bodies is equivalent to the abuse of rights, as it means the exercising of some legal competences without any reasonable motivation or without any appropriate relation between the imposed measure, situation in fact and the legitimate aim pursued.

The problematic of the excess of power forms mainly the subject of the law doctrine and administrative jurisprudence. Thus, the jurisprudence of the administrative prosecution courts in other countries delimited the freedom of decision of the administration from the excess of power. French State Council uses the concept of "appreciation manifest error" to describe situations where the administration exceeds, by legal acts adopted, the discretionary power. German administrative courts can annul the administrative acts for abuse of power or "wrong use of power". In such cases the legal acts of the administration have the appearance of legality, since they are adopted within the scope prescribed by law, but the excess of power consists in the fact that the administrative acts are contrary to the purpose of the law.

The Romanian [13]Administrative Litigation Law uses the concept of "abuse of power of the administrative authorities", which it defines as "the exercise of the appreciation right belonging to public authorities, through the violation of the fundamental rights and freedoms of citizens consecrated in the constitution or by the law" (Article 2, paragraph 1, letter m). For the first time the Romanian legislator uses and defines the concept of abuse of power and also recognizes the competence of the administrative prosecution courts to sanction the exceeding of the limits of the discretionary powers through administrative acts.

The exceptional situations represent a particular case in which the state authorities, and especially administrative ones, may exercise their discretionary power, with existence of the obvious dangers of power excess.

In the doctrine there is no unanimous agreement on the legal significance of the exceptional situations. Thus, in the older French doctrine, the discretionary power is considered to be the liberty of decision of the administration within the law permitted framework, and the opportunity evokes an action in fact of the public administration, under exceptional circumstances, action not necessary (therefore advisable) but contrary to the law[14]. Jean Rivero believes that through exceptional circumstances means certain factual circumstances that have a double effect: suspending of the application of the ordinary legal system and triggering of the application of a particular law to which the judge defines the requirements. Another author identifies three specific elements for exceptional situations: 1) the existence of some abnormal and exorbitant situations or serious and unforeseen events; 2) inability or difficulty to act in accordance with the natural regulations; 3) the need to intervene quickly to protect a considerable interest, gravely threatened[15].

The excess of power can manifest itself in these circumstances at least by three aspects: a) an appreciation of a factual situation as being an exceptional case, although it has not this meaning (lack of a reasonable and objective motivation); b) the measures taken by the competent state authorities, by the virtue of the discretionary powers, exceed what is necessary for the protection of the public interest seriously threatened; c) if these measures restrict excessively, unjustified the exercise of the rights and freedoms constitutionally recognized.

The existence of an economic, social, political or constitutional - crisis does not justify the abuse of power. In this respect Professor Tudor Drăganu said: "the idea of the lawful state requires that they (the exceptional circumstances) to find adequate regulations in the constitution texts, whenever they have a rigid character. Such constitutional regulation is needed to determine the limits of the areas of social relations, in which the transfer of competence from the Parliament to the government may take place, to highlight the temporary character, by setting deadlines for application and by specifying the purposes in view of which it is carried out.[16]"

Of course, the excess of power is not only a phenomenon manifesting itself in the practice of the executive bodies, it can also be found in the work of Parliament or of the courts.

We appreciate that discretionary power recognized by the state authorities is exceeded, and the measures ordered represent an abuse of power, wherever the following situations occur:

1. The measures decided do not pursue a legitimate aim;

2. The decisions of public authorities are not adequate to the factual situations or the legitimate aim pursued, as they go beyond what is necessary to achieve that purpose;

3. There is no rational justification of the measures imposed, including the situations in which is established a different legal treatment for identical situations, or an identical legal treatment for different situations;

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[13] Law nr.554/2004, published in Official Gazette. no.1154/2004.
[14] Antonie Iorgovan, *quoted works*, vol. I, 294.
[15] Dana Apostol Tofan, *quoted works*, 81.
[16]Tudor Drăganu, *Drept constituţional şi instituţii politice. Tratat elementar* (Bucharest: Lumina Lex, 1999), 131-132.

4. Through the measures ordered the state authorities restrict the exercise of fundamental rights and freedoms, without any rational justification to represent, in particular the existence of an appropriate relation between these measures, the situation in fact and the legitimate aim pursued.

In the final part of this study we will refer to some issues that we believe that need to be considered in a future proceeding for revising the Constitution.

As shown above in regard to the excessive politicianism and the power discretionary manifestations of the executive contrary to the spirit and even the letter of the Constitution, with the consequence of violation of fundamental rights and freedoms, manifested throughout the last two democracy decades in Romania, we consider that the scientific approach and not only in reviewing matters of the basic law should be directed to find solutions to guarantee the values of the lawful state, to limit the violation of the constitutional provisions in view of some particular interests and to avoid the excess of power by state authorities.

The provisions of art. 114, paragraph 1 of the current drafting state: "The Government may assume responsibility before the Chamber of Deputies and the Senate in joint session on a program of general policy statement or a bill."

The engagement of Government liability has a political nature and is a procedural instrument which avoids the phenomenon of *"dissociation of majorities*"[17] where the Parliament could not meet the required majority to adopt a certain action initiated by the Government. To determine the Legislative forum to adopt the measure, the government through the accountability procedure, conditions to continue its work requiring a vote of confidence. This constitutional process ensures that the majority required for the government dismissal, in case of submitting a motion of censure to dismiss to coincide with that for rejecting the law, program or political statement of which the government binds its existence.

The adapting of the laws as a result of the political liability engagement of the Government has as an important consequence the absence of any discussions or parliamentary deliberations on the bill. If the government is supported by a comfortable majority in the Parliament, through this procedure one can achieve the adoption of the laws by "bypassing the Parliament", which can have negative consequences on the principle of separation of powers in the State, but also in regard to the role of Parliament, as defined of Article 61 of the Constitution.

Consequently, the use of this constitutional procedure by government for adopting a law must be exceptional, justified by a political situation and a social imperative, well defined.

This particularly important aspect for respecting the democratic principles of the lawful state by the Government was well highlighted by the Constitutional Court of Romania: "To this simplified form of regulation one must reach *in Extremus*, when the adopting of bill in the ordinary procedure or emergency procedure is no longer possible or when the Parliament's political structure does not allow the adopting of the bill in the current or emergency procedure.[18]" The political practice of the Government in recent years is contrary to these rules and principles. The Executive frequently used the assuming of responsibility not only for a single law, but for packages of laws without a justification in the sense shown by the Constitutional Court.

The politicianism of the government clearly expressed by the high frequency of assuming such a constitutional decision seriously harms the principle of political pluralism which is an important value of the lawful system as consecrated in the provisions of article 1, par. (3) of the Constitution but also of the principle of parliamentary law that shows that "the opposition expresses and the majority decides"[19]. "To deny the right of the opposition to speak is synonymous with the denial of political pluralism which, according to Article 1, paragraph (3) of the Constitution is a supreme value and is guaranteed ... the principle the 'majority decides, opposition expresses "implying that in the entire organization and functioning of the Parliament's Chambers to ensure, on one hand that the majority is not obstructed, especially in the conduct of the parliamentary procedure and, on the other hand the majority to decide only after the opposition has voiced"[20]. The censorship of the Constitutional Court has not proved to be sufficient and effective to determine the Government to respect these values of the lawful state.

In the context of these arguments we support the proposal to revise these constitutional provisions that limit the right of the Government to use its liability for a single bill in a parliamentary session. However, in our opinion there is no justification to exclude from the limitation of Government's liability, situations aiming the government draft law on state budget and state social insurances.

2. All post-December governments have massively used the practice of Emergency ordinances, fact widely criticized in the literature.

The conditions and prohibitions established by revising law in 2003 on the constitutional regime of

[17] Gheorghe Iancu, *Drept constituţional şi instituţii publice* (Bucharest: All Beck, 2010), 482.
[18] Decision nr. 1557 on 18th of November 2009, published in the Official Gazette. Nr. 40 on 19,01,2010.
[19] Ioan Muraru and Mihai Constantinescu, *Drept parlamentar românesc* (Bucharest: All Beck, 2005), 55-69.
[20] Ioan Muraru, Mihai Constatinescu, quoted works, 56.

emergency ordinances, in practice proved to be insufficient to limit this practice of the Executive and the control of the Constitutional Court also proved insufficient and even ineffective. The consequence of such a practice is the violation of the Parliament's role as "the sole legislative authority of the country" (art. 61 of the Constitution) and creating of an imbalance between the executive and legislature by emphasizing the discretionary power of the Government, which most often turned into the abuse of power.

We propose in the perspective of a new revision of the Basic Law, that art. 115 par. 6 of the Constitution be amended so as to prohibit the adopting of emergency ordinances in the field of organic laws. In this way is protected an important area of social relationships as the constitutional legislature considers essential for the social and state system, the excess power of the executive through the practice of issuing emergency ordinance.

3. In our opinion is necessary that the Constitutional Court's role as guarantor of the Basic Law to be amplified by new responsibilities in order to limit the excess of power by the state's authorities. We disagree with the assertions in the literature that a possible improvement of constitutional justice could be achieved by reducing the powers of the constitutional court[21]. It is true the Constitutional Court ruled some questionable decisions regarding their compliance with the limits of exercising their duties according to Constitution, by assuming the role of a positive legislator[22]. Reducing the powers of the constitutional court for this reason is not a solution as a legal basis. Of course reducing the powers of the state authority has the consequence of eliminating the risk of improper exercise of those powers. This is not a way of doing things in a lawful state, but it should be done by seeking legal solutions to achieve better conditions of the tasks which prove to be necessary to the state and social system.

To the powers of the Constitutional Court may be included the one to rule on the constitutionality of administrative acts, exempted from the review of legality by the administrative courts. This category of administrative acts, to which refers Article 126 paragraph 6 of the Constitution and the provisions of Law no. 544/2004 of administrative litigation, are particularly important for the whole social system and state. Therefore it is necessary a constitutional scrutiny because in its absence, the discretionary power of the issuing authority is unlimited with the consequent possibility of restricting the excessive exercise of fundamental freedoms and rights or of breaching the important constitutional values.

For the same reasons our constitutional court should be able to control in terms of constitutionality also the Presidential decrees establishing the referendum procedure.

The High Court of Cassation and Justice has the power to take decisions in an appeal on points of law that are binding on the courts. In the absence of any control of legality or constitutionality, the practice has shown that in many cases the Supreme Court has exceeded its power to interpret the law, and such decisions amended or completed acts behaving as a genuine legislature thus violating the principle of separation of powers in the state[23].

In these circumstances, in order to avoid the excessive power of the Supreme Court, we consider it necessary to assign the Constitutional Court the power to decide on the constitutionality of the decisions of High Court of Cassation and Justice adopted in the procedure of appeal on points of law.

III Conclusions

Proportionality is a fundamental principle of law consecrated explicitly to the constitutional, legislation and international legal instruments regulations. It is based on the values of the rational right of justice and equity and expresses the existence of a balanced or appropriate relation between actions, situations, events, being a criterion for limiting the measures ordered by the authorities to what is necessary to achieve a legitimate aim, thus being guaranteed the fundamental rights and avoided the excess of power by the state's authorities. Proportionality is a fundamental principle of EU law being expressly consecrated by article 5 of the Treaty on European Union[24].

We consider that this principle's express regulation in the content of the provisions of Article 53 of the Constitution, with application in the restriction of certain rights, is not enough to highlight the full significance and importance of the principle of the lawful state.

It is useful that to article 1 of the Constitution to add a new paragraph stating that *"The exercising of state power must be proportionate and non-discriminatory"*. This new constitutional regulation would be a veritable constitutional obligation for all state authorities to conduct their duties in a way that the measures adopted to enroll within the discretionary power recognized by law. At the same

[21] Genoveva Vrabie, "Natura juridică a curţilor constituţionale şi locul lor în sistemul autorităţilor publice", *Revista de Drept Public* 1 (2010): 33.

[22] We refer with the title for example to the Decision No.356/2007, published in the Official Gazette.no.322on 14th of May 2007 and to the Decision no..98/2008 published in the official gazette no. 140 on 22nd of February 2008.

[23] For developments see Marius Andreescu, "Constituţionalitatea recursului în interesul legii şi ale deciziilor pronunţate", *Curierul Judiciar* 1(2011): 32-36.

[24] For developments see Marius Andreescu, "Proporţionalitatea, principiu al dreptului Uniunii Europene", Curierul Judiciar 10(2010): 593-598.

time it creates the possibility for the Constitutional Court to sanction by means of the constitutional reviewing control of the laws and ordinances, the excess of power in the work of Parliament and Government, using as criteria the principle of proportionality.

Of course, the existence of an institutional state viable, efficient qualitatively, well structured and harmonized, including under the aspect of moral and professional quality of the civil servants and magistrates dignitaries is obviously an ontological factor to eliminate or at least diminish the excess of power of state's authorities in all its forms, especially we would emphasize on the situation in which the measures decided by the political and legal manifestations will take the *form of legality* but are in obvious contradiction with the requirements of *the principle of legitimacy.*

Strengthening the judiciary power, the control of the courts and control of constitutionality, particularly, mainly in situations where being questioned the violation of human rights or of the principles of lawful state, particularly the separation and balance of powers, can be a viable solution to ensure not only the legality of the measures taken by the state authorities, but also of their legitimacy.

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GENERAL PRINCIPLES OF LAW

Elena ANGHEL[*]

Abstract

According to Professor Djuvara "law can be a science, and legal knowledge can also become science when, referring to a number as large as possible of acts of those covered by law, sorts and connects them by their essential characters upon legal concepts or principles which are universally valid, just like the laws of nature".

The general principles of law take a privileged place in the positive legal order and represent the foundation of any legal construction. The essence of the legal principles resides in their generality. In respect of the term "general", Franck Moderne raised the question on the degree of generality used in order to define a principle as being general – at the level of an institution, of a branch of the law or at the level of the entire legal order.

The purpose of this study is to find out the characteristics of law principles. In our opinion, four characteristics can be mentioned.

Keywords: *principle, general, experience, values, universal.*

1. Introduction

In its great historical spatial diversity, despite the natural differences, the law has a permanent nature, represented by a bunch of constants. Not only principles, but institutions are conserved, according to the continuity of social life; the state does not create law, but establishes a law, the positive law"[1].

The general principles of law take a privileged place in the positive legal order and represent the foundation of any legal construction. The essence of the legal principles resides in their generality.

The purpose of this study is to find out the characteristics of law principles. In our opinion, four characteristics can be mentioned.

2. Content

2.1. The generality of law principles

Mircea Djuvara pointed out that „in the filed of the science, the scientific progress consists of generalization. The scientific method consists of the knowledge of as many actual cases as possible and of their concentration in unitary laws by means of their essential similarities. The law of gravitation was a huge progress due to the fact it succeeded in combining a huge number of phenomena"[2].

In its entirety, the science of the law tends to generalization: the law is the result of judgment and the judgment consists of generalization; positive law has a general application; the rule of law is general and impersonal. According to Djuvara, the rule of law was always created by individual cases, by means of their comparison, a higher and higher level of generality being developed. In this respect, the author refers to the Greek primitive organization period, described by Homer, when the resolution ordered by the king, in case of a dispute, called „Themistes", was repeated in all similar cases so that, due to his will of reaching the same settlement, the idea of a general rule emerged over time[3]. Nowadays, statist law provides such general regulations that they can embrace the whole activity of a society. The Napoleonic Code has the great merit of having worded „precisely and clearly so general regulations that they could regulate almost all social life of its time"[4]. Djuvara concludes that, in the field of the law, generalization is necessarily required by the „logical postulate which rules the entire legal thinking, namely the rational idea of justice"[5].

Therefore, the generality is a defining element of the law system. But, within the law framework, „the legal construction of principles is the ultimate expression of refined abstraction"[6]. The generality is related to the law principles essence, is the „the core of the definition", according to Bergel.

Gheorghe Mihai notes that the principles of the law are called both general and fundamental, without the distinction between these two terms being explained. In his opinion, „fundamental" is the attribute of something that has the capacity to substantiate, and „general", in current sense, concerns „what is valid for a whole class of objects,

[*] Lecturer phd, The Faculty of Juridical Sciences "*Nicolae Titulescu"* University, Bucharest, Văcăresti Blvd**,** Nº. 185, Bucharest, Romania (e-mail: **elena_comsa@yahoo.com**).

[1] Gheorghe Mihai, *Fundamentele dreptului*, vol. I - II, All Beck Publishing House, Bucharest, 2003, pag. 250.

[2] Mircea Djuvara, *Teoria generală a dreptului (Enciclopedie juridică)*, All Publishing House, Bucharest, 1995, pag. 225.

[3] *Idem*, pag. 234.

[4] *Idem*, pag. 468.

[5] *Idem*, pag. 447.

[6] *Idem*, pag. 312.

what belongs to the entire class". Therefore, the principle is „the simplest and the most general sentence of which we can infer a totality of knowledge or precepts" and which substantiates, as an essential judgment, this entirety"[7].

Furthermore, the author insists on the fact that we should not confuse the generality of a principle with its extension. The principle, as a main idea, is only one, the founder of the law, the rest being „founded founders, not principles"[8]. For example, the principle of the freedom to adduce the evidence is an extension of the principle of freedom. Therefore, principles are not ranked according to the degree of generality, all of them being „the most general sentences". According to the author, if we refer to principles which are specific to certain areas of the law, we should call them „rules of method", mandatory rules, and not guidelines.

Most authors express a contrary opinion, meaning that in their opinion, principles have a different degree of generality. Therefore, Sofia Popescu shows that the general principles of law are different in terms of the degree of generality[9]: some of them have full applicability, being valid for the entire law system, while others are applicable only to private law or public law or to a certain branch of the law. While branch legal disciplines organize branch principles, the general theory of law concerns the most general principles. By setting aside the whole positive law, the general theory of law, by means of synthesis, can approach to universality.

In what concerns the principles of international law[10], Grigore Geamănu distinguishes, according to their generality, between fundamental principles and other principles of international law. The fundamental principles „represent a full generalization of the international rules of law", by being part of that bundle of rules which is the essential and specific part of this law[11]. The other principles of international law have a lower degree of generality, according to the author.

Furthermore, Franck Moderne wonders what degree of generality would be needed in order to classify a principle as being general, the generality being perceived, as Norberto Bobbio shown, at the level of an institution, of a branch of the law or at the level of the entire legal order[12].

Philippe Jestaz is reserved in expressing a clear point of view, both in what concerns the definition of general principle concept which has so many meanings that, according to the author, we need to resort to our intuition, and in what concerns the generality of the principles of law[13]. In his opinion, the principles of law have three characteristics: permanent, general and unanswerable. The general characteristic consists of the fact that the principle crosses several institutions or branches of law; for example, the principle which good faith is presumed on finds its applicability in various fields. Any rule of law entails in its structure a presumed fact (for example, any married woman gives birth to a child) and a consequence of this fact (the child's father is the husband of the mother). However, a principle consists of a multitude of presumed facts, so that we are not aware of the consequences of the fact unless we resort to certain rules of law. Jestaz concludes that the generality of a principle is a very relative concept, due to the fact that there is no standard to establish the degree of generality where a regulation becomes principle.

The generality of the general principles of law is „maximum", therefore they cannot be placed at the same level with the rules of law. We share the opinion of Jean - Louis Bergel, according to which the aforementioned expression, although pleonastic, is the most appropriate, due to the fact that it outlines the specific generality of these principles and distinguishes them, in this regard, from the rules of law. Therefore, a rule of law is general because it is applicable to an indefinite number of acts and facts, however, in relation to some of them, it can have a special characteristic. On the contrary, a principle is general „in what concerns an indefinite series of applications"[14]. In order to reinforce this statement, professor J. Boulanger exemplifies: the provision of the Civil Code according to which the conceived child is entitled to receive inheritance, is only a rule of law on inheritable devolution, while *infans conceptus pro nato habetur quotiens de commodis eius agitur* (the conceived child is considered born whenever his interests are concerned) is a genuine rule of law, by being applied in all situations which relate to the beginning of personality development. Therefore, Bergel concludes that the principles govern the positive law, by drawing the limits of the

[7] Gheorghe Mihai, *Fundamentele dreptului*, vol. I - II, All Beck Publishing House, Bucharest, 2003, pag. 362.

[8] Gheorghe Mihai, *Despre principii în drept*, in Studii de Drept Românesc, year 19 (43), no. 3-4/1998, pag. 273-285.

[9] Sofia Popescu, *Principiile generale ale dreptului, din nou în atenție*, în Studii de Drept Românesc, year 12 (45), no. 1-2/2000, pag. 7-25.

[10] Roxana-Mariana Popescu, *Introducere în dreptul Uniunii Europene*, Universul Juridic Publishing House, București, pag. 39: *international law principles should not be confused with the EU principles* (Augustina Dumitrașcu, Roxana-Mariana Popescu, Dreptul Uniunii Europene. Sinteze și aplicații, ediția a II-a, revăzută și adăugită, Universul Juridic, București, 2015, pag. 128).

[11] Grigore Geamănu, *Principiile fundamentale ale dreptului internațional contemporan*, Edit. Didactică și Pedagogică Publishing House, Bucharest, 1967, pag. 15.

[12] Franck Moderne, *Légitimité des principes généraux et théorie du droit*, in Revue Française de Droit Administratif no. 15(4)/1999, pag. 723

[13] Philippe Jestaz, *Principes généraux, adages et sources du droit en droit français,* in Les principes généraux du droit, Droit français, Droits de pays arabes, droit musulman, Bruylant Bruxelles, 2005, pag. 171.

[14] Jean - Louis Bergel, *Méthodes du droit. Théorie générale du droit*, 2nd edition, Dalloz Publishing House, 1989, pag. 100.

branches of law, while the rules of law are only applications of or exceptions from these principles.

Gh. Mihai provides a response to this statement, namely, by being the most general sentence, the principle does not admit exceptions, even more if we talk about a basic principle; rules involve exceptions, however, „if a principle is declared as such, the exceptions abolish its capacity of principle"**[15]**. The author criticizes those definitions which distinguish between the principles and the rules of law, by arguing that the first are abstract and general, and the letter would be actual and particular: „by taking over the abstract and general characteristics from the filed of the regulations and moving them into the filed of the principles, means that all regulations are converted into principles or that all principles are converted into regulations"**[16]**.

According to Gh. Mihai, the distinction between principles and regulations is performed by means of justification: „the principle is the conceptual and axiological horizon of the regulations, the regulations are valid constructions of this horizon"**[17]**. The differences between the principles of law and the rules of law shall be discussed in another chapter.

2.2. The principles of law are the outcome of the experience

By defining the principles as the most general ideas which arise from judgment and which substantiate law, we should not understand that they could be designed outside social facts. They have to support the totality of rules of positive law and to find their justification within social life. Therefore, we point out that the principles are not the outcome of a simple speculation, but on the contrary they are created by means of the experience.

Mircea Djuvara wrote that, setting aside the experience in the field of the law is nonsense, by being impossible to create law only by means of rational deductions. „The knowledge of the legal phenomenon should start from the practice developed from actual cases. In order for the truth to be achieved, the legal science should start from the actual to the abstract and not the other way". Here is the how the instruments of law are created according to the author: the law starts by ascertaining the things of the society, it always starts from the examination of particular cases, which applies legal and rational assessments to, by means of the legal consciousness of the society. Following the assessment of these actual social relationships, by means of induction, higher and higher levels of generalization are reached. Out of these general laws, legal consciousness achieves more precise forms of positive law, which are deemed outcomes of the legal techniques. The principles of law emerge from the legal text established as such, whereas „the legal experts seek the logical ground of each provision". The principles represent the higher level of abstraction, but they have no meaning outside the actual social facts: these principles „have no value, unless they are in relation to the initial particular cases they emerge from"[18]. Therefore, „all the principles of law are the outcome of continuous and necessary observations of the necessary needs of the society and these principles are not only the outcome of abstract speculation".

The philosophy of law recorded different guidelines in the construction of the principles of law. Therefore, Paul Roubier distinguishes three important categories of thinking: formalist school (positivists), idealist school (iusnaturalists) and realist school, which gathers under this name, historical and sociological doctrines[19]. Positivists thought that any rule of law is an expression of the king's power; the rule is mandatory for the individuals, regardless if it is applied, therefore, the effectiveness of the rule is not important according to this theory.

Iusnaturalists substantiated law on a bundle of natural and permanent principles, the systems of positive law emerge from. These principles emerge from the nature of things, they are ordered by the judgment, by remaining the same, regardless time and space. „The lawfulness of the rule emerges from its compliance with an intangible pattern (natural or rational order)", therefore the lawmaker is also bound to comply with it, according to Roubier.

By expressing doubt against the transcendental nature of law and by disclaiming the ideas of natural law, realist school sought the ground of the law in the life experience of people: the law is a spontaneous outcome of social life and every rule emerges from experience. Realists tried to point out the influences of the past, of the traditions, by being concerned not about the natural human being, but about the real human being, not about the alleged permanent principles, but by laws emerged from the spirit of the people.

By being against the codification of law, German historical school substantiated law on experience. Savigny, the prominent representative of this theory, believes that the law is the work of nature, so that it does not have to be created, but it is self-created as a natural phenomenon, such as religion or language. The law is the outcome of a

[15] Gheorghe Mihai, *Fundamentele dreptului. Teoria răspunderii juridice,* vol. V, C. H. Beck Publishing House, Bucharest, 2006, pag. 140.
[16] Gheorghe Mihai, *Despre principii în drept*, in Studii de Drept Românesc, year 19 (43), no. 3-4/1998, pag. 273-285.
[17] Gheorghe Mihai, *Fundamentele dreptului*, vol. I - II, All Beck Publishing House, Bucharest, 2003, pag. 363.
[18] Mircea Djuvara, *op. cit.*, pag. 245 and the following.
[19] Paul Roubier, *op. cit.*, pag. 55.

collective action, it is developed at the same time with the spirit of the people and reflects its entire history; therefore, it cannot find its expression in law, but in tradition. The tradition watches over the conservation of the law, by representing the inheritance transmitted sequentially from a generation to another.

The sociological school, represented by Durkheim, developed the ideas of Auguste Comte, whose research followed the method of observation of facts and the role of the experience. Durkheim believes that the law is the result of the intervention of the society in its own interest, namely in order to improve life conditions of social body. The social interest is what prevails: the law emerges from the society and not from the individual.

Free Law School was established by François Gény, as a fight against the theories which believed that the legislation is the sole source of the law. The arguments against these theories were the following: the law is a spontaneous outcome of the society; the formal sources of law are only procedures for the ascertainment of the law, in fact, the law precedes them, due to the fact the law is the outcome of social powers, it does not emerge from the state, but from the society. According to Roubier, the rules of law system substantiated on formal sources, has, to some extent, a virtual characteristic, an absolute overlap between the law of the sources and the actually practiced law, being impossible. The validity of formal sources of law depends on their compliance with the real sources[20].

According to professor Benoît Jeanneau, most of the general principles of law, are the result of the wording of latent rules emerging from social life, rules emerged from the repetition of fragmentary text, which at one point in time, the judge promoted them as more or less general principles[21].

We note that this theory is shared by Mircea Djuvara. According to the author's opinion, the law actually practiced within a country is not necessarily and absolutely in accordance with the law drawn up by its sources. There is a „positive latent law" beyond the construction of the positive law: it is the own law of the society, consisting of a series of social practices which, without being guaranteed by the state authority, have a long practical efficiency within society life.

However, every legal system expresses the community life experience of that space, an experience which varies depending on ideologies, traditions and religious symbols. Sometimes, this positive law has such strong roots in the consciousness of the society that the respective legal system remains immovable under the power of tradition; this is the case of Muslim system, which still tries to break away from the clutches of tradition, by slowly progressing under the influence of Western law principles.

There is no place where the law can afford to ignore the experience that its history has gained for centuries. Legislative experience „is not the experience of the legal normality, which is established in rules, but of its clear disclosure, as unambiguous as possible and especially, as public as possible. According to Gheorghe Mihai, this experience could be a logical historical finishing of human normative experience, or in other words, it would be the formalized prescriptive living".[22] In our opinion, the principles of law emerge from this clear disclosure and serve as a basis for positive law.

2.3. The principles of law are axiologically established

The law system cannot be reduced to a set of axiomatic rules of law, as Kelsen believed, but it necessarily entails value judgments. „The importance lies in the social value of the result and not in the logical beauty of laws. If law is faulty, misfit, anti-economic or even unfair, a perfectly logical judgment will only serve to increase the flaw of the premise, of the initial rule"**[23]**.

According to Ion Craiovan, the law is „generated, structured and directed towards the inseparable connection with the constellation of values of the historical time in which it is developed and in certain conditions the law itself accedes to the statute of value"**[24]**. The author conceives the culture as a merger between the knowledge and the value. The knowledge is not sufficient in order to grant an unitary view to the act of culture, therefore the value appears as a "fulfillment of the knowledge" in relation to human beings, their aspirations and needs.

The law always starts from the social actions, but it also means legal consciousness, ideals and social values. Gheorghe Mihai deeply outlines that people do not coexist, people live together**[25]**. The coexistence is specific to the herds, packs or hordes; but the human community means collaboration, cooperation, unity which implies the value awareness. The individuals, as free beings endowed with sense and consciousness, choose their behaviors, measure their actions, relate to behavior standards and assess the consequences of their actions. „The actual law is not everlasting outside these values and these values are always typically

[20] Paul Roubier, *op. cit.*, pag. 76 and the following.
[21] Benoît Jeanneau, *Les règles et principes non écrits en droit public*, sous la direction de Pierre Avril et Michel Verpeaux, Panthon Assas Publishing House, Paris, 2000, pag. 12.
[22] Gheorghe Mihai, *Fundamentele dreptului. Teoria izvoarelor dreptului obiectiv*, vol. III, All Beck Publishing House, Bucharest, 2004, pag. 35.
[23] Dan Claudiu Dănișor, Ion Dogaru, Gheorghe Dănișor, *Teoria generală a dreptului*, C. H. Beck Publishing House, Bucharest, 2006, pag. 35.
[24] Ion Craiovan, *Tratat de teoria generală a dreptului*, Universul Juridic Publishing House, Bucharest, 2007, pag. 31.
[25] Gheorghe Mihai, *Fundamentele dreptului*, vol. I - II, All Beck Publishing House, Bucharest, 2003, pag. 164 and the following.

expressed in the statements of the principles of a law system".

The principles of the law are the expression of the values promoted and defended by means of the law. Such great is the importance of the values, that they classify any positive law from the axiological point of view. However, the people do not cohabit only legally, but also morally, politically and religiously. The law does not exhaust the wealth of the horizon of the values: besides the independent legal values which build the rules of law, there are also other values, namely non-legal values (equity, welfare, utility, dignity, truth) which are necessary for the human coexistence and which the law takes over, legalizes, promotes and defends by means of its rules.

The law, as a dimension of the society, is not limited to the totality of the legal regulations in force; the values are those which give meaning to the rigid normative feature. The basis of the law is praxio-axiological[26]. The bases of positive law consist of principles, values, ideals, which have accompanied the society since the beginning of its existence. By being guided by the ideals, the law is a social control mean for the individual: human beings comply with the rules of law due to the fact they grant them cultural normative models, which they acknowledge as being necessary for them and they follow them. The law is valued; it sums up the standards of conduct emerging from the consciousness of value of the society. By means of these ideals, the law falls under the scope of „must be". According to Mircea Djuvara, the ascertainment of the ideal of a society must be the beginning of any law scientific research.

Therefore, the development of the law falls under the scope of the values and principles. The values belong to the given of the law, they are always social. The principles are value bearers. As the principles are the bases of the positive law, the values are crystallized, enshrined and protect by rules of law. The values impact the legal order both in the process of law creation, due to the fact the lawmaker creates the rules of law in this axiological space, and in the process of law fulfillment, thus the values being promoted by effective legal means[27].

In the application of the law, the enshrined values become references for the personality of the individual who, endowed with responsibility, will guide and assess the conduct according to their standards. Therefore, „the normative legal universe is built on principles and is humanized by the work of the values"[28]. The law is mandatory within the relations between the individuals not as a necessary result of the coercive power of the state, but as the adherence of the members of the society to its regulations. The individuals willingly comply with the rules of positive law in so far they give expression of the values emerging from the legal consciousness of the society. Therefore, the law has to be accepted by the members of the society, in terms of values and regulation, exactly in this order, due to the fact that the principles and accordingly, the values these principles assimilate, represent the bases of the objective law, have logical precedence against the regulations of the positive law. Therefore, the axiological dimensions of the principles also impact the rules of positive law.

According to Gheorghe Mihai, the value „is not given, as the properties of the things, it is not based on the real world, but on the ideal world, of the pure validity"[29]. However, although the individuals are similar by means of the values they receive, they are still different by means of their valorization, due to the fact that „each and every value is valued by means of the actions".

If the law were not related to values, the law would be an artificial structure of rules without scopes. The individual acts in a regulated framework; as the values are expressed by rules of law, the individuals value them by means of their actions. For human beings, the value is the reference of the responsibility: they assume the values that the law crystallizes in its rules of law and act according to their consciousness. Gheorghe Mihai distinguishes between moral assumption and legal assumption of social values, therefore: the moral assumption of the value is „universal and absolute and no speculative derogation of it impacts its substance", while the legal assumption of the same value is „neither universal, nor absolute, as long as the same lawmaker falls in contraction in the same respect"[30].

2.4. Certain principles of law benefit from universality

In antiquity, Cicero expresses his belief in an universal law and according to him „it is not one thing in Rome, and other at Athens; one thing today and another tomorrow, but in all times and nations this universal law must forever reign, eternal and imperishable"[31]. Iusnaturalists strongly supported the transcendental nature of law, from a dual perspective: there is natural law, consisting of the

[26] Gheorghe Mihai, *Natura dreptului: ştiinţă sau artă?*, in Studii de Drept Românesc, year 12 (45), no. 1-2/2000, pag. 42.
[27] Ioan Ceterchi, Ion Craiovan, *Introducere în teoria generală a dreptului*, All Publishing House, Bucharest, 1992, p. 27.
[28] Gheorghe Mihai, *Fundamentele dreptului. Teoria izvoarelor dreptului obiectiv*, vol. III, All Beck Publishing House, Bucharest, 2004, pag. 155.
[29] Gheorghe Mihai, *Fundamentele dreptului. Teoria răspunderii juridice,* vol. V, C. H. Beck Publishing House, Bucharest, 2006, pag. 42 and the following.
[30] *Idem*, pag. 55.
[31] *Apud* Ion Craiovan, *Tratat de teoria generală a dreptului*, Universul Juridic Publishing House, Bucharest, 2007, p. 91.

totality of natural, permanent principles, which are dictated by the judgment, being the same regardless of time and space; the positive law emerges from these eternal principles and by being the work of a lawmaker, it can only be changeable and imperfect.

If by 18 century, it was considered that the law was universal and unchangeable, being developed by human judgment out of the nature of things, Montesquieu revolutionized this thinking, by proving that law is the result of development factors. A great number of theories were developed against metaphysical foundation of law, by disclaiming the ideas of natural law. The historicism denied the universality of principles, by claiming that a historical *a priori*, which emerges from the spirit of the nature corresponds to each period and people. For the positivists, the law is the work of the lawmaker, for the sociologists is the result of facts.

According to Alexandru Văllimărescu „in order to avoid the free will of the lawmaker, we have to admit the existence of an *a priori* law, developed by human judgment which is also incumbent on the lawmaker"[32]. It is important to admit the existence of certain principles which are binding on everybody, to find an „outside rule", regardless if we call it natural law, rational or objective law, *donné* or *règle du droit*. The author explains that „the postulation of the existence of an absolute principle, which depends neither on the contingency of fact nor on the free will of the people who hold the great power", is essential.

Nowadays, we witness to some extent, the revival of the natural law. The principles of law represent the universal bases of the legal field, due to the fact they can be found in the depth of each positive law system. As of 1920, „the general principles of law recognized by civilized nations" were proclaimed in art. 38 of the Statute of the International Court of Justice, by being expressly recognized as a source of public international law. The current international view reinstates the universality of these principles, the establishment of mechanisms appropriate in order to ensure the globally protection of the inherent rights, natural for individuals, being in the center of the concerns of all states. In our opinion the institution of the Ombudsman is an extremely important institution of the European scene considering the role played by it in protecting the rights and interests of the European citizens[33] As they „express a sole truth which is mandatory for the judgment", these principles which substantiate law are transferred from a legal system to another, from the internal legal order to the international legal order and vice versa.

Under the integration into an united Europe, it is easy to note the tendency of the law towards universality. The predictions of Nicolae Titulescu – „starting from national, passing to regional, heading towards universal" were fulfilled. The European Union is opened to all European states which undertake to jointly promote universal values such as, humanism, human dignity, freedom, equality, solidarity, tolerance. The violation of the principle of equality and non-discrimination exists when a different treatment is applied to equal cases without any objective and reasonable grounds, or if there is a disproportion between the scope aimed by means of the unequal treatment and the used means[34]. The building of the European construction entails a blending of different legal orders, without impacting the foundation of member states national identity, and the reconfiguration of national, European and international relations. Such a difficult process would not be possible if the sense of European identity would not be expressed by means of universal principles and values, which breathe life into this continent[35]. It is important to keep in mind that in the European Union, the European Court of Justice "develops the general principles of law, which can be considered to be judge-made law – almost quasi-legislative"[36].

Giorgio del Vecchio pointed out that we should not understand that the general principles of law belong to a certain positive law system. The statement according to which the general principles of law are valid for only one people and that there are as many general principles as particular systems, would be contrary to the universal belief in *ratio juris*, which dates from Roman times and which is still valid today[37].

The objective law benefits form universality, due to the fact it is based on principles. The principles, in terms of ontology, give meaning to the law from the beginning of the society, namely before being discovered and worded by the law science. They substantiate law from the axiological perspective and guide the lawmaker in the construction of positive law.

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[32] Alexandru Văllimărescu, *Tratat de Enciclopedia dreptului*, Lumina Lex Publishing House, Bucharest, 1999, pag. 287.

[33] Elena Emilia Ștefan, *The role of the Ombudsman in improving the activity of the public administration*, Public Law Review no.3/2014, pag.127-135.

[34] **Decision no. 107/1995** of the Constitutional Court, published in Official Journal no. 85/1996, *apud* Elena Emilia Ștefan, "*Opinions on the right to nondiscrimination*", CKS e-Book 2015, pag. 540-544.

[35] For more details on European Union's legal principles, see Laura-Cristiana Spătaru-Negură, *Old and New Legal Typologies*, CKS e-Book 2014, pag. 365-466.

[36] Laura-Cristiana Spătaru-Negură, *Some Aspects Regarding Translation Divergences Between the Authentic Texts of the European Union*, CKS e-Book 2014, pag. 378.

[37] *Apud* Sofia Popescu, *Principiile generale ale dreptului, din nou în atenție*, in Studii de Drept Românesc, year 12 (45), no. 1-2/2000, pag. 9.

3. Conclusions

In its great historical spatial diversity, despite the natural differences, the law has a permanent nature, represented by a bunch of constants. Positive law „does not exhaust the extension of the Law, and does not rebuild its foundations. Not only principles, but institutions are conserved, according to the continuity of social life; the state does not create law, but establishes a law, the positive law"[38]. Philippe Jestaz assigns a permanent feature to the principles of law, by showing that „they crossed centuries and survived numerous legislative convulsions"[39].

The assessment of legal principles, as found in the Western and Arab-Muslim legal systems, reveals their universal value, the fact that they „are identical or quasi-identical in Romanian law, in, Islamic Sharia and in the modern European legal systems"[40]. These principles are and shall remain universal as they crystallize eternal values for human beings of all time and places, independently of the social realities which delimitate their legal status of persons in law.

According to professor Djuvara, „the law can be a science, and the legal knowledge is converted in science when, by covering a large number of the documents contemplating law, sorts and connects them according to their essential characters by concepts or *universal legal principles*, just like the laws of nature"[41].

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[38] Gheorghe Mihai, *Fundamentele dreptului*, vol. I - II, All Beck Publishing House, Bucharest, 2003, pag. 250.

[39] Philippe Jestaz, *Principes généraux, adages et sources du droit en droit français,* in Les principes généraux du droit, Droit français, Droits de pays arabes, droit musulman, Bruylant Bruxelles, 2005, pag. 171.

[40] Sélim Jahel, *Les principes généraux du droit dans les systèmes arabo-musulmans au regard de la technique juridique contemporane,* in Les principes généraux du droit, Droit français, Droits de pays arabes, droit musulman, Bruylant Bruxelles, 2005, pag. 29-46.

[41] *Apud* Ioan Ceterchi, Ion Craiovan, *Introducere în teoria generală a dreptului*, All Publishing House, Bucharest, 1992, pag. 5.

THE NOTIONS OF „GIVEN" AND „CONSTRUCTED" IN THE FIELD OF THE LAW

Elena ANGHEL*

Abstract

Montesquieu drew attention on the fact that "the laws that seem opposed are in some cases based on the same spirit". In this context, we will attempt to answer the following question: can the lawmaker create ("originate") the law by simply establishing norms in the form and upon the procedure required by laws or, on the contrary, besides these "exterior marks", is the lawmaker conditioned by some merits, contents criteria the efficiency and validity of legal norms depend on?[1]

The scientific research pursues at detecting that process of transition from "given" aspects to "constructed" aspects, from what it is to what it could be, from indicative to imperative. Social effectiveness of law depends on the degree of compliance between "given" and "constructed".

Keywords: *given, constructed, sources, norms, lawmaker.*

1. Introduction

The system of rules of law is the result of the interpretation of a certain lawmaker of the social relationships and of the appreciation of these interpretations according to own criteria[2]. The rule of law is the internal form of the law and its wording is the external form of the law. The rule of law does not come out of thin air, but it has a social background. This social background is the „given" notion of the law which entails the „constructed" notion of the law.

According to Hegel, there are two kinds of laws: laws of nature and laws of right. The laws of nature are independent and are valid as such; we just need to learn to know them, because they actually exist and are accurate, our ideas being the only ones which may be wrong. Instead, the laws of right are not absolute, they are established and originate from people so that „the thought of right is not something that we can own from the very beginning, but the right thinking is the knowledge and acknowledgment of the thing and this is why our knowledge must be scientific"[3].

The knowledge of the laws of right must originate from the social reality (this condition being necessary even in case of legal transplants[4]), due to the fact the law cannot avoid the complexity of the social system. The actual social life of each community is subordinated to two factors: space and time. In what concerns law and space, Montesquieu urged us not to separate the laws from the circumstances in which they were created, while pointing out that „the laws which seem to be opposed are sometimes based on the same spirit". The law is not an invention, but a *creation*, and the creation belongs to the spirit.

In terms of the situation in time, it is understandable that the legal phenomenon cannot be penetrated in its entirety only through a systemic approach, purely technical, but it has to be viewed from the perspective of the social-historical traditions. Without the values left behind by the history, the law would be an artificial construction. In order to decode the bases of the creation in the field of the law, the review of the historical conditions and of the whole social background where the law emerged and was developed, is needed.

2. Content

The beginnings of the society legal life were connected to the religious phenomenon, the law being perceived as a divine phenomenon. For instance, "law was considered by the Sumerians and Babylonians as being divine. Sumerians even had a goddess of law, Nanse, and at the Babylonians, the law was guaranteed by the deity of Heaven and Earth, Shamash"[5]. It was believed that the human's creative intervention in the material world can only be superficial, because the human being cannot cause essential modifications in the order of the matter by means of the externalized will[6]. The human beings live on the hope that they are „at the

* Lecturer phd, The Faculty of Juridical Sciences *Nicolae Titulescu* University, Bucharest, Văcărești Blvd**,** Nº. 185, Bucharest, Romania (e-mail: **elena_comsa@yahoo.com**).

[1] Anita M. Naschitz, *Problema dreptului natural în lumina filozofiei marxiste a dreptului*, in Studii şi cercetări juridice no. 3/1966.

[2] Gh. Mihai, *Fundamentele dreptului* , vol. I-II, All Beck Publishing House, Bucharest, 2003, pag. 454.

[3] G. W. F. Hegel, *Principiile filosofiei dreptului*, Paideia Publishing House, Bucharest, 1998, pag. 13.

[4] For more details on legal transplants, see Laura-Cristiana Spătaru-Negură, *Exporting Law or the Use of Legal Transplants*, CKS e-Book 2012, pag. 812-819.

[5] Laura-Cristiana Negură, *Legal Sanction in Ancient East*, CKS e-Book 2010, pag. 988.

[6] Sever Voinescu, *Drept şi logos*, in Studii de Drept Românesc, year 11 (44), no. 1-2/1999, pag. 30.

helm of the society" and that the law is the result of their will. The universal vector the society is led by is the will of God, and the social human creative activity is the „pale copy of the great Creation".

The iusnaturalism removed the law from the field of the religion and placed it into the field of the human judgment. The natural law doctrine thoroughly researched the bases of the creation in the field of the law, an issue assessed from a dualistic perspective, namely the perspective of the natural law and of the positive law.

The Modernism placed the human being in the center of all legal concerns, any law system being intended to protect the fundamental human rights. Another feature of the modern society is rationalization, due to the increasing number of legal experts. The creation in the field of the law was also imagined as a duty of a rational lawmaker, a fiction by which the doctrine sought to prove the idea of rationality of the law.

Luc J. Wintgens, professor of the European Academy of Legal Theory of Brussels, believes that, as of the 17th century and until the 19th century, the legal modern thinking was dominated by legalism, which conceived the normative conduct only as a need to comply with the rules, regardless their origin; „the law is designated as being given, just there"[7].

According to Ioan Vida, nowadays we witness the collapse of modernism and the emergence of a new way of perceiving society: *postmodernism*. The modernist model of the legislative decision, based on simplicity and on the exclusive resort to the given of the law, is outdated. The new paradigm is the transition from the simple decision within the legal regulation process, to the complex legal decision, based on the multidimensional legislative approach and on the need to direct the normative process to the European standards[8].

All thinkers were concerned by the issue on the metaphysical development of the law: **is the law a result of the social phenomena, being variable in time and space as the phenomena are or, does the law hide behind it a bunch of absolute and universal principles which human judgment discovers?** Nowadays, this issue still raises concerns, this is why many people acknowledge the tendency to the revival of the natural law.

The law is a social reality constructed under given historical and social circumstances. There is also an *a priori law*, developed by the human judgment, which is mandatory for the lawmaker. This *a priori law* was called by Mircea Djuvara rational law, consisting of certain principles which are logically prior to the positive law which is based on them.

François Gény is the one who introduced the notions of „*given*" and „*constructed*" in the assessment of law creation process. By means of his scientific approaches, Gény wanted to end the „fetishism of written law" and faith in its sufficiency, estimating that it is incomplete and that „no matter how sharp the human being mind is, it is not able to cover the whole image of the world living in"[9]. Therefore, the lawmaker is bound to investigate the given in order to fulfill the constructed.

By assessing the relation between the science and the technique of the law, Gény distinguished between the „given" which arises from the nature of things, having emerged before the legal phenomenon and the „constructed" represented by the work of the lawmaker. If the given of the law entails a certain continuity and is mandatory for our judgment, the constructed is represented by those artificial and variable elements, the effectiveness of which is ensured by human will.

The given of the law is that reality outside the positive law, which grants it the substantiality necessary in order to exist. The given must „express the rule of law as it emerges from the nature of things and as far as possible, in the raw state".

According to Gény, the given consists of four constitutive elements:

real given, represented by the total conditions emerging from the nature of things and which are mandatory for any will (both natural conditions, and the conditions concerning the anatomical and psychological constructions of human beings, their moral aspirations);

historic given, accompanying the evolution of mankind, by providing a series of precepts born of experiences (for example, those on private property);

rational given, the total rules that the judgment orders, being mainly about the content of the natural law;

ideal given, which concentrates all aspirations, feelings, beliefs of mankind in what concerns the progress of positive law, the ultimate goal of the law.

Only the overall interpretation of these four elements can lead us to understand the essence of the law. According to François Gény, the development of the law entails a thorough observation of social facts and the knowledge of the legal experiences lived by different peoples in different eras. The law cannot be explained outside its historical reality because it is not created by sudden leaps, but step by step. The genesis of the law is an integral part of the historical process, of the historical development of the society itself. But the law is not a pure

[7] Luc J. Wintgens, *Legisprudenţa – studiu pentru o nouă teorie a legislaţiei*, in Studii de Drept Românesc, year 18 (52), no. 3-4/2006, pag. 240.

[8] For more details on the complexe decision system, see Ioan Vida, *Orientări post-moderniste în procesul de creare a dreptului*, in Studii de Drept Românesc, year 12 (45), no. 1-2/2000, pag. 27-39.

[9] *Apud* Philippe Malaurie, *Antologia gândirii,* pag. 316.

explanatory discipline but has essentially a regulatory nature. The law is not limited to the description of the legal reality, by indicative sentences; it cannot emerge only from the facts, from what it is; *the law speaks to imperative*, it is based on value judgments and its appreciations start from an ideal.

The development phase of the law is followed by the legislative technique. The construction of law must be the essential part of law creation process. If the knowledge of the law is dominated by the rational element, the technical development is a work created artificially. „This form remains essentially a construction, largely artificial, of the law, rather an action work than an understanding one, where the will of the law expert can move freely".

According to Gény, the given of the law belongs to the science, and the constructed belongs to the legal technique. This opinion is contradicted by Paul Roubier, who shows that the legal technique is a set of processes which relate to the external form of the rule of law; but, the construction of the rule impacts its internal content, which is a matter of legal and not of technical policy[10].

According to Paul Roubier, the knowledge of the law content entails the understanding of the creation of rules of law. The establishment of a rule of law must always start from the knowledge of social life needs, according to which the rule is enacted, and then, according to them, the organization of legal relationships is proceeded with. If the first approach is scientific, the second belongs to the art of law. The society is under a continuous development and the law is permanently renewed. It is not enough for the human beings to know how things are, but they will always seek to discover how things should be. The human being relates all the time to an ideal and this ideal cannot be reached by means of scientific methods but only by means of value judgments. This is why the law is an art, directed towards the reaching of an ideal: *the ideal of justice*.

„The laws of physics which do not allow exceptions, which enable predictions and retrodictions and can be expressed in mathematical language, do not belong to the field of the law", due to the fact that the history of the society is „a permanent assessment of the communities in what concerns the possibilities to organize efficiently their coexistence and cooperation structures, where the law is imminent"[11].

Paul Roubier lays at the basis of the law structure two givens: the experience and the ideal of justice, which turn the social order into a superior moral order. Justice „is undoubtedly a constant given of our spirit, but it is likely to embed different forms, depending on the society". The ideal of justice is not the same for all peoples and is not the same in different historic moments.

The ideal of justice is the actual (material) source of the positive law. In the absence of such an ideal, positive law would be a simple construction of power. Even if this ideal is impossible to be achieved, the law needs to aim it, due to the fact that each and every legal institution is judged in the light of this ideal.

Roubier criticizes the excessive formalism emerging from the pure theory of the law expressed by Hans Kelsen, which builds the rule of law strictly on its external appearance, by removing from its content any moral or political element. We will not be able to understand the law if we stick to the study of the rules of positive law. In his opinion, Kelsen's theory is primarily contradicted by the case law. How can an interpretation, which is in accordance with the opinion of the lawmaker, be useful, if it is in total disagreement with the legal practice? The rule of law is outdated if it cannot be adapted to the needs of social life. Kelsen's theory disregarded the fact that the legal phenomenon is constantly subject to improvement. By denying the dynamic nature of the law, the pure theory restrained the givens of the law, by annihilating its possibility to meet legal reality[12].

Therefore, the legal creation work covers two stages: the acknowledgement of those givens of the social life and the construction of the rule of law based on them[13]. According to Roubier, three groups of factors have to be taken into account: religious and moral factors (*traditions*), political and social factors (*ideologies*) and economic factors (*interests*). By assessing the foundation of the rule of law, the author shows that, if the lawmaker creates the rule of law without taking into account all the givens of the social order, the lawmaker performs an useless work.

The distinction between what is given and what is constructed was assessed by distinguished professors Traian Ionaşcu and Eugen A. Barasch, in a study dedicated to the fundamental and applied research, as they combine on the land of the law[14]. They pointed out that although the distinction between the scientific and technical field is not approached in the Marxist legal literature, such an approach can be noted. If the substance of the law is

[10] Paul Roubier, *Théorie générale du droit, Histoire des doctrines juridiques et philosophie des valeurs sociales*, 2nd edition, Edit. Dalloz, 2005, pag. 192 and the following.

[11] Gh. Mihai, *Fundamentele dreptului. Teoria izvoarelor dreptului obiectiv*, vol. III, All Beck Publishing House, Bucharest, 2004, pag. 258

[12] Paul Roubier, *op. cit.*, pag. 70.

[13] Paul Roubier, *op. cit.*, pag. 193.

[14] Traian Ionaşcu, Eugen A. Barasch, *Îmbinarea cercetării fundamentale cu cea aplicativă pe tărâmul dreptului*, in Studii şi cercetări juridice no. 3/1966.

rooted in the material existence conditions of a given collectivity, then the role of the technical field is to include this substance in the rule of law. The scientific field will indicate the scopes and the technical field would propose the most appropriate procedures in order for the substantive requirements of social life to become rules of law. „Effective things cannot be achieved unless we start from what is given. The scopes do not have significance, unless they are adapted to the means. From the social point of view, problems do not have meaning, unless they are likely to be solved".

According to another opinion[15], the given of the law is represented by „the directive, the standard of justice, the rational necessity which creates the objective validity of a legal system". This given is informal, is a fluid, non-crystallized state, therefore the lawmaker is bound to use certain techniques in order to create a formal reality. The transition from the given of the law to the constructed law is performed by means of the legal technique, by being itself impregnated with value considerations.

Contrary to Savigny's theory according to which the law does not need to be created, but it is self-created, as a natural phenomenon, the work of law development is the result of conscious human actions. However, the German historical school had the great merit of showing that the law is the result of social, historical and moral factors and that lawmakers cannot create it arbitrarily by means of their simple will. The lawmaker must take into account certain requirements of social life, because behind all formal law sources, real sources, called by G. Ripert „the creative forces of law", are laid. Essentially, the natural environment, social environment and human factor represent the bases of positive law, by jointly contributing to the development of the legal phenomenon.

The natural environment impacts the law by means of all its components: geographic framework (topography, climate, water, air), biological, physiological, demographic factors. The location of human being in stable communities and coexistence depended on landforms and the nature of soil necessary for agriculture, the climate influenced food production, mood and body development; nowadays, demographic factor exerts a great influence on the legal regulations, by calling for legislative measures on population growth limitation or on the contrary, on birth rates stimulation.

The structure of the social environment consists of several components: economics, politics, culture, moral, traditions. Due to the fact that each of us is the product of the social environment living in, the understanding of the legal phenomenon requires the knowledge of the influences of this law configuration factor. Sofia Popescu describes the influence of culture and traditions on the legal phenomenon, by writing that the law is not a simple regulatory texture, it cannot be reduced to a set of legal force endowment modalities, but it is a complex cultural entity incorporating human culture and which organizes a great number of traditions[16].

According to Mircea Djuvara, from the sociological point of view, nowadays, all peoples are the result of different races mixtures. Even though, physically speaking, we cannot establish continuity by means of heredity, psychologically and mentally speaking, it can be noted that current nations have the same mental features, as two thousand years ago. But the influence of the social environment is so great that, despite the strong persistence of mentalities, if races mixed, as inevitably happens, they lose their specific mentality in order to adapt to the mentality of the people they get lost in.

In what concerns the influence that the human factor has on the legal phenomenon, the precedence of human being or of the society was always questioned. Under the assumption that the individual is not self-sufficient, Aristotle showed that the society preceded the individual; after having been established, the society created the individual. The opinion of Gény is at the opposite end, in his opinion the individual being the basis of the society.

The human being is the central area of interest of the lawmaker. The law is constantly related to the presence of the individual within the society, due to the fact the scope of the individual is social coexistence. However, unlike the moral, the law considers human action in a system of given relations. The law does not concern thoughts, inner life or individual's intentions. It was claimed that the law lacks of faith in human perfectibility, as it does not concern the actual human beings, with their aspirations, but concerns only the individuals involved in a system of relation, the abstract, standardized individuals, who are bound to fulfill their obligations. There were cases when human settlement in communions was missed by the laws, the individual being abandoned in „the narrow circle of its own singularity"[17].

The law has to be based on the existential understanding of the individual as a human being, who is often sacrificed in favor of certain figures: person in law, person in state. Moreover, in Romanian, *persoană* (person) meant the mask behind which the actor was hiding on the stage when interpreting a role. By means of analogy, the Romanian took over the concept and used it in the

[15] Dan Claudiu Dănişor, Ion Dogaru, Gheorghe Dănişor, *Teoria generală a dreptului*, C. H. Beck Publishing House, Bucharest, 2006, pag. 196.
[16] Sofia Popescu, *Cultura juridică, concept-cheie în cercetarea căilor integrării europene în domeniul dreptului*, in Studii de Drept Românesc, year 14 (47), no. 3-4/2002, pag. 266.
[17] Gh. Mihai, *Fundamentele dreptului. Teoria izvoarelor dreptului obiectiv*, vol. III, All Beck Publishing House, Bucharest, 2004, pag. 197.

field of the law, by suggesting the roles the individual assumes when creating legal relations.

Nowadays, the European citizen, namely the person, not the human being, is at the center of the community concerns. The Constitutional Treaty[18] provides that „Every person holding the nationality of a Member State shall be a citizen of the Union. Citizenship of the Union shall complement and not replace national citizenship". In our opinion the institution of the Ombudsman is an extremely important institution of the European scene considering the role played by it in protecting the rights and interests of the European citizens[19]. „Variables of places and time which cannot be easily estimated are interceded between the abstract human being of his fundamental rights and the worldly human being"[20].

3. Conclusions

Therefore, the law has real and formal sources. *The real sources of the law*, consisting of all the components of the given do not have a regulatory nature, but only determine will to adopt a certain regulation; these sources stay outside the legal system, by having an influence on law construction work. But, up to the extent certain ideals are taken over from the given of the law and expressly provided by the rules of law, as in case of the democratic traditions of the Romanian people and the ideals of the Revolution of 1989, established by the Constitution of Romania, revised in 2003, the real sources turn into mandatory rules of law and become *formal sources* of law. The constitutional architecture puts on a place of honor the principle of the separation and balance of powers[21].

The research of the basis of legal regulations and of the aims pursued by them is the essential task of legal science. But scientific research, either fundamental or applied, is developed in consideration of practice. The research is knowledge, the practice is action, entails finding solutions to meet the relevant theory needs[22].

By establishing what it is, the scientific research is liable to establish what it could be and it must be. The essentially regulatory nature places the science of the law in the field of the „must be" and subordinates it to the scope of the law, unlike sociology, which is an explanatory science, dominated by the causality and necessity law. The law is not a simple „social engineering", but it takes into account a social order directed towards the fulfillment of scopes.

Every positive law has its scopes, which the law enhances differently „by legally classifying them, in relation to time and people; the Nazi, Saudi Arabian or Japanese social order do not have the same meaning"[23]. The scientific research aims to describe the process of transition form the „given" to the „constructed", from what it is to what it must be, form the indicative to the imperative. The social effectiveness of the law depends on the correlation level between the given and the constructed.

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[18] Roxana-Mariana Popescu, Introducere în dreptul Uniunii Europene, Universul Juridic Publishing House, București, 2011, pag. 19 and 184.
[19] Elena Emilia Ștefan, *The role of the Ombudsman in improving the activity of the public administration*, Public Law Review no. 3/2014, p.127.
[20] *Idem*, pag. 80.
[21] Elena Emilia Ștefan, *Participation of the Public Ministry in the contentious administrative trials*, Public Law Review no. 1/2014, p.85.
[22] Anita M. Naschitz, *Problema dreptului natural în lumina filozofiei marxiste a dreptului*, in Studii şi cercetări juridice no. 3/1966.
[23] Gheorghe Mihai, *Natura dreptului: știință sau artă?*, in Studii de Drept Românesc no. 1-2/2000.

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A PLEADING IN FAVOUR OF THE CONSTITUTIONAL COURT

Valentina BĂRBĂŢEANU[*]

Abstract

Most of the European countries have chosen the centralized system of constitutional review, performed by a unique authority empowered with the competence of removing from the normative ensemble those legal provisions that do not comply with the principles and rules comprised in the Basic Law. This „European model" has proved to be more appropriate than the so-called „American model" in what concerns the compatibility with the European jurisdictional mechanism. Romania has adopted the same European trend and the Constitutional Court has become a very important actor in the Romanian legal landscape. From the very beginning of its activity, it has influenced in a great measure the national normative system. It has been sometimes criticized and accused that it interferes in an excessive way in the legislative process. Due to its competence to regulate the juridical conflicts between the public authorities and its possibility to repeal laws before their promulgation, it has been many times in the centre of heavy attacks, mostly from different political forces, often driven through mass media. Nevertheless, despite of its detractors, the Constitutional Court has proven, over the years, its ability to develop the Romanian normative system. The present paper intends to display the most significant contribution of the Romanian Constitutional Court in improving various legal regulations. In the same time and much more important, using concrete examples from the Court's case-law, the paper also intends to demonstrate that the Constitutional Court of Romania has been a major factor of improving peoples' life, removing unconstitutional obstacles set in front of the unimpeded exercise of their fundamental rights and freedoms.

Keywords: *constitutional review, constitutional court, effects of decisions, human rights, legistative process.*

1. Introduction

Unprecedented authority within the Romanian landscape, the Constitutional Court has been established by the new and democratic Romanian Basic Law adopted in 1991 as an expression of the ideals of freedom of the Romanian people. During its 24 years of existence[1], the Court had a very intense and diverse activity, in accordance with its legal powers, on various areas of social, political and economic. Its decisions had different echoes in the legal environment. Some of them have been embraced with a lot of enthusiasm, while others have been, on the contrary, received with disapproval, reproaches and criticism. Most of the subjective reactions have regarded certain decisions loaded with political significance, exploited by the press in mediatical purposes and sometimes turned into media events. However, there have been left in the shadow decisions that had a great favourable impact over an important number of citizens. Due to these decisions, have been repelled from the legislation provisions of law restricting the exercise of fundamental rights or decreasing to annihilation the guarantees they were to enjoy. The Court has also eliminated discriminations between categories of people in the same legal situation and it has re-established the balance usually by raising disadvantaged category to the same standard of protection enjoyed by the other category to which the comparison was analyzed and obtaining, in the end, an equivalent legal regime applicable for all the persons entitled to.

This study aims to reveal the importance of the constitutional review performed by the Constitutional Court and to highlight the positive impact that its work has in the Romanian society. The paper shall also tries to illustrate the way that the solutions given by the Constitutional Court manage to improve the quality of life of citizens by ensuring the compliance with the requirements imposed at the constitutional level in what concerns especially the human rights guarantees. The present study intends to prove that even if the constitutional review consists in an abstract and theoretical comparison between the norm subject to verification and the constitutional referential text, nevertheless, the Constitutional Court always keeps in mind the practical finality of its decisions, being aware of the direct impact direct on the Romanian legal landscape. The study will present illustrative decisions of the Constitutional Court good influence on the ensemble of the society. Displaying such decisions is the way in which I will try to highlight the complexity of its activity and the vastness of the areas in which its decisions bring favourable consequences. In what concerns the stage of the knowledge in this field, it has to be mentioned that the constitutional review is, in general, a frequently discussed theme, but the emphasis of its positive influence has preoccupied the legal scientists in the same measure. Within the European Commission for Democracy Through Law (Venice Commission,

[*] University assistent, PhD, Faculty of Law, "Nicolae Titulescu" University, Bucharest (e-mail: **valentina_barbateanu@yahoo.com**).

[1] The Constitutional Court has been consecrated by the Basic Law adopted in 1991, but it has started its activity in 1992, following the entrance into force of the Law no.47 of 1992 regarding its organization and functioning. The Court has rendered its first decision on the 30th of June 1992.

authority that monitor the constitutional jurisdiction of the states that are members of Council of Europe, there have been drafted various researches regarding the impact of the constitutional authorities activity on the society's life, but not from the perspective that the present paper intends to depict.

2. The emergence and necessity of the constitutional review

The emergence of the constitution in the world occurred in the context of revolutionary efforts and theories with particular relevance, like the separation of powers, rule of law, representativity and the natural rights of humans[2]. The idea of a Basic Law involved its supremacy as a feature that gives expression to its super-ordinated position not only in the legal system, but in the entire socio-political system. This is an unquestionable legal reality that needed to be ensured and guaranteed. In this context, the constitutional judicial authorities appeared and imposed themselves as true grantors of the supremacy of the constitution.

The general rule in a modern, democratic state is that a law should be issued by competent state authority, within its competence, in compliance with the normative legal acts situated above in the normative hierarchy. Due to the supremacy of the Constitution, the necessity of a check of the compliance of the law with the Basic Law became obvious. In order to achieve this goal, the legal scientists have imagined and created the concept of "constitutional review".

From a historical perspective, acceptance of constitutional review represented a dramatic change of optics, thus achieving desecration of the law, whose infallibility - dogma enshrined by Rousseau – had been imposed since the French Revolution of 1789 and was respected over the entire nineteenth century and early twentieth century, being very difficult to remove[3]. In the same way has also been exceeded the parliamentarism theory, according to which the legislator supremacy over the other branches of government has ruled out for a long time any form of judicial review of the constitutionality of legislation[4]. Abandoning the idea of a mythical sovereignty of the Parliament and of the intangibility of the law occurred in Europe after the Second World War. The first states to overcome this stage were Germany and Italy. And this is not a surprise, if we take into consideration the fact that their tragic historical experience has shown that decisions taken by popular majorities do not always constitute a sufficient guarantee for the realization of constitutional democracy if they are not accompanied by regulations meant to judicially limit the omnipotence legislature and if the law cannot be subject to an independent scrutiny in what concerns its compliance with the Constitution[5].

3. Constitutional review models

Worldwide, the constitutional review is currently provided mainly through two major types of constitutional jurisdiction: a diffuse review and a centralized one. They are basically specific to the two great systems of law that dominate the legal world, namely *common law* and the *civil law*, characteristic to the Anglo-Saxon law and the Roman-Germanic system of law.

Thus, it is, on the one hand, the so-called "American model", developed in the United States and subsequently adopted by the Anglo-Saxon countries (Australia, Canada, India, except Britain), but also by countries such as Denmark, Greece, Norway, Sweden and even Japan[6]. Its distinctive note is that the power to review the constitutionality of normative acts incumbe on all courts, regardless of their location in the hierarchy of the state's jurisdiction.

The essence of the logic underlying this so-called "judicial review" lies in the fact that when two laws are in conflict, the court has the right and, in the same time, the duty to determine which one is applicable. If the two laws have different legal force, one of which being the Constitution itself, the latter will be preferred, according to the principle *lex superior derogat legi inferiori*[7].

On the other hand, there is the "European model" characterized by the existence of a specialized jurisdiction, separate and distinct from

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[2] Marieta Safta, *Drept constitutional și instituții politice, Vol.I. Teroria general a dreptului constitutional. Drepturi și libertăți*, Editura Hamangiu, București, 2014, p.71.

[3] Louis Favoreu, *Les cours constitutionnelles*, collection „Que sais-je?", la 2-eme edition, Press Universitaires de France, Paris, 1992, p.8.

[4] Ioan Deleanu, *Justiţia constituţională*, Editura Lumina Lex, Bucureşti, 1995, p.19.

[5] Valerio Onida, „Pour le dépassement définitif de la « souveraineté » de la loi", *Les Cahiers du Conseil constitutionnel* nr. 25/2009, available on-line, on the French Constitutional Council's web site, http://www.conseil-constitutionnel.fr/conseil-constitutionnel/francais/nouveaux-cahiers-du-conseil/cahier-n-25/pour-le-depassement-definitif-de-la-souverainete-de-la-loisup1-sup.51712.html

[6] Ján Klučka, „The role of the Constitutional Court with regard to the Legislator", report presented at the workshop „The Role of the Constitutional Court in the State and Society", organized by the Constitutional Court of Ukraine in cooperation with the Venice Commission and The German Foundation for International Legal Cooperation, hold in Kiev, 10-11 May 2001, published in CDL-JU (2001) 32, available at the web address http://www.venice.coe.int/docs/2001/CDL-JU(2001)032-e.pdf

[7] Ion Deleanu, *Justiţia constituţională*, Editura Lumina Lex, Bucureşti, 1995, p.38.

any other public authority. Hans Kelsen was the one who developed the concept[8].

The idea of establishing a unique authority, called, as appropriate, constitutional court, constitutional court of arbitration[9] or the constitutional council[10], endowed with the ability to centralize the entire constitutional review and to render generally binding decisions regarding the validity of a normative act was considered a viable solution, which has expanded over time all over the European continent, including Romania, and has been also adopted by some countries in South America, Asia and Africa

Both models of constitutional review have, of course, advantages and disadvantages, but each is adapted to the legal ideology dominant in the areas where it was implemented, so each meets the need of those societies. That's why both deserve to be analyzed and presented with their essential characteristics. It also helps us understand why in the particular case of Romania the centralized constitutional review is preferable to the diffuse one.

3.1. The American model of constitutional review

The constitutional review of the laws arose in the United States in response to the need to find an effective way of solving the conflicts between the Federal Constitution and the constitutions of the member states and between the federal laws and laws of the member states of the federation[11].

In the United States, the system of judicial review of the constitutionality (judicial review) was imposed and was transformed over time as a praetorian creation, since the American Constitution does not provide for such a power.

The doctrine of constitutional law is unanimous in placing the origins of this kind of review[12] in 1803 when the Supreme Court of Justice has solved the case *Madison v. Marbury*[13],

Following the current classifications, doctrine[14] has concluded that the so-called American model of constitutional review of laws is a diffuse control, characterized by de-centralization and that can be performed by any court within the judicial system. These courts solutions can be delivered, subject to censorship, to a supreme court which has, among others, task of unifying the case-law.

Courts decisions take effect only *inter partes litigantes*, declaring the unconstitutionality of a law with relative authority of *res judicata*, meaning that they are limited to those individual cases. Only Supreme Court's decisions on the constitutionality of laws, although not result in their cancellation, manage, however, to prevent their application in all member states of the American Federation, given that lower courts must respect the decisions of the Supreme Court Federal according to the rule of the binding precedents[15] that states that its decisions have absolute authority[16].

It's been noted that "the great contribution made to the American constitutional law is to entrust the interpretation and application of the Basic Law to the ordinary judiciary" and it became, over the time, so important that the constitutional law began to consist strictly in studying judicial interpretations of the Constitution[17]. Its famous the remark that "Constitution is what judges say it is"[18]. Federal states' courts' rulings and, especially, the United States Supreme Court's rulings create what is called case-law. As a result, it is considered that, at present, the federal constitutional law and the Constitution includes 22 amendments thereto, as well as constitutional conventions, and federal sentences.[19]

The North American constitutional review was perceived and adapted also by countries on the South American continent. The American system of diffuse control was maintained only in Argentina in its pure form. In contrast, in countries like Brazil, Mexico, Uruguay, Paraguay, Venezuela, Nicaragua and the Dominican Republic it has been adopted a mixed system of control, by combining the diffuse and the concentrated control[20].

[8] Hans Kelsen was te one that, based on the Austrian Basic Law of 1920, has brought the most significant contribution at the foundation of the Constitutional Court of Austria. He has also been a member of the nw stablished Court, between 1920 and 1929.

[9] Characteristic to Belgium, up until it has been transformed, in 2007, in constitutional court.

[10] As it is in France.

[11] Ioan Vida, „Bătălia pentru Curtea Constituțională", in *Liber Amicorum Ioan Muraru, Despre constituţie şi constituţionalism*, Editura Hamangiu, Bucureşti, 2006, p.241.

[12] Ioan Vida, *op.cit.*, p.241.

[13] Translated in Romanian language by M. Bălan şi B. Iancu and published in Noua Revistă de Drepturile Omului no.2/2006, p.141-161.

[14] See Dominique Rousseau, *La justice constitutionnelle en Europe*, 3e édition, Montchrestien, Paris, p.13.

[15] Louis Favoreau, Patrick Gaïa, Richard Ghevontian, Jean-Louis Mestre, Otto Pfersmann, André Roux, Guy Scoffoni, *Droit constitutionnel*, 8e édition, Dalloz, Paris, 2005, p.207-210.

[16] See Alain A. Levasseur, „Izvoarele dreptului", in *Dreptul Statelor Unite ale Americii*, coordinated by Alain A. Levasseur, Editura Scrisul Românesc, Craiova, 1999, p.21-22.

[17] Mario G. Losano, *Marile sisteme juridice. Introducere în dreptul european şi extraeuropean*, Editura All Beck, Bucureşti, 2005, p.87.

[18] Louis Henkin, „John Marshall Globalized" în *Proceedings of the American Philosophical Society*, Philadelphia, Vol.148, nr.1/2004, p.63, available at http://www.amphilsoc.org/sites/default/files/proceedings/480105.pdf

[19] Mario G. Losano, *op.cit.*, p.88.

[20] Ioan Leş, "Controlul constituționalității legilor în America Latină", in *Acta Universitatis Lucian Blaga* nr.1-2/2003, p.105.

3.2. The European model of constitutional justice

In Europe, the idea of the superiority of the Constitution has been introduced throughout the American branch, being popularized through the writings of Alexis de Tocqueville[21]. The European model of constitutional review was outlined for the first time by Georg Jellinek, who, in 1885, published "A Constitutional Court for Austria", sketching the idea of controlling the constitutionality of laws by a distinct and specialized court, separate from any other state authorities. His idea was supported by the ascending of the rule of law era, which requires both individuals and state authorities to respect the rules on which the society is based. Hans Kelsen is the one who has completed the nascent theory of Jellinek, defining and explaining the new concept of review of constitutionality. The essence of his theory was illustrated by the image of the pyramid of the legal system, dominated by the Basic Law, *das Grundnorm*. The model he promoted countered the main drawback of the American model, consisting in the relative value of the US courts' judgments, which have only *inter partes litigantes* effects. In his famous work, *„La garantie juridictionnelle de la Constitution"* (1928), the Austrian scientist argues that the legal system's integrity can be ensured only if the supremacy of the Constitution is guaranteed through an authority similar to a court.

The creation of a constitutional court that would centralize the review of constitutionality had, in Kelsen's view, the advantage of avoiding divergent constitutional interpretations that the American system can generate. To this end, decisions finding an unconstitutionality passed by a unique constitutional court have the effect of nullifying the validity of the law not only in specific, individual cases, but in all cases where that law is applicable[22].

Establishment of a unique Constitutional Court that renders generally binding decisions, with the consequence of elimination from the normative system of the law stated as unconstitutional, has been adopted by most European countries whose legal systems are built on Roman-Germanic legal system.

The suggested model has imposed in the European space due to the fact that it managed to avoid two American model's features that were completely incompatible with the specificity of the states whose legal system belongs to the Roman-Germanic family of law. Firstly, it is about the risk that different courts would issue different solutions, even divergent, on the same provision of law, given the fact that in the Roman-Germanic system the judicial precedent does not represent a source of law that the lower courts should be obliged to follow. The second problem avoided thanks to the model kelsenian regards the fact that decisions on the constitutionality of a normative act have only effects *inter partes litigantes* in the American system. This means that even if a legal provision was declared unconstitutional by a specific instance, in a particular process, the same provision of law may be applied subsequently freely in any other case.

The Kelsenian traditional model of constitutional justice necessarily involves a jurisdictional authority that is distinct and separate from the ordinary courts' system, with a different composition and functioning using a special procedure. It has the power to verify the compliance with the Constitution of the laws passed by the Parliament and repeal them if it finds that there is a discrepancy between the legislative texts and the Supreme Law.

The renowned professor Louis Favoreu offered to this type of authority an enlightening definition: "a constitutional court is a jurisdiction created especially and exclusively to settle constitutional disputes, outside the ordinary judicial apparatus and independent of any other public powers"[23].

Moreover, it was noticed that the consequences of the totalitarian regimes that marked the history of Europe in the first half of the twentieth century created the premises of a more acute awareness in what concerns the need for an appropriate means of control over the acts and actions of representative bodies - including parliamentary assemblies and their legislative work - to ensure the rights enshrined in the Basic Laws[24].

However, there were also views hostile to the establishment of constitutional justice, be coming - as in Italy - from members of the pro-fascist or communist political formations[25], be determined by the existence of traditions relating to the exercise of constitutional review by courts as part of the judicial authority, as in the case of Romania.

The reasoning for adoption of such a centralized review, different from the American diffuse type of review, has got its foundation in

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[21] Alexis de Tocqueville, *Despre democraţie în America*, vol.1, Editura Humanitas, Bucureşti, 1996.

22 Hans Kelsen, *Doctrina pură a dreptului*, Editura Humanitas, Bucureşti, 2000, p.327.

23 Louis Favoreu, *Les cours constitutionnelles*, collection „Que sais-je?", la 2eme edition, Press Universitaires de France, Paris, 1992, p.3.

24 National Report for the XVth Congress of the European Constitutional Courts Conference, presented by Italy, published in *Justiţia constituţională. Funcţii şi raporturi cu celelalte autorităţi publice – Drept constituţional comparat*, Editura Universul Juridic, Bucureşti, 2012, (cited, as in what follows, *brevitatis causa*, Ialy's Report for the XVth Congress of E.C.C.C.), p.316.

[25] According to Alessandro Pizzorusso, Palmiro Togliatti, one of the communist leaders in the 50', was describing the Constitutional Court as some kind of juridical and political *monstrum* (see Alessandro Pizzorusso, „Présentation de la Cour constitutionnelle italienne", in *Les Cahiers du Conseil constitutionnel* nr.6/1999, p.24.

several theoretical and practical considerations[26]. Thus, it has been taken into account the absence of the rule of binding precedent in the legal Roman-Germanic system, dominant in Europe, which would not permit the correct implementation of the American model. That is because it would have generated contradictory interpretation of the Constitution by the courts, which would have led to the destabilizing the constitutional order and severely harm the principle of legal certainty, which is a principle of special importance in countries of civil law tradition.

There has been also considered the discussion about the so-called "democratic objection ", which casts doubt over the right of judges that form any court to annul a law, which is the product of a democratic legislator, carrying the legitimacy and representativeness endorsed by the people. On the contrary, from this point of view, the judges are not designated based on a popular vote. Seen from this angle, the option for the centralized review, exercised by a specialized court whose members are selected in a relatively democratic way[27], avoids the risks that a brutal transplanting of the American model would have produced in the European system[28]. It was said, however, that the European model is a way to review the constitutionality of laws ultimately deriving also from the American model, but in a certain style, appropriate to the requirements of the family of Continental law[29].

So in most European countries, the authorities of constitutional review are not part of the judiciary, in the strict sense.

Their position in the constitutional edifice of the state is distinct from the ordinary or administrative courts. In most cases, they are *sui generis* courts, located, within the state's organization, outside the other three traditional powers - legislative, executive and judicial. Only in isolated cases they are part of the judicial authority, Germany being one of the most illustrative examples[30].

4. Constitutional review in Romania – General and historical benchmarks

Originar Constituent power in Romania has opted, in 1991, for the European model of verifying the constitutionality of laws and it has organized by the Basic Law adopted on that date, an effective way of monitoring the compliance with supremacy of the Constitution. This task was entrusted to the Constitutional Court, authority placed outside the judicial system and, in the same time, distinct and independent from any other public authority[31].

Constitutional Court's Law[32] establishes, in Article 1, the exclusive nature of constitutional jurisdiction, meaning that it is the sole authority of constitutional jurisdiction in Romania, which ensures the supremacy of the Constitution[33].

According to Article 147 paragraph (4) of the Constitution, revised in 2003, decisions shall be published in the Official Gazette of Romania and, following its publication, they are generally binding. The constitutional text states further that they take effect only for the future.

As a result of generally binding decisions of the Constitutional Court, issued under Article 146 d) of the Constitution, whereby the unconstitutionality of a law or Government ordinance was found unconstitutional cannot be applied any longer, ceasing its legal effects for the future.

In order to emphasize the strength of its decisions, the Court held that no other public authority may challenge the considerations of principle resulting from the jurisprudence of the Constitutional Court and all will be required to properly apply, given that compliance with decisions of the Constitutional Court is an essential component of rule of law principle[34].

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[26] For details regarding the failure of the transplant of the American model in European states, see Louis Favoreau, *Les cours constitutionnelle*, p.8-9, şi Ion Deleanu, *Justiţa constituţională*, p.21 and next.

[27] Constitutional judges are usually appointed by political bodies (Parliament, Government, Chief of the State) for a limited term.

[28] Tania Groppi, "The relationship between constitutional courts, legislators and judicial power in the European system of judicial review. towards a de-centralysed system as an alternative to judicial activism?", report for the Conference "Judicial activism and restraint theory and practice of constitutional rights", held in Batumi, Georgia, 13-14th of July 2010, organized by the European Commission for Democracy Through Law (Venice Commission) and the Constitutional court of Georgia, published in CDL-JU(2010)012, Strasbourg, available on-line http://www.venice.coe.int/docs/2010/CDL-JU(2010)012-e.asp?MenuL=RUS, p.11.

[29] Ioan Muraru, Marian Vlădoiu Nasty, Andrei Muraru, Silviu-Gabriel Barbu, *Contencios constituţional*, Editura Hamangiu, Bucureşti, 2009, p.10.

[30] Michel Melchior, Andre Alen şi Frank Meersschaut, General Report on the XIIth Congress of the Constitutional Courts in Europe, Bruxelles, 14-16 mai 2002, *The Relations Between the Constitutional Courts and the Other National Courts, Including the Interference In This Area Of the Action of the European Courts*, Vanden Broele Publishers, Brugges, 2002, p.73.

[31] Mihai Constantinescu, Ion Deleanu, Antonie Iorgovan, Ioan Muraru, Florin Bucur Vasilescu, Ioan Vida, *Constituţia României comentată şi adnotată*, Editura Regia Autonomă „Monitorul Oficial", Bucureşti, 1992, p.304.

[32] Legea nr.47 of 1992 regarding the organization and functioning of the Constitutional Court, republished in the Oficial Monitor of Romania, Part I, no.807 of 3rd of December 2010.

[33] In the legal doctrine were formulated opinions supporting the introduction in Romania of a constitutional review of American type exercised by the judiciary and not by "an authority deeply politicized" (Ioan Alexandru, „Obiectivele şi scopul revizuirii Constituţiei: consolidarea democraţiei", în *Revista de Drept Public* nr.1/2013, p.63).

[34] Decision no.1039/5.12. 2012, M.Of., Part I, no.61/29.01.2013.

Decisions on finding unconstitutional a law or an ordinance have to be followed by a reaction of the legislature. This means that the Parliament or, where the case be, the Government have to intervene and modify or repeal the normative act declared as unconstitutional. If such action is not taken or delays, the Constitutional Court's decision shall take effect, according to Article 147 paragraph (1) of the Constitution. According to the constitutional text, the provisions of laws and ordinances in force, as well as the regulations declared unconstitutional, cease their legal effects within 45 days starting from the publication of the decision of the Constitutional Court if, in the meantime, the Parliament or the Government shall not bring in line the unconstitutional provisions with the Basic Law. During this period, the provisions declared unconstitutional are suspended as of right.

Reaching this final legislative solution was a difficult task for the Constituent power. During the debates that took place over the project of the new, democratic Romanian Constitution, have been launched many ideas referring to the way the constitutional justice should be configured. These debates could be summarized into four main ideas, namely: a) elimination of the institution, without any other option; b) elimination of the institution and entrusting the review of constitutionality to the ordinary courts; c) entrusting the control of the constitutionality to a commission; d) acceptance of the constitutionality of laws exercised by a distinct authority council, constitutional court or tribunal. Following stormy, contradictory discussions, finally, the Constituent Assembly approved the proposal as Title V to be labeled "Constitutional Court". It's been said that entrusting the constitutionality of laws to the Supreme Court of Justice would have result in the transformation of the judicial body into a political one.

The current Constitutional Court of Romania is the result of the conjunction of the advantages chosen on the basis of the experience of other countries with traditions in the constitutional matter and it has the prospect of an organizational and functional integration, in an efficient and sustainable manner, in the European legal structures, according to the covenants, treaties and conventions to which Romania is a party. Connection to the European institutions clearly derives from the rules concerning the designation of judges and the way the role and the functions of the Constitutional Court are provided.

5. The role of constitutional courts in the democratic states

These authorities reveals their role in defending democratic values guaranteed by the Constitution, acting as a "civilizing factor"[35], and also contribute to higher levels of protection offered by the legal provisions to the fundamental human rights and freedoms

The supremacy of the constitutional norms is the central idea on which the constitutional review mechanism is set. Recognising the prevalence of the Basic Law on all legislation is a huge step towards a genuine democracy[36].

There are two major categories of constitutional review that can be found in most states that have a similar type of control. It is, firstly, the preventive constitutional review, which is also called *a priori* review and regards the laws before they come into force. Such preventive control is exercised by most of the constitutional authorities[37]. The consequence of this *a priori* constitutional review consists in the fact that the normative act declared contrary to the Basic Law will not enter into force, thus avoiding the introduction of unconstitutional legal provisions into the legal system.

There is also a repressive constitutional review, targeting the normative acts that are already in force. It can be both abstract and concrete. This distinction is linked to the origin of the question of constitutionality. Thus, we talk about an abstract review where the compliance with the Constitution has been questioned in the absence of an actual conflict, usually by a political subject, as Members of Parliament, the Head of State or Government, or another high authority as the attorney general, the president of the Supreme Court or the Ombudsman. On the contrary, the so-called concrete constitutional review has its roots in a proceeding before a court. A question of constitutionality (referred, in the Romanian legal system, exception of unconstitutionality) can be raised when the interests of justice so require.

The right to petition the Constitutional Court is conferred to the parties in a judicial trial as an expression of the right of access to a court and the right to a fair trial, but also as a proof of principle of the rule of law. This is because the purpose which is intended to be achieved is a final judicial decision rendered on the basis of legal regulations whose constitutionality is beyond any doubt and, in the same time, the elimination of all legal provisions that

[35] Ioan Muraru, „Există un garant al supremației Constituției române?", in *Revista română de drept privat* nr.1/2011, p.131.

[36] Theoretical and historical details on the development of the concept of constitutional supremacy and the mechanisms of ensuring it were detailed by Professor Ioan Deleanu, in *Instituții și proceduri constituționale în dreptul român și în dreptul comparat*, Editura C.H. Beck, București, 2006, p.227-257.

[37] Until the constitutional amendment of 2008, the French Constitutional Council was often considered representative for this type of control, given that it only checked the constitutionality of laws before their promulgation by the President of the French Republic.

contradict texts or principles enshrined in the Constitution[38].

In addition to reviewing the constitutionality of legislation, constitutional justice authorities are responsible for exercising a range of powers which highlight the important role they play in ensuring the supremacy of the Constitution. Many constitutional courts are called upon to resolve legal disputes of a constitutional nature between public authorities. Such a task is particularly significant in the case of the federal and regional states[39]. There are also states that have granted constitutional court jurisdiction to resolve disputes between central and local or regional authorities[40]. In Romania, this power is limited to conflicts arising between central authorities[41]. Inspired by the experience of other countries in the problems caused by this type of conflict, the constituent power has amended the Romanian Basic Law in 2003 and enlarged the powers of the Constitutional Court. Since then, the authority of constitutional justice in Romania was asked to resolve such conflicts in some of the most difficult moments of social and political life. It has been said from this perspective that this task often requires involvement in sensitive areas, in conflicts hard to be refereed and deals with egos difficult to satisfy[42].

The paper will further on illustrate some of the relevant decisions of the Constitutional Court that prove its good influence over the ensemble of the society.

6. The positive effects on the legislative system of the *a priori* constitutional review performed by the Constitutional Court of Romania

The effects of decisions rendered by the Constitutional Court that find the unconstitutionality of a law adopted, but not yet promulgated by the President are regulated in Article 147 paragraph (2) of the Constitution which requires Parliament to put the law in line with the decision of the Court. The weird formulation of the fore mentioned constitutional text has to be remarked. It states that Parliament must reconcile the law with those stated by the Constitutional Court and not with the Constitution. This can be seen as a way the constituent legislator understood to emphasize the importance of constitutional review performed by the Constitutional Court[43].

In the form before the amendment of the Constitution, the text allowed the Parliament to ignore the Court's findings and to pass the law in the same form, with a majority of at least two thirds of the members of each Chambers. However, most times, even before this moment, Parliament took into account the Constitutional Court's solutions and corrected the vices of unconstitutionality and sent the law to the President of Romania for promulgation only after that. Therefore, the corrective purpose pursued when performing the a priori review has been reached. In this manner, the Court prevents the entry into force of certain provisions contrary to the Constitution, removing the risk of introducing such provisions in the active fund of legislation.

Thus, for instance, performing the a priori review with regard to the law on war veterans and certain rights of the invalids and war widows, the Court upheld the complaint and found, regarding the recognition of war veteran quality for those residents of the Romanian provinces temporarily occupied during 1940-1945 who were compulsorily incorporated in the Hungarian army, that it was unconstitutional the imposed condition according to which they should have not fought against the Romanian army. In this regard, the Court held that the persons concerned have been compulsory incorporated in the Hungarian army since they were living in a temporarily occupied territory under the Vienna dictatorship Treaty of 1940, which currently is null and void.

In this situation, the Romanian state was unable at that time to dispose enlisting or mobilizing them, and if, today, these historic circumstances would represent an obstacle for those people in obtaining a deserved benefit for their prejudices and disabilities, it would mean that it would be recognize the legal effects of an act which is null and void. Therefore, the Court concluded that the exemption of the fore mentioned persons constitutes discrimination, since nobody can be held responsible for an unenforceable obligation. However, the Court also found that some provisions of the law were unconstitutional regarding the definition of 'war

[38] Valentina Bărbăţeanu, "Aspecte particulare referitoare la reiterarea excepţiei de neconstituţionalitate", în *Buletinul Curţii Constituţionale* nr.2/2011, p.103.

[39] This was the case in Austria (Article 138 of the Basic Law), Germany (Article 93(1)(1)(4) and (4)(b) of the Basic Law) or Italy (Article 37 of the Law no. 87 of 11th of March 1953).

[40] This is the case of the Constitutional Court of Bulgaria (Article 149(1)(3) of the Basic Law), of Czech Republic (art.87(1)(c) of the Basic Law) or Hungary (Article 1(f) of the Court's Law).

[41] Article 147 lit.e) of the Romanian Basic Law establish the Constitutional Court's jurisdiction to resolve legal disputes of a constitutional nature between public authorities, at the request of the President of Romania, President of one of the Parliament's chambers, the Prime Minister or the President of the Superior Council of Magistracy.

[42] See, in this regard, Mihai Constantinescu, Ioan Muraru, *op.cit.*, p.323.

[43] The solution chosen by the constituent legislator has been criticized in legal doctrine, because, in fact, the text found to be unconstitutional should be put in accordance with the Constitution and not with the Court's decision. See, in this regard, Ion Deleanu, *Instituţii şi proceduri constituţionale,* footnote no.1, p.895.

veteran', considering that the Parliament should correlate them, in order to ensure observance of the principle of equality of citizens.

The law was brought into line with those stipulated by the decision of the Constitutional Court and became after promulgation Law no.44 of 1994. The cited provisions of Article 2, letter b) were drafted in a manner that ensures equal legal treatment, stating that veterans are also considered those persons who participated in the first or second world war and were inhabitants of Romanian provinces temporarily occupied during 1940-1945, who were incorporated or compulsorily mobilized and fought in the other states' armies, if they have retained or regained Romanian citizenship and residence in Romania.

The beneficial role of the Constitutional Court was indirectly materialized, due to the fact that the law examined was changed and a was inserted a new provision thanks to which that avoid the creation of a discriminatory situation within the same categories of people, namely the War Veterans.

7. Decisions rendered by the Constitutional Court of Romania in the *a posteriori* review of constitutionality which had beneficial consequences on improving peoples' life

It is an undeniable reality that the Romanian legal system was strongly transformed following the finding by the Constitutional Court of inconsistency between the provisions and principles of the Basic Law and various laws or ordinances - or just certain provisions thereof - followed by fulfilment by Parliament or, where appropriate, the Government the obligation to draw up amendments to the normative content of the latter and bring the criticized texts in accordance with the requirements imposed by the Constitution.

The study will present further the way some normative acts were amended as a result of the decisions rendered by the Constitutional Court in the *a posteriori* review of constitutionality. This is aimed to demonstrate the contribution of the constitutional court to improving overall legislative ensemble and in special of those norms that have a good influence on everyday life and also on those that govern important institutions in society and are indispensable in ensuring the proper functioning of justice and the effectiveness of the rule of law principle, in a democratic and social Romanian state, so characterized in the very first article of the Basic Law.

7.1. In what concerns the protection of fundamental rights during the criminal proceedings

7.1.1. Personal liberty, guaranteed by Article 23 of the Basic Law, has been one of the areas of particular importance, referring to which, especially in the early years after the fall of the communist regime, the Constitutional Court was asked to clarify and establish standards to be met in order to ensure that, under the rules of criminal proceedings, there won't be any harm of the intangible values vital in a constitutional democracy, inextricably linked to the human being.

Thus, the Court held[44] that the deprivation of freedom is a serious act regardless the phase of the judicial trial where it occurs. Therefore, it should not apply a different treatment depending on the fact that the criminal process is in the pre-trial proceedings or it is in the trial phase, in front of a judge. This is the essence of the provisions of article 23 of the Constitution, which regulate the conditions under which it may be order the arrest of a person, without distinguishing between a certain stage of the trial. Therefore, constitutional provisions guaranteeing individual freedom have to be observed whenever the freedom of a person is at stake, as any custody measure seriously affects the personal liberty.

7.1.2.The court ruled[45] that the principle of State liability for damages caused by judicial errors in criminal cases should be applied to all victims of such errors. As such, the Court noted that the legislature does not have the power to restrict the State's responsibility only to some judicial errors. It has extended the scope of the legal criticized text, stating that the victims are entitled to compensation not only if it has been established by final judgment that the person has not committed the act alleged or that the offense does not exist, but also if after a retrial, was discharged of accusation for any of the reasons set out in the Code of criminal procedure.

Thanks to these decisions, the ordinary courts could consider the possibility of granting compensation for miscarriages of justice also to other persons than those provided by legal texts that were subject to constitutional review.

In the labour law field, the Court found[46] that restricting the possibility for teachers to perform tasks to other higher education institutions infringed the right to work enshrined at the constitutional and international level. The legal criticized text[47] provided that a teacher having the basic job in an educational public or private institution could teach by association in different other institutions of higher

[44] Decision no.60/25.05.1994, M.Of., Part I no.57/28.03.1995, Decision no.279 /01.07.1997, M.Of., Part I no.50/04.02.1998, Decision no.60/25.05.1994, final through Decision no.20/15.02.1995, M.Of., Part I no.5728.03.1995, Decision no.546/04.12.1997, M.Of., Part I no.98/02.03.1998, Decision no.924.01.2000, M.Of., Part I no.221/19.05.2000, Decision no.10/24.01.2000, M.Of., Part I no.213/16.05.2000.

[45] Decision no.45/10.03.1998, M.Of., Part I no.182/18.03.1998.

[46] Decizia no.114/15.11.1994, M.Of., Part I no.354/21.12.1994.

[47] Article 32 paragraph (1) of the Law no.88/1993 on higher education accreditation and recognition of diplomas.

education up to a maximum equivalent of a teaching loads determined in accordance with legal provisions.

The Court noted that the restriction led to discrimination between teachers and the rest of the employees for whom the right to work is not limited by law, contrary to the provisions of Article 16 of the Constitution which proclaims that citizens are equal before law and public authorities, without any privilege or discrimination.

Similarly, the Court held[48] that limiting teachers' activity at mostly two didactic loads[49] infringes the constitutional provisions of Article 38 paragraph (1) of the Constitution, which establishes that the right to work and choosing profession and the place of work cannot be restricted. The Court also took into account, in this respect, Article 6 paragraph 1 of the International Covenant on Economic, Social and Cultural Rights[50], according to which "The States Parties to the present Covenant recognize the right to work, which includes the right of everyone to the opportunity to gain his living by work which he freely chooses or accepts, and will take appropriate steps to safeguard this right". The Court held, *inter alia*, that limitation of teachers' right to work would not provide a higher quality education, since the professional qualification of the teacher, his or her teaching experience and the seriousness with which every teacher achieves its mission define the performance framework of the university professor, not the number of working loads conferred.

7.1.3. Romanian Constitutional Court found contrary to the Constitution[51] the text[52] which recognized the benefit of certain rights previously earned but whose effects took place later. The Court noticed that there is a discrimination in what concerns the recognition of the benefit of those rights only for people who are still in active jobs or activities characterized by difficult conditions, not in favour also for those who previously worked in the same conditions but they ceased their employment through retirement or other reasons before the entry into force of the normative act that provided those rights. The Court emphasized that the text was unconstitutional not because it recognized the benefit of those rights, but because it recognized them only for certain categories of citizens, and not for the others who really were in the same situation.

7.1.4. In a similar manner, the Court stated[53] that it does not challenge the legitimacy of the bonus offered to the staff in the primary education for simultaneous teaching, but the constitutional legitimacy of granting this bonus only to this category of teachers. The Court held that the normative text subject to the constitutional review created a difference in what concerns the legal treatment between teachers in primary and secondary schools, meaning that more benefits ware granted only to the first simultaneous teaching staff. Or, both categories of professors teach simultaneously under the same nervous consumption, neuropsychological overuse and psychological effort. In those circumstances, the Court held that although both categories of staff provide teaching activity under simultaneous system, legal treatment on rewarding this mental effort is different. The Court stated that the differentiation depending on the level of education, primary or secondary, does not represent an objective criterion justifying the differentiated legal treatment applied.

The Court found that the legislature has chosen an incorrect criterion in granting this bonus, which created a situation of discrimination towards teachers in secondary education that provides simultaneous teaching. As such, it upheld the objection of unconstitutionality and found that the wording *'primary education'* comprised in some legal provisions on the remuneration of teachers and auxiliary staff in education is unconstitutional. On the same occasion, the Court felt the need to bring some clarification about the effects of the decision, stressing that the public authorities involved, including the courts, are called upon to carry out an interpretation and application of this law in accordance with the effects of the Court's decision regarding the bonus of simultaneous teaching under Law no.63 of 2011, from the date of publication of the decision, entitled teachers will benefit from the future payment of the bonus of simultaneous teaching. Thus the Court has ensured that discriminatory situation will not produce negative consequences, even if the Parliament would not intervene to remove inequality found by the Court.

7.2. The role played by the Constitutional Court in reconfiguring the relationship between the state's public property and private property following the communist regime and in increasing the guarantees granted by the new democratic Basic Law to the private property

7.2.1. The Constitutional Court was called to decide over the constitutionality of the provisions of Article 8 paragraph 3 of Decree Law no.118 of 1990 on granting specific rights to the persons persecuted

[48] Decision no.30/10.02.1998, M.Of., Part I, no.113/16.03.1998.

[49] Provisions of Article 93 par.(4) of Law no.128 of 1997 on teaching staff, M.Of., Part I, no.158/16.07.1997, currently revoked by Article 361 of the National Education Law no.1 of 2011, M.Of., Part I, no.18/10.01. 2011.

[50] Ratified by Romania by Decree no.212 of 1974, published in the Oficial Bulletin of Socialist Republic of Romania no.146/20.11.1974.

[51] Decision nr.87/01.06.1999, M.Of., Part I, no.352/26.07.1999.

[52] Article 2 par.1 of Law-Decree no.68 of 1990 for the removal of inequities in staff salaries, M.Of., Part I, no.24/09.02.1990.

[53] Decision no.1615/20.12.2011, M.Of., Part I, no.99/08.02.2012.

for political reasons by the dictatorship with effect from 6 March 1945 and to those deported abroad or in prison. The Court found[54] that there was no objective and reasonable justification for setting a deadline for submission of applications by the rights holders, while for applications from spouses of the deceased and those submitted by Romanian citizens living abroad was not set any deadline.

7.2.2.By another decision[55] the Court found the unconstitutionality of the provisions of Article 1 paragraph 2 of Law No.9 of 1998 on compensation offered to the Romanian citizens for the assets passed into the Bulgarian State ownership after applying the Bulgarian Treaty between Romania and Bulgaria, signed at Craiova on the 7th of September 1940. It noticed that the fore mentioned legal provisions are contrary to Article 42 of the Constitution that guarantees the right to inheritance, to the extent that limits the scope of persons entitled to indemnification only to former owners and their legal heirs, excluding the testamentary heirs. In deciding so, the Court observed that Article 42 of the Constitution does not make any distinction between legal and testamentary inheritance.

The Court also held that the petition of unconstitutionality was based on the infringement of the principle of equality enshrined in the provisions of Article 16 of the Constitution whose meaning is that the application of differentiated legal treatment was justified only by the existence of different situations. In the light of the situation analyzed in the case, the quality of legal or testamentary heir do not place them in different situations, such as to require the establishment of a differentiated legal treatment

7.3. In the field of regulations regarding certain professions and various other fields

7.3.1. A decision that resulted in the extension of the benefit of social measures also on other categories of people than those for which it was originally dedicated to was the one in which the Court upheld the objection of unconstitutionality of the provisions of Article 15 of Law No. 80 of 1995 regarding the military employees[56], which provided that only women active military personnel are entitled to maternity leave and childcare leave, and excluded the men military personnel from such a benefit. The Constitutional Court decided that the complete elimination of certain categories of persons from the benefit of a form of insurance provided by law for all categories of insured persons violates the principle of equality. In this regard, the Court held that, despite their special status, military personnel in activity is no different from other categories of social insurance policy holders, so the establishment of a different legal treatment, which deprives them of the benefit of a form of social insurance provided by law for all insured persons is discriminatory due to the fact that the criticized legal text recognize the right to parental leave only for women in active military personnel, to the exclusion of the other parent, all military setting.

7.3.2. The Court admitted the exception of unconstitutionality of the provisions that repealed the text comprised in Law no.146 of 1997 according to which actions and claims that aimed to obtain moral compensation for damages perpetrated to the honour, dignity or reputation of individuals were exempt from judicial tax[57].

The regulation represented a legal defence of the fore mentioned attributes of the human personality - provided in Article 1 paragraph (3) of the Constitution as the supreme values in a state governed by the rule of law. Thus was ensured the access to justice, without imposing the condition of payment of judicial stamp duty to the persons aggrieved by uttering insults, slanders or disparagement committed in any way, directly or indirect, by any means of mass communication.

7.4. The Constitutional Court rendered some useful decisions in the field of social security law

7.4.1. One of the decisions with the strongest positive impact on a large number o people was Decision no.872 of the 25th of June 2010 that stated that the intention to diminish by 15% the amount of pensions in the context of measures to ensure budget balance due to the economic crisis was contrary to the Constitution. The Court noted that the right to obtain the pension for retirement has been pre-constituted, far back as the active life of the individual who has been required by law to contribute to the state social insurance budget based on a percentage of revenue levels. The state has got the correlative obligation to pay the individual, in his or her passive life, a pension whose amount is governed by the principle of contribution. The purpose of the pension is to compensate during the passive period of the life the insured contributions made by the individual to the state's budget of social security under the principle of contribution and to ensure the livelihood of those who have acquired this right under the law, depending on the contributory period, retirement age etc.

Amounts of money paid as a contribution to social security entitle the person who earned any incomes and has paid its contribution to the state's social insurance budget to benefit from a pension that reflects the income received during the active period of life. Pension amount established according

[54] Decision no.148/08.05.2001, M.Of., Part I, no.592/20.09.2001.
[55] Decision no.312/19.11.2002, M.Of., Part I, no.81/07.02.2003.
[56] Decision no.90/10.02.2005, M.Of., Part I, no.245/24.03.2005.
[57] Decision no.778/12.05.2009, M.Of. no.465/06.07.2009.

to the principle of contribution, is a consolidated right, so reducing it cannot be accepted even temporarily.

The Court also found that provisions which decrease by 15% allowances for the companions of the people who have been retired because of serious disability degree and establishment of a pension point lower than the existing one are also contrary to the Constitution, because the state does not fulfill its constitutional obligation to take adequate social protection.

7.4.2. The Court declared unconstitutional the legal provisions that provided that the state allowance was given only to those children attending the form of general compulsory state education[58]. The Court noted that the Ministry of Education had not approved the payment of state allowance for children attending private schools since those schools were not included in the records of the National Commission for Evaluation and Accreditation of Pre-university Education. The Court noted that the of the child to get the allowance is granted under the provisions of Article 49 paragraph 2 of the Constitution, which does not provides, in defining the subjects of the right to state allowance, any other condition beside the one that the beneficiaries have to be children.

The Court held that the consecration of children's right to special protection in the form of allowances granted by the State without any discrimination corresponds to the general principles underlying the Romanian State, provided for in Article 1 paragraph (2) of the Constitution, and the provisions on protection of children contained in the Universal Declaration of Human Rights, the Convention for the Protection of Human Rights and Fundamental Freedoms and other pacts and treaties to which Romania is a party.

8. Conclusions

The analysis carried out in the pages of this paper highlights the complex role that the Constitutional Court currently fulfils in the process of creating and enriching the legislative system. Its powers, as they were detailed and developed in practice manage to significantly influence the whole legislation.

The overall conclusion would be that the constitutional case-law has, undoubtedly, a visibly positive effect not only on normative regulations and the legal system in general, but also on the lives of every citizen, through the multitude of ways in which it can intervene and modulate and harmonize rules and legal provisions with the values and principles comprised in the Basic Law.

Based on an the analysis of the relevant case-law of the Constitutional Court of Romania, this study is geared towards highlighting not only its potential to strengthen the guarantees provided for the full enjoyment of the fundamental human rights and freedom, but also its ability to improve citizens' standard of life.

It was stated in the doctrine that constitutional review performed by specialized authorities is a creative activity. That is because the constitutional judges have got a much greater flexibility than the judges from the ordinary courts in what concerns the possibility to enrich the meaning of the law by the means of interpretation, released from the constraints imposed by the rigid application of law[59].

Indeed, the evolution of the concept of authorities of constitutional review towards revealing their role and the impact on the juridical life of the state of the solutions they pronounce led to their transformation from "negative legislators", as they were initially characterized by Hans Kelsen, into "positive legislators" or, at least, "co-legislators"[60]. In fact, the Romanian Constitutional Court held that its position of guarantor of the supremacy of the Constitution obliges it to take an active attitude[61].

From the case-law of the Constitutional Court of Romania, as shown in the present paper, follows another useful according to which the constitutional review performed by the Constitutional Court plays both a preventive and stimulating role in the normative drafting process.

The fact that the primary regulation (laws, as acts of Parliament, and government ordinances, simple or of emergency) may be subject to censorship of the Constitutional Court, is undeniably a factor of accountability of the legislature, which is forced to adopt regulations that, in the event of checking their constitutionality, prove to be consistent with the rules and principles comprised in the Basic Law.

The prospect of sanctioning infringements of constitutional requirements, either in terms of the form or content of the regulation manages to keep the legislature aware of the risk of gradual loss of credibility generated by drafting of laws declared unconstitutional by the Constitutional Court. Consecutively, the constitutional review urges the legislature to increase the quality of its creative activity and stimulates enactment of rules drafted in accordance with the Basic Law. In this way, the solutions pronounced by the Constitutional Court

[58] Decision nr.277/21.03.2006, M.Of., Part I, no.348/18.04.2006, regarding Article1 par.(2) and Article 5 par.(1) of Law no.61/1993 on state allowance for children.

[59] Mario Cappelletti, cited by Louis Favoreu in *op.cit.*, 463.

[60] Ion Deleanu, *Justiţia constituţională*, p.47.

[61] See Decision no.1615/20.12.2011.

tend to impregnate all branches of law with the values and principles enshrined in the Constitution[62].

When rendering unconstitutional a law before promulgation thereof, Parliament is bound, according to Article 147 para. (2) of the Basic Law, to redraft the law, or provisions thereof, in a manner consistent with the finding of the Court.

The solutions of the Constitutional Court have effect both on the provisions of existing legislation as a whole and also on future regulations. In this regard, the scholars stressed the influence that the case-law of the Constitutional Court has on the future rulemaking process[63], given the fact that decisions on the constitutionality of existing rules have a certain impact even on the content of legal provisions that have not been yet developed.

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CONSIDERATIONS REGARDING THE INFLUENCE OF LEGAL COMMUNICATION FROM THE PERSPECTIVE OF NATURAL LAW

Claudiu Ramon D. BUTCULESCU*

Abstract

This article addresses the issue of legal communication within natural law. Law has an important role, in relation to civilization and legal culture and one of the means through which law influences both culture and civilization is legal communication. The patterns of legal communication should be analyzed from the perspective of all important schools of legal thought: natural law, legal positivism, historical school of law etc. In this paper, the perception of law, through legal communication, within natural law is discussed and analyzed, from the principles and statements of Aristotle to the writings of St. Bernard of Clairvaux, St. Thomas Aquinas and later to the theories of Hugo Grotius. This study also aims to prove that the difference between legal communication within the major schools of legal thought does not regard the essence of communication or the various principles of law, but merely the perception of law, which varies from one school of thought to another.

Keywords: *legal communication, natural law, legal semiotics, communication patterns, legal culture.*

1. Introduction

The principles of natural law have been studied thoroughly, throughout the entire history of law.

From the first philosophers of ancient Greece, like Aristotle and Plato, to the fathers of Christian philosophy such as Saint Augustine or Saint Thomas Aquinas, and to modern thinkers like Niklas Luhmann.

The communication of law was also studied, by prestigious scholars like Jurgen Habermas[1], Niklas Luhmann[2] and Marc van Hoecke[3]. In Romanian literature regarding legal theory, the problem of legal communication was tackled by Maria Nastase Georgescu and also Anita Naschitz[4].

The communication of law may be analyzed, on a more specific basis, with regard to the principal schools of legal thought, namely the doctrine of natural law, legal positivism, the historical school of law and the organic theory of law.

The doctrine of natural law was the first to be established, within legal philosophy, and also is the first to mention streams of legal communication between various senders and receivers. The communication model that may be applied to legal communication is the constructivist model, which is a variation of the transactional model. For this model, the meaning of information is essential. In other words, the participants to the communication process have to establish the meaning of information, either through negotiation or through management. Therefore, as it was shown in the specialized literature, it's the person that hears the speech, not the speaker, that establishes the meaning of the information[5].

2. Content

2.1. Legal communication related to the sources of law

The evolution of the law can be, without a doubt, differentiated according to its main divisions, all the more so as the law is thought of as a normative order distinct from natural order itself[6]. Thus, if private law is based on immutable principles and founded on universal principles as holistic equilibrium and subrogation, public law, is a sub-system of law based on defensive principles, which appeared at the same time with the advent of the first humans which evolved together with our society and shall cease to exist at the time with the human society[7]. The law has emerged as a result of essential requirements of human society, its existence being a condition *sine qua non* for the development of the community. In other words, the legal rules are closely related in their evolution to certain social and

* Associate Researcher, „Acad. Andrei Radulescu" Legal Research Institute, Lecturer, PhD, Faculty of Juridical, Political and Administrative Sciences, "Spiru Haret" University of Bucharest (e-mail: **butculescu@yahoo.com**).

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[2] Niklas Luhmann, *Theory of Society*, trans. Rhodes Barrett, vol. 1, Stanford, CA, Stanford University Press, 2012, p. 116.

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[5] Christina Waters, Invitation to Dance – A Conversation with Heinz von Foerster, Cybernetics & Human Knowing, vol. 6, no. 4, 1999, pp. 81-84.

[6] Tudor Avrigeanu, *Metodologia penală română și totalitarismele secolului XX*, St. de Drept românesc, an 21 (55), nr. 3, p. 261-285, București, iulie-septembrie 2009, p.262.

[7] Claudiu Ramon D. Butculescu, *Considerații privind influența culturii juridice asupra codificării în România, în perioada 1864-2009*, în volumul Știință și Codificare în România, Editura Universul Juridic, București, 2012, p. 368.

juridical phenomena, which have led to various theories, like natural law, the historical school of law, the organic theory of law or legal positivism. The communication of law is realized in a two-way stream: firstly, as a stream of material communication, coming from the society to the state authorities, using the material or substantial sources of law and secondly, the synthesized legal information, streaming back from the legal authorities to the people, through formal sources of the law. The material sources of law have been defined in Romanian doctrine as social sources, that include law configuration factors, human reasoning, legal conscience et.al.[8] On the other hand, formal sources of law have been envisioned as forms through which law is expressed, by which the regulatory content of a norm becomes a mandatory rule of conduct[9].

As shown below, the law has an important role in its relations with civilization and culture, especially from the perspective of legal communication. Moreover, a more thorough analysis of the legal communication may significantly contribute to a better understanding of the relations developed within the system of law. To this end, it is necessary, in terms of scholarly research, to explain a few introductory concepts of the doctrine of natural law, and how this doctrine envisioned law as a communication tool. In this regard, we appreciate that within natural law, the role of law in the legal system, from the perspective of communication has been analyzed and appreciated in a specific way. In order to correctly assert the perception of legal norms, through legal communication, it is necessary to analyze the influence of law from the point of view of legislative communication within the main schools of law: natural law school, the historical school of law and legal positivism. While the analysis of legal communication from the perspective of legal positivism[10] has already been analyzed in another article, this paper address the issues of legal communication within natural law. Incidentally, the subjective perception of the law may constitute an important starting point in analyzing legal communication, seen through the perspective of law schools. Undoubtedly, each of these schools of thought, include, even if not directly, elements of legal communication. Starting with the principles laid down by natural right and continuing with the ones stated by legal positivism, all come into contact, more or less with the concept and effects of legal communication.

2.2. Legal communication analyzed from the perspective of natural law

Within the concepts natural law school, the first approach in consideration of law as a communication tool was that of Aristotle, who put into opposition the natural justice to earthly justice. He preached the idea of invariability in natural justice, in contrast to the variable and degradable nature of legal justice, which through concrete application, leaves the upper sphere of neutrality and becomes biased. This concept was especially addressed in one of his famous works - *Rhetoric*. In fact, some basic concepts regarding communication where laid within this work of Aristotle[11]. Interesting in Aristotelian theory is the fact that he does not criticize the perennial nature of the fundamental principles, but the human ability to perceive them justly. Thus, we may bring into discussion a possible communication of the law, which, however, is incorrectly perceived by the human community, as the message gets deteriorated. By applying the above-referred mentions to the model of communication, it is reasonable to believe that this theory can be applied successfully to the constructivist model of legal communication, in which the message may be not properly received, due to faulty perception, while the source does not show any signs of deterioration. An example of erroneous perception of natural laws may be found in antiquity, in the work of Aeschylus, called The Eumenides. As an effect of matricide, Orestes murder becomes the subject of a conflictual relation, involving punishment, according to natural law and should be punished by the Erinyes. Still, Orestes has acted as a result of the dire predictions made by Apollo, implying that natural law does not apply without exception. But this inflexibility is precisely what constitutes the essence of natural law, that applies regardless of time, space or person, as an expression of its universal character. If Orestes would not have followed the prediction of Apollo, that would mean that the aforementioned god's prophecy was not infallible, so the prophecy of divine origin could not be perfect. Following a logical reasoning, we may consider that divine law is not perfect. However, we can consider interpretations that may serve as a work around this apparent paradox. Thus, a possible explanation could be the following: Orestes did not violate the natural law, and the conflict was born as a result of erroneous perception by the Erinyes, with regard to natural justice. Also in ancient times, a similar form of communication is discernible in the works of

[8] Mihai Bădescu, *Teoria generală a dreptului*. Curs universitar. Editura Sitech, Craiova, 2013, p.108.
[9] Nicolae Popa, *Teoria generală a dreptului*. Ediția 3, Editura C.H. Beck, București, 2008, p. 147.
[10] Claudiu Ramon D. Butculescu, The role of law as an instrument of communication within legal positivism, Juridical Tribune, Issue 2, December 2015, pp. 132-137.
[11] Robert L. Heath and Jennings Bryant, *Human Communication Theory and Research: Concepts, Contexts, and Challenges*, 2nd ed. (Mahwah, NJ: Lawrence Erlbaum Associates, 2000), 56, http://www.questia.com/read/14363794.

Ariston of Chios, who proposes the existence of two categories of rules: firstly, the rules that are imperfect, because there will always be exceptions, which may not be limited to these rules and secondly, principles, which constitute the universal rules[12]. Natural law school proposed the idea of an immutable law, which is communicated to the human society, which in turn applies it inefficiently, because it is incompletely or erroneously perceived. However, we should take into account Luhmann's theories, which spoke of meaning and acceptance in legal communication[13]. Therefore, one should analyze to what extent the rules of natural law are applied incorrectly because they are perceived incorrectly or because they are not accepted by the recipient. To this purport, in a subsequent period, *St. Ambrose (337-397 A.D.)* considered that the ten commandments were stated and communicated to Moses because mankind has ceased to observe and respect the natural law. It is interesting to observe that within the relationship between the society and the earthly authorities there is a third important party, which presents itself as a source of natural law, namely the deities. It is not the society that communicates the law, but the deity, who is the one that transmits natural laws, only to be applied by people to the people. Of course, the question arises as whether at a perceptive level, we can envision a direct source of law or just an interpretation of certain perennial principles, adapted to the limited human knowledge. Without a doubt, the natural law is made known to recipients directly, as it is seen in the Decalogue. However, there are also indirect meanings within the rules, proof being the very fact that Moses is commanded in the first commandment: "Thou shalt have no other gods before Me" and as Mircea Eliade remarked[14], this commandment does not preclude, ab initio, the existence of other deities but only imposes a ban, or better said, a mandatory prohibition. In this view, it is the responsibility of the people not to worship idols, and if they do not comply with this obligation, certain liability shall be imposed on them, characterized by penalties and punishments. The difference between responsibility and liability was analyzed at length in the works specialized in matters of the general theory of laws[15]. Interestingly, such communication is not circular in nature, but rather rectilinear. The material sources of law are not the needs of society, but the universal laws, which are communicate by deities, through sacred, albeit earthly authorities. Of course, in those times, the authorities commonly had religious attributes. Another example regarding the communication of law, we find, at a microsystemic level in the works of *St. Bernard (1090-1153 A.D.)* (*Bernard of Clairvaux*) who speaks about natural law, considering that on the basis of the latter, individuals must act in relation to other people as they would want others to act towards them[16]. At the same time, other representatives[17] of the natural law in medieval times indicated perception as a singular means of ensuring effective communication. In order to assess properly the effects of law, we should first define the scope of their action. To do this, it is necessary to resort to psychological instruments, more specifically to the concept of perception. The effects may be multiple, but in the context of this paper we should put into question those effects which may be levied and felt by the recipients of legal norms. These norms should be perceived and understood. For the compliance or refusal of the recipients to exist, as referenced by N. Luhmann, the rules must first be perceived. Also, the effects of these rules should be perceived distinctly by the recipients, respectively by the members of the community. Thus, there must be a distinction between the effects of legal communication, in its wholeness and effects of legal communication in relation to the perception of the recipients. The entire legal system is built on the basis of a referential system; on which we can assign symbols or meanings to our own perceptions. As shown above, William of Auxerre *(-1233 A.D.)*, believed that natural law is known through direct perception of divinity. Contrary to this idea, *Thomas Aquinas* and *Albertus Magnus (1193-1280 A.D.)*, believed that natural law is perceived by humans with the aid of reason.

3. Conclusions

The idea of legal communication can also be found in contractualism theories, as described in the works of Grotius, subsequently developed by Pufendorf and Thomasius. If there is even an empirical notion of social contract, then there must be a prior stream of communication. Thus, the social contract could be considered the effect of the communication right in the sense of acceptance of mandatory rules. Also, Christian Wolff, a disciple of Leibniz believed that justice and morality are projections of natural law (universal). Unlike Pufendorf or Thomasius, Wolff believed that these universal precepts are accessible without human revelation. Another example of communication of law we find in the works of Jean Jacques Burlamaqui, which differentiates between natural

[12] Julia, Annas, *The Morality of Happiness*, New York: Oxford University Press, 1995, p. 104.
[13] Niklas Luhmann, *Theory of Society*, trans. Rhodes Barrett, vol. 1, Stanford, CA, Stanford University Press, 2012, pp. 116-120.
[14] Mircea Eliade, *Istoria credințelor și ideilor religioase*, Editura Univers Enciclopedic, București, 2000, p.120.
[15] Mihai Bădescu, *Teoria generală a dreptului*, Editura Sitech, Craiova, 2013, pag. 304.
[16] Saint Bernard (of Clairvaux), Gilliam Rosemary Evans, *Selected Works*, Paulist Press, New Jersey, 1987, p. 242.
[17] Jean Porter, Nature as Reason: A Thomistic Theory of the Natural Law, Grand Rapids, MI: Eerdmans, 2005, p. 248.

law and jurisprudence. Through natural law, he envisioned the law imposed by God to men, which may be perceived and understood with the aid of reason. Natural jurisprudence was considered the art of gaining knowledge regarding the laws of nature, explaining them and their application to human actions18.

The role of law as a tool of communication within the school natural law obviously stems from the perspective of how law is envisioned in this doctrine. In principle, the human society does not carry out a material communication of law, because, according to this current of thought, the principles of law are perennial and immutable, and preexisting the society itself. So, communication has rectilinear form, and through this form of communication, abstract and perennial principles are adapted to daily realities. This assumption is not necessarily against the concrete reality, but the aprioristic structures confer an inflexible character to this type of communication. However, another interpretation could be that there are, on a priori basis, certain universal principles, without mandatory legal content, which govern the society, and the society, by adapting to these general rules, carries out a substantive communication to the state authorities, to be able to be supported in its development. If we continue on this reasoning, it seems that communication is rectilinear only in the beginning, afterwards developing a circular character. This articles addresses certain issues regarding the legal communication from the perspective of natural law, by explaining briefly some propaedeutic aspects related to natural law, legal communication and legal cultures.

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[18] J.J. Burlamaqui, *The principles of Natural Law*, *London*, 1752, p.126.

ORDER OF LAW AND LEGALITY - GUARANTEES OF CONSTITUTIONAL DEMOCRACY

Emilian CIONGARU[*]

Abstract

The principle of legality is a principle of social and State life consisting in the compliance with the legal norms by all participants in social relations. In any rule of law, enforcement of legality requires the duty of every citizen to follow the general provisions of the law. The principle of legality is a universal principle that requires all subjects of legal relations to comply with the law in their work. Due to the fundamental importance of laws, and mainly of the Constitution, legality is considered a principle of constitutional democracy. The order of law is another legal category close as concept to legality. It is an essential element in society's life. The order of law is obtained when the principle of legality prevails, that is, when all people comply with the law. The order of law is a status of social relations governed by legal rules that correspond to the requirements of laws and other normative acts. The concepts of legality and order of law are close and interdependent. The order of law can not exist without legality, and legality weakens if there are flaws in the order of law.

Keywords: *order of law, legality, constitutional democracy, normative acts.*

1. Introduction

The classic notion of the Constitution is rooted in the doctrine of social contract or social pact supported and assisted by new social class - the bourgeoisie, since the sixteenth century, at first timidly and replete with military failures and ending as the dominant political theory of the eighteenth century – *Age of Enlightenment*. The Constitution is, from a legal point of view, a law superior to all other laws. Both the organic and ordinary laws must correspond to the letter and spirit of the Constitution. The obligation to observe it belongs to all, including the power bodies.

Constitutions embody the fundamental principles of economic, political, social, moral and legal life of a State, a society.

The fundamental principles laid down in constitutions are generally consistent with the fundamental values that the State, the society, promotes and defends.

The German philosopher Hegel in his famous work *Principles of the Philosophy of Law* says that people should have for their constitution the feeling of their right and the state of affairs at the present time passing through. He believes that every people have their own constitution which suits them and that they deserve. [1]

To establish the concept, the notion of constitution, there are required some clarification, namely:

firstly, that the constitution and the law can not be equated;

secondly, in historical order, the law comes first, the constitution appearing later;

thirdly, the constitution appears as a historical category, excelling in the evolution of the legal system;

finally, the constitution expresses a new political, social and legal ideology.

2. Order of law, social order, legal order – concepts

Any society is interested in maintaining order, balance, structures and forms of organization and management, to ensure the functioning of all institutions, the normal development of the actions of individuals and groups. The *norms and penalties* that ensure the orientation of human behaviors are central to the notion of *social order*.

Social norms are social requirements expressed in norms of what is possible and payable. They regulate the variety of social, political, economic, moral relations, ensuring the conduct of activities in all areas.

The different categories of norms[2] in place in society give rise to specific types of social order. This explains the fact that within the same society operate an economic order, a moral order, a legal order, etc. Within each society, between these distinctive normative orders, there is a complete compatibility. Their synthesis is what we generically call the *social order*. In this broader framework of social order, any human society develops a *legal order*.

[*] Asoc.Prof.Ph.D. – Faculty of Law – "Bioterra" University of Bucharest; Asoc.Researcher - Romanian Academy – Institute of Legal Research "Acad. Andrei Radulescu" (e-mail: **emilian.ciongaru@yahoo.com**).

[1] Georg Wilhelm Friedrich Hegel, Principles of philosophy of law (translate by Virgil Bogdan and Constantin Floru), (Bucharest, IRI Publishing House, 1996), pp. 205-207.

[2] Andre Jean Arnaud, *Dicţionnaire encyclopedique de theorie et de sociologie du droit,* (La Librairie générale de droit et de jurisprudence, Paris,1993) pp.94-98.

By *legal order* or *order of law* one can understand *all the legal norms with the legal relationships arising under them*. The legal order is based and operates on the norms of law[3] established in the society. It is the core of social order, the fundamental condition of social equilibrium, the guarantee of essential rights of members of society and normal functioning of institutions. The legal order is an organic whole, a full legal reality that corresponds to a particular collectivity.

The *legal order is a coercive order*, based on public norms to guide and control individual and group behaviours, to ensure the cohesion and stability of society.

The *legal order* generates and reinforces the *order of law*, noting, however, that this order of law includes the scope for institutional-functional setting of *power*, the exercise of full and unimpeded thereof, self-limiting only by observing the private life of the person, sphere in which it is manifested as being in the field of freedom. No less true, by a relationship this time weaker in terms of bi-univocacy, the order of law is intended to strengthen institutional mechanisms and procedures by which de legal order is produced and self-reproduced, therefore, again in a kelsenian sense, a new legal field *growing positive*, finding its validity by an operation of inferation of the basic norm - *the constitution* - but also, at the same time, by arranging some reproductive procedures, validated by reference to this fundamental norm.

From a conceptual point of view, the *legal order* should not be confused with the *order of law*, as they are distinct in scope and content. The *order of law* implies, more or less visibly, the manifestation of the State as a political organization of society, involving the permanent activation of institutional means to exercise coercion, both in private and public area of activities of the person and involves permanent reference to legal order, existence that determines the being of the *order of law*. The relation between the *order of law* and the *legal order* is not a perfect bi-univocity, but assumes a certain position of determination from the part of the *legal order*.

The *order of law* is the awareness of people, either individually or collectively considered, of the prescriptive content of the command given by the authors that produce legal norms, the awareness of the fact that ignoring this *sollen*-sentence or deviation from this falls under the coercive power of bodies established with substantive jurisdiction to exercise certain coercive attributes, therefore competences by establishing norms meant to exercise control and domination of state power over the individual. Said another way, *the order of law* may be affirmed as *limitation in actu* of the free will of the individual. The person's behaviour is expressed into acts and facts only according to what the State requires, as a way of political organization, by its will, or at least only such expression is or would be correct in relation to the legislator's command, otherwise, by logical consistency, being followed by a legal sanction.

The *order of law* is a function-concept that has the role of ensuring the achievement of a/some general and sectoral policies to reduce, generally, inevitable social entropy. What the *order of law* is reflecting is the functional entwining of order (positive or negative) expressed by the law-making authority with the means/ways of an anytime and immediate, in general rule, coercive interventions of the State through its function-bodies, to ensure and preserve the balance between freedom and civic and political obedience, the State, as a political organization, considering that such a balance is beneficial to its security and citizens' security, that such a balance is a way of manifesting as subject producer of order in international relations[4], that, especially, such a balance is correspondent to certain standards of internal and external public morality. By its content, the concept of *public order* does not empower or allow or provide for an exemption, but actually *imposes* a *must*, mediating the coercive relationship between the State and the individual, especially as regards repressive-type impunity, by means of a system of courts or administrative authorities having well-prescribed roles using procedures of competence.

The concept of *legal order* is not an attribute only of domestic law, whereas any legal order, any order of law, any national public order is inter-positioned to such other orders in the field of existence of an international society and increasingly internationalized as effect of a nearly complete globalization. As such, symmetrically to a domestic legal law, the doctrine argued that there is *an international general judicial order*[5], with certain particular features given by the very nature of public international law, by its specific creation as normative field as the totality of legal norms.

The legal order is a term synonymous with the normative order[6] but claiming the reality that every State is or represents an order of law, such an attribute is, however, relatively, because under certain socio-political determinations, the order of

[3] Iosif Friedmann-Nicolescu, *Interpretation of the legal standard between tradition and reform*, Revue Europeenne du droit social. (Bibliotheca Publishing House, Targoviste, Romania, 2015), pp.78-79.

[4] Mihail Niemesch, *Principles of international law and some determining aids of determination of the international law*, Revue Europeenne du droit social. (Bibliotheca Publishing House, Targoviste, Romania, 2015), pp. 126-127.

[5] Raluca Miga-Besteliu, *International Law. Introduction to Public International Law*, Bucharest, ALL Beck, 1997; Adrian Năstase, B. Aurescu, *Contemporary International Law* (second edition, revised and supplemented.), (Bucharest, ALL Beck, 2000) pp. 131-133.

[6] Ion Craiovan, *Philosophy of Law or the Law as Philosophy*, (Universul Juridic, Bucharest, 2010), pp.36-39.

law can be overthrown, replaced, sometimes brutally, with another order of law, without the State to cease its existence as a political organization of that given society[7]; at most, one can appreciate an involutive stage that would be placed upon the State in question following a change in its order of law, this order being understood as a public order[8].

Legal orders are far from being opposed one to each other, entirely and trait to trait. Most often, if not always, they are opposed and come close one to each other at the same time. The observation is accurate for the legal orders of the same legal system, as to the legal orders belonging to different legal systems. The most important is to know what are the elements by which the legal orders are similar or opposed to each other, because, ultimately, on these elements will depend their typological relatedness and the classification of two or more legal orders in one and the same legal system or different legal systems.

The normative layer of which the legal order system is composed consists of legal norms defined as general and binding norms of conduct set by law or use. They have a decisive role in ensuring the order of law as they promote core values and human relationships, defend State institutions, and ensure the rights and freedoms of individuals. Therefore the power of influence and coercion of legal norms is greater than that of the moral, religious, politeness norms.

The legal norms have certain specific features which differentiate them from the non-judicial norms, namely:

express the elaboration and implementation procedure. The legal norms are enacted, promulgated and enforced by the legitimate public authority subject to certain legislative procedures and techniques, while moral norms are the product of anonymous, spontaneous and diffuse collective work of individuals, groups and social collectivities, being developed mostly in unwritten form within the unorganized procedure;

their action in time and space takes the written form (laws, decrees, decisions) and therefore legal norms know a certain determination in time and space, their emergence, modification or disappearance can be determined spatially and temporally;

in terms of form and structure, regardless of variety, legal norms are characterized by a unitary structure within which can be identified three elements (hypothesis, disposition, sanction), while the non-legal norms do not know, most part of the case, these elements;

in terms of efficiency and validity, being accompanied by organized penalties, legal norms act over the entire society, their non-compliance or breach calling for intervention of specialized bodies of public authority.

Admitting that the legal norm is the rational expression of the law or the solemn pronouncement of the law, it is better distinguished that *the legal norm is the primary means of achieving and maintaining social order, of protecting the rights and freedoms of citizens*.

Considering the entire social order, social penalties and legal penalties have an important place. The sanction, as part of the norm, refers to the measures and means to be adopted against those individuals who break the norms and the prescriptive regulations.

4. Priciple of legality – concept

The ideal of legality and equality was born as a requirement of natural law and it has been sought to justify it with religious, psychological and philosophical arguments, but all proved untenable. It is a fact that people are endowed differently by nature; thus, the requirement that all people be treated equally can not be based on any theory that all would be alike. Insufficient argumentation if the natural law is exposed most clearly when dealing with the principle of equality and legality. For understanding these principles, one must start from a historical examination. Thus, in modern times, as earlier, it was appealed to these principles as a means to abolish feudal differentiation of individuals' legal rights. As long as individual development and development of some sections of the people is hampered by barriers, social life will be disturbed by violent social movements. People without rights are always a threat to social order. Their common interest in removing such barriers unites them; they are prepared to resort to violence because they can not get what they want by peaceful means. Social peace is attained only when it allows all members of the society to participate in democratic institutions. And this means equality before the law, that is, before legality.

3. Rule of law and principle of legality in rule of law

Legality is a principle of social and State life consisting in compliance with the legal norms by all participants in social relations.

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[7] Mircea Djuvara, *Summary of Legal Philosophy*. Fascicule 1., ("Universul" newspaper printing press, Bucharest, 1941), pp. 44 and following.

[8] Ioan Muraru, Gheorghe Iancu, *The Romanian Constitutions (Textes, notes, comparative presentation*), 3rd edition, (Bucharest, Regia Autonoma „Monitorul Oficial", 1995.).

In a Rule of law, lawfulness requires duty of every citizen to observe the general provisions of the law. The principle of legality is a universal principle that requires all subjects of legal relations to comply with the law in their work.

Due to the fundamental importance of laws, and mainly of the Constitution, legality is considered a principle of constitutional democracy.[9]

Strengthening of the legality is prevented by the breach of the principles of law supremacy, of equality of all before the law, of social equity and of dysfunctions of the activity of legal norms enforcement bodies.

Trying to define legality, one can say that it is a principle, a method and a strict compliance regime, unyielding enforcement of legal norms by all participants in social relations.

The principle of legality involves primarily that the most important social relationships are governed by general and impersonal legal norms, by a democratically elected representative body, expressing the real will and fundamental interests of the nation.

Secondly, the principle of legality implies that the overall conduct of individuals, as the work of public authorities and other social organizations, to conform to the general and impersonal norms adopted by the legislative authority.

Viewed from the perspective of the principle of legality, relations between the State and the law are expressed most suggestively by the doctrine of the order of law. According to this theory[10], the State is obliged to obey its own laws that otherwise expresses the fundamental interests of the society. Therefore, the State, the public authorities, the civil servants are obliged to observe the law, like any other citizen.

The order of law is another legal category close to legality. It is an essential element in society's life. The order of law is obtained when the principle of legality prevails (if everyone complies with the law provisions). The order of law is a state of social relation governed by the legal norms that correspond to the legal provisions of laws and other normative acts.

The concepts of legality and order of law are close and interdependent. The order of law can not exist without legality, and legality weakens if there are flaws in the order of law.

The idea of the order of law is inextricably linked to the role of justice, the promotion of legality in the activity of State bodies, the firm defending of the rights and freedoms of citizens. Referring to the true meaning and the deep implications of the concept of order of law, Professor Ion Deleanu highlighted, in an assessment as successful as possible, that ″by an original feedback circuit, the law once created is imposed to the State - subject of law itself - like other subjects. To have the strength to impose, some minimum conditions are essential: by postulating through norms of law of some moral and political values which are authentic and persuasive for the global civil society and for the individual; by establishing a democratic ambience; by strengthening the principle of State responsibility; by institutionalization of effective means of control over its activity; by establishing a coherent and stable legal order; by strictly promoting the principle of legality and the principle of constitutionality; by transforming the human being into a cardinal axiological reference″.[11]

The Rule of law was the criterion for the classification of States in of law and despotic, in legislator State, administrator State or judge State. The Rule of law must not be confused with the principle of legality, because it is more than that. [12]

The complex content of the Rule of law consists of: the lordship of law; the capitalization at their actual sizes of the real fundamental rights and freedoms; achieving the mutual balance/cooperation of public authorities and achieving the free access to justice.

The Rule of law must be accompanied by a guarantee system[13], which has as its purpose the self-limitation of the State by the law. This guarantee scheme is based on the following main norms: any amendment of the Constitution to be dealt with only by an expressly authorized assembly, elected on democratic bases and which should carry out the review procedure; the review itself does not have to affect the fundamental values of constitutional democracy; the existence of a constitutional control; the restriction on the exercise of rights and fundamental freedoms by law only if necessary, only in proportion to the situation that caused it, without prejudice of the right or freedom and for the grounds expressly provided in the Constitution and the non-limitation of the free access to justice.

The social nature of the State is a current corrective brought to the classical liberalism. The essence of liberalism was constituted by individualism and freedom, which required non-

[9] Constantin Ionescu, *Fundamental Principles of Constitutional Democracy*, (Bucharest: Lumina Lex, 1997), p. 206.

[10] Giorgio del Vecchio, *Lessons of Legal philosophy*, (Bucharest, Europa Nova Publishing House, 1993), p. 269.

[11] Ion Deleanu, *Constitutional Law and Political Institutions. Treaty*, vol. I, (Europa Nova, Bucharest, 1996), p.13.

[12] Ioan Santai, *State and Law. Between legal exegez and fenomenologic approached*, in vol. For a General Theory of state and of law, (Arvin Press Publishing House, Bucharest, 2003), pp. 114 și urm.

[13] Mircea Tutunaru, *The presumption of innocence under the state of law*, Revue Europeenne du droit social. (Bibliotheca Publishing House, Targoviste, Romania, 2015), p. 178.

interference of the State in the social or economic life. In current circumstances, such a doctrine can not fit the realities of many countries of the world, where the material conditions can not provide a decent living, health of population, environmental protection, development of education system, etc., all united under the umbrella of the notion of general interest. The State must intervene for achieving the general interest, that is, to have a proactive rather than passive attitude, as demanded by the classical liberal doctrine. In this regard, the State must protect the weak individual; must support economic sectors required to promote the general interest; must ensure the functioning of public services and social protection.

The democratic nature of the State implies: a pluralistic system; Government members' accountability; the obligation to comply with the laws; the impartial pursuit of justice by independent and irremovable judges; the order of law, the exercise of sovereignty by the people; ensuring people's participation in solving public affairs; the enforcement of the principle of separation/balance and collaboration of public authorities; decentralization.

All these implications include: achieving balance of powers and ensuring the supremacy of the constitution, a democratic State being found where these two traits are met.

Attempting a synthesis of the relationship between modernity and tradition in the constitutional law, with profound implications for the principle of legality, one can emphasize the following:

some concepts of constitutional law have evolved naturally over time, acquiring new connotations that have defined much deeper and more clearly their profile. Thus, one can mention the concept of sovereignty, the human rights etc.;

there was recorded continuously a greater flexibility in the implementation of separation of powers, which remains a fundamental principle of political organization. In this regard, it may be mentioned, for instance, the responsibility of the Government to legislate on certain conditions, for a fixed term, under strict parliamentary control, by way of ordinance;

in modern constitutional law arose, however, new institutions designed to assure into a greater extent the human rights and the observance of democratic principles, in a word, the functioning of the order of law mechanisms. Among these new institutions is, of course, the institution of the Ombudsman (The People's Lawyer), the courts of audit, the constitutional courts (or the constitutional councils);

as a consequence of developments mentioned earlier, new opportunities to guarantee the constitutional rights of citizens emerged, judiciary ways have improved, whilst being carried out a junction between internal mechanisms to protect the rights of citizens (justice, administrative litigation, exception of unconstitutionality in the process) and international mechanisms, such as, for example, the recognition of the right of citizens prejudiced in their rights, which have exhausted domestic remedies, to appeal to the European Court of Human Rights.

Control of the constitutionality of laws is one of the legal guarantees of the supremacy of the constitution. This control includes the principle of legality, because the normative acts must be developed according to an established procedure and the Constitution, on the one hand, and on the other hand, the law, including the constitution, must be observed by all State bodies. Control is understood as the activity of verifying the enforcement of the principle of compliance of the law with the constitution and as an institution of constitutional law, including norms combined with the same object of regulation. There is subject to control not only the law, as the legal act of the Parliament, but also normative acts with equal legal force with the law (ordinances, decrees-laws). Administrative deeds are not subject to this control, because public administration authorities issue these deeds in the exercise of law and detailing of constitutional provisions is done by law. Administrative deeds are subject to judicial control, within the administrative jurisdiction. Draft laws do not submit to this control either, because they are not laws and can be withdrawn from the originator until commencement of debates (on texts of legislative initiatives). There are a number of causes determining conflict between the Constitution and laws, even if they are incomprehensible because of the similarity of those who adopt them (social contradictions; contradictions between political groups; exaggerated stiffness of the constitution; violation of the legislative technique norms; harmonization of the federal interests with ones of the federal States).

4. Conclusions

In conclusion, ensuring the constitutional supremacy actually means ensuring social stability and legal order in the State. The Constitution is the seat of citizens' rights and liberties and the structural factor of the legal order which shall provide guiding principles: equality of all citizens, legality, non-retroactivity of laws etc. Legality and the order of law are presented primarily as a means of defending the rights, freedoms and legitimate interests of citizens. Building the Romanian political lifetime on the ideas of law and legality became and is becoming increasingly a prerequisite

of acceptance of Romania as a full member of the world community of States, of some international bodies. In this comprehensive effort, jurists are given an essential role, they must be the first to contribute to promoting observance for the order of law, applying consistently and justly the laws, but also directly contributing to the awareness of the entire Romanian public opinion about the value of legal norms, with the requirement of unabated observance of the law in relations between individuals, as well as between them and the authorities, within the whole mechanism of functioning of our State bodies and organizations.

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IMPLICATIONS OF THE RECOURSES IN THE INTERESTS OF LAW ON THE PROVISIONS OF LAW NO. 554/2004

Claudia Marta CLIZA[*]

Abstract

Law no. 554 was adopted in 2004 and amended in 2007. In the meantime and during all this period, the Supreme Court adopted a lot of recourses for the interest of law and these decisions modified the law in a deeply manner. This study is dedicated to these recourses and the way they affected the law.

Keywords: *Law no. 554/2004, recourses for the interests of law, modifications, first degree, recourses.*

1. Introduction

This study aims the default modifications that not the lawmaker, but paradoxically, the judge, has brought to Law no. 554/2004. It should be noted that the decisions to be contemplated by the analysis of this study are recent and fall under the scope of the actual tendency of the High Court of Cassation and Justice to come up with explanations on any matter it is requested a settlement of matters of law.

The institution of the High Court of Cassation and Justice referral in order to rule a prior resolution for the settlement of certain matters of law is new[1], and together with the recourse in the interests of the law, the institution aims to provide an uniform legal practice and both civil procedural institutions are extremely welcome in the Romanian legal frame, in order to establish case law patterns which provide the person subject to the law a greater confidence in the act of justice.

The number of litigations caused by the local government is currently large among civil litigations. This is something normal if we take into account the fact that within the administrative law, understood as a branch of public law, the term of local government holds the central position and it is natural to be so. As shown in the doctrine, the administration is the most complex activity of the state; it is ever-present within the society, the people's life and this is why there is the constant concern of decision makers to make from the local government a force in the interests of the people[2].

Therefore, the material law essentially correlates with the procedural law in the settlement of the administrative litigations.

Practically, the aforementioned civil institutions outline the possibility of the High Court of Cassation and Justice to „clear" the obscurity of the law, so that the courts of law do not rule non-uniform judgments, the premise for the person who resorted to the law to ask „why did I lose the trial" while citizen X, who was in the same situation as me, won? The question is natural and frustrating and the act of justice lacks of finality in such situations.

The obscurity of the law also affected Law no. 554/2004 of the contentious administrative, and these civil procedural instruments appeared and corrected the interpretations of the courts of law.

By means of the proposed analysis, this study reviews four matters of law settled by the High Court of Cassation and Justice, by taking into account four articles of the aforementioned law, a matter which has never been subject to any doctrinal analysis up to this point.

The author of this study aims to analyze the practice of the High Court of Cassation and Justice in this field, by summarizing the decisions which were ruled and by emphasizing their importance.

It should be noted that the institution of the ruling of a prior resolution for the settlement of a matter of law is regulated, as provided above, in art. 519 – 521 of the Code of civil procedure. In summary, in order for the referral under art. 519 of the Code of civil procedure to be admitted, the following conditions must be fulfilled at the same time[3], namely:

the case where the matter of law is raised, is on the dockets of the court of last resort;

the referral concerns a matter of law, namely an issue regarding the interpretation of a legal regulation for which the settlement in principle is required;

the settlement of the case on the merits depends on the clarification of the respective matter of law;

the matter of law the clarification of which is required, is new;

the High Court of Cassation and Justice did not rule on the respective matter of law and it is not

[*] Associate professor PhD, Faculty of Law, „Nicolae Titulescu" University of Bucharest (e-mail: **cliza_claudia@yahoo.ro**).

[1] The institution of the settlement of matters of law was introduced by means of the New Code of Civil Procedure, respectively articles 519 – 521.

[2] Elena Emilia Stefan, *Drept administrativ. Partea I* (Universul Juridic Publishing House, Bucharest, 2014), p. 8.

[3] G. Boroi, O. Spineanu-Matei, D.N. Theohari, G. Raducan, D.M. Gavris, A. Constanda, C. Negrila, V. Danaila, F.G. Pancescu si M. Eftimie, *Noul Cod de procedura civila. Comentariu pe articole. Vol. I. Art. 1-526* (Hamangiu Publishing House, 2013), 1008 – 1010.

contemplated by any pending recourse in the interests of the law[4] .

2. Prior resolutions for the settlement of the matters of law

2.1. Decision no. 10/2015

The first reviewed decision is Decision no. 10 of May 11th, 2015[5], ruled in Case no. 427/1/2015, by the Court Panel for the settlement of matters of law which took into consideration the referral filed by the Court of Appeal of Craiova — Division of the contentious administrative and fiscal, by Closure of December 11th, 2014, ruled in Case no. 7.752/101/2013, in order to rule a prior resolution on the interpretation of the provisions of art. 23[6] of Law no. 554/2004 of the contentious administrative, as further amended and supplemented (Law no. 554/2004).

The matter of law submitted to the High Court of Cassation and Justice was the following:

„The provisions of art. 23 of Law no. 554/2004 shall be interpreted in the sense that the court ruling whereby a regulatory administrative act was annulled, is applicable only to those individual administrative acts issued under the respective act, after the annulment resolution or is it also applicable to those which, although they were previously issued, on the date of final annulment resolution were appealed in cases pending on the dockets of the court of law?"

The point of view of the court panel that filed the referral was that the provisions of art. 23 of Law no. 554/2004 provide, unequivocally, that such court rulings are generally mandatory and produce effects in the future. These provisions are exempt from the principle of the relativity of the court rulings, providing that the court ruling on the annulment of a regulatory administrative act produce erga omnes effects as the regulatory administrative act which is executed produce the same effects in practice. This feature of the court ruling logically leads to the conclusion that the court ruling whereby a regulatory administrative act was annulled in full or in part, is applicable to all matters of law.

The *erga omnes* effects are produced only for the future, an aspect which results, with no doubt, from the provisions of art. 23 first thesis, final part of Law no. 554/2004. Therefore, the legal relationships and legal effects produced by the regulatory act during its execution, until the date of its irrevocable annulment, shall remain in force and shall produce legal effects.

In what concerns the words „they only produce effects in the future", has to be construed as meaning that the invalidity of the regulatory administrative act, pronounced under an irrevocable court decision, does not produce retroactive natural effects, but only ex nunc effects, for the future, starting from the moment of its acknowledgement, by its publishing on the Official Journal of Romania, Part I, and for the issuance authority, as of the date of the final annulment resolution due to the fact, as a party to the proceedings whereby the resolution for the annulment of a regulatory administrative act was ruled, the issuance authority cannot rely on the failure of the resolution to be published in the Official Journal of Romania, Part I, as an argument for the substantiation of the dismissal to settle a petition.

Therefore, the invalidity of the regulatory administrative act cannot be opposed to the legal effects caused by the administrative acts issued prior to the mentioned time, but only to the legal effects caused by the administrative acts subsequently issued.

In what concerns the extension of the court ruling on the annulment of a regulatory administrative act similar to the effects of the motion to dismiss on grounds of unconstitutionality in what concerns pending cases (as it was noted by means of the decisions ruled by the Court of Appeal of Craiova attached to the referral), the referring court noted that the invalidity of the individual administrative act issued under a regulatory administrative act, in this case the taxation decision, must be analyzed on the time of its issuance (the invalidity grounds being previous or concomitant). The contrary solution would result in the invalidity of all individual administrative acts (in this case the taxation decisions) issued before the resolution on the annulment of the regulatory administrative act, a situation which would violate the legal certainty principle.

Therefore, in the opinion of the referring court, in consideration of the provisions of art. 23 of Law no. 554/2004, the annulment of a regulatory unilateral administrative act produces erga omnes effects only for the future, similar to the repeal or expiration, and the legal relationships and the legal effects produced by the regulatory administrative act during its execution and up to its final annulment, shall remain in force and shall produce legal effects. The High Court of Cassation and Justice decided that

[4] G. Boroi, *Noul Cod de procedura civila. Comentariu pe articole*, 998.

[5] The court panels for the settlement of matters of law, published in Official Journal, Part I no. 458 of 2015.

[6] G.-V. Birsan si B. Georgescu, *Legea contenciosului administrativ nr. 554/2004 annotated* (Hamangiu Publishing House, 2nd edition, rev., Bucharest, 2008): „the action in contentious administrative having as scope the annulment of a regulatory administrative act annulled under a final and irrevocable court ruling, which was published in the Official Journal of Romania, Part I, or as the case may be, in the official journals of the counties or of Bucharest, lacks of object, as these court rulings are generally mandatory and they produce effects in the future (The High Court of Cassation and Justice, division of the contentious administrative and fiscal, dec. no. 2182 of May 29th, 2008, not published)".

the provisions of art. 23 of Law no. 554/2004 of the contentious administrative, as further amended and supplemented, are construed in the sense that the irrevocable/final court resolution whereby a regulatory administrative act[7] was annulled in full or in part is effective on those individual administrative acts issued under the respective act and which, on the date of the annulment court resolution, are appealed in cases pending on the dockets of the courts of law.

2.2. Decision no. 11/2015

The second analyzed decision is Decision no. 11/2015[8], whereby a settlement in principle on the following matter of law is provided: „If the provisions of art. 3 of Law no. 554/2004 of the contentious administrative, as further amended and supplemented (Law no. 554/2004), in conjunction with the provisions of art. 63 par. (5) letter e) and art. 115 par. (2) of Law no. 215/2001 of the local government, republished, as further amended and supplemented (Law no. 215/2001), and with the provisions of art. 19 par. (1) letter a) and letter e) of Law no. 340/2004 on the prefect and the prefecture, republished, as further amended and supplemented (Law no. 340/2004), and of art. 123 par. (5) of the Constitution, shall be construed in the sense that the prefect is acknowledged the right to appeal before the court of the contentious administrative, all the acts of the local government which he deems illegal or only the acts of the local government which fall under the scope of the provisions of art. 2 par. (1) letter c) of Law no. 554/2004, respectively only administrative acts".

In the reasoning of the point of view, the referring court referred the case law to the Court of Appeal of Bucharest, where the matter of law was settled differently, as shown below.

In an opinion, it was noted that art. 123 par. (5) of the Constitution is a general provision of principle, the role of which is to establish the public guardianship institution[9], without its text aiming the exact definition of the acts issued by the authorities of the local government which can be appealed before the contentious administrative, this delimitation being achieved by the „organic law", according to the reference of the constitutional text.

The organic law is law no. 340/2004, a special regulation, an exception both from the provisions of Law no. 554/2004, and from the provisions of Law no. 215/2001, and which, by means of the provisions of art. 19 par. (1) letter e), limits to the administrative acts the scope of the acts which can be appealed before the contentious administrative.

Furthermore, art. 3 of Law no. 554/2004, which refers to the „acts issued by the authorities of the local government" and to the „contentious administrative court" shall be construed by reference to the definition of the activity of „contentious administrative" given by art. 2 par. (1) letter f) of Law no. 554/2004, which refers to the term of „administrative act" provided for by art. 2 par. (1) letter c), and not to the general term of „act".

According to art. 1 par. (8) of Law no. 554/2004, the actions filed by the prefect before the contentious administrative are subject both to Law no. 554/2004, and to special law, including to Law no. 340/2004, which limits to the administrative acts the scope of the acts which can be appealed.

In another opinion, it was noted that art. 123 par. (5) of the Constitution deliberately refers to all the acts of the local government, and such an interpretation is supported by the general obligation incumbent including on the local government, provided for by art. 1 par. (5) of the Constitution, on the observance of the Constitution and of the law in all activities, regardless the nature of the legal relationships they are performed in.

Such an interpretation is also supported by the general role of the prefect established by art. 19 par. (1) letter a) of Law no. 340/2004, respectively the role to „ensure, within the county or, as the case may be, within Bucharest, the application and observance of the Constitution, laws, ordinances and resolutions of the Government, of the other regulatory acts, and of public order". Another argument is that art. 115 par. (7) of Law no. 215/2001 refers, without distinguishing, to the „orders of the mayor".

Therefore, the acts filed by the prefect by means of the contentious administrative shall be deemed admissible, regardless of the type of the acts issued by the mayor.

The High Court of Cassation and Justice decided that, for the interpretation of the provisions of art. 3 of Law no. 554/2004 of the contentious administrative, as further amended and supplemented, in conjunction with the provisions of art. 63 par. (5) letter e) and art. 115 par. (2) of Law no. 215/2001 of the local government, republished, as further amended and supplemented, and of art. 19 par. (1) letter a) and letter e) of Law no. 340/2004 on the prefect and prefecture, republished, as further amended and supplemented, and of art. 123 par. (5)

[7] Dana Apostol Tofan, *Drept administrativ. Volumul II*, (All Beck Publishing House, Bucharest, 2004), p. 49: „*Therefore, in what concerns the termination of the legal effect, the administrative acts shall produce effect until their removal from force, which is regularly performed by the issuing body, by the hierarchically higher authority or by the courts of law, being about suspension, revocation or cancellation*" (A. Iorgovan, op. cit., 2002, p. 69).

[8] The courts of law for the settlement of matters of law, published in Official Journal, Part I no. 501 of 2015.

[9] Elena Emilia Stefan, *Drept administrativ*, p. 145: „*During interwar period, the public guardianship institution was expressly established by the law, the state granting a high importance to this form of administrative control (...) Law no. 554/2004 of the contentious administrative comes to detail the procedural elements of the public guardianship as follows: the prefect can appeal before the contentious administrative court the acts issued by the local government, if he deems them illegal*".

of the Constitution, the prefect is acknowledged the right to appeal before the contentious administrative court, the administrative acts issued by the authorities of the local government[10], within the meaning of the provisions of art. 2 par. (1) letter c) of Law no. 554/2004 of the contentious administrative, as further amended and supplemented.

2.3 Decision no. 12/2015

The third decision which is subject to this analysis is Decision no. 12/2015[11] on the assessment of the referral filed by the Court of Appeal of Bucharest – Division VIII of the contentious administrative and fiscal, by Closure of November 24th, 2014, ruled in Case no. 30.461/3/2013, whereby a settlement in principle is provided on the following matter of law:

„If, under the terms of Law no. 215/2001 of the local government, republished, as further amended and supplemented (Law no. 215/2001), and of Law no. 554/2004 of the contentious administrative, as further amended and supplemented (Law no. 554/2004), the territorial and administrative division, by means of its executive authority, respectively the mayor, is entitled to appeal before the contentious administrative court the resolutions adopted its deliberative authority, respectively the local council or, as the case may be, the General Council of Bucharest".

The matter of law subject to settlement, as formulated by the referring court, aims the right of the territorial and administrative division, by means of its executive authority, respectively the mayor, is entitled to appeal before the contentious administrative court the resolutions adopted its deliberative authority, respectively the local council or, as the case may be, the General Council of Bucharest, under the terms of Law no. 215/2001 and of Law no. 554/2004.

The High Court of Cassation and Justice notes that the modifications occurred in case of the provisions of Law no. 215/2001, do not establish expressis verbis the right of the territorial and administrative division, by means of its executive authority, respectively the mayor, to appeal before the contentious administrative court the resolutions adopted by its deliberative authority, respectively the local council or, as the case may be, the General Council of Bucharest.

The acknowledgment of such a right cannot be inferred by way of interpretation, as a consequence of the removal of the law text expressly providing the right of the mayor to refer to the prefect if he considered that the resolution issued by the local council was illegal.

In such conditions, according to the „*lex dixit quam voluit*" interpretation rule, it can be concluded that the lawmaker did not intend to acknowledge the right of the territorial and administrative division, by means of the mayor, to appeal before the contentious administrative court, the resolutions adopted by the local council or, as the case may be, by the General Council of Bucharest, since, if he had intended to acknowledge such a right of the mayor, he would have done it expressly.

The High Court of Cassation and Justice notes that the provisions of Decision of June 23rd 2003[12] of the High Court – United Divisions, keep their validity, meaning that „the acts issued by the local council and the mayor are independent, and none of these authorities can pursue directly a remedy at law against the other symmetric authority, the sole authority vested with such a power being the prefect". In this respect, we note that the provisions of art. 46, in art. 71 par. (1) and art. 27 par. (1) of Law no. 215/2001, in force on the date of the decision, are included in the content of art. 45 and art. 68 par. (1) of Law no. 215/2001, in force on the date of this decision, respectively in the content of the provisions of art. 115 par. (7) of Law no. 215/2001, art. 19 par. (1) letter a) and e) of Law no. 340/2004 and art. 3 par. (1) of Law no. 554/2004.

Notwithstanding, under art. 62 par. (1) of Law no. 215/2001 and art. 1 par. (8) of Law no. 554/2004, the mayor is acknowledged the right to file court actions and to represent the territorial and administrative division before the courts of law. However, in what concerns the lawfulness of the acts adopted by the local council, both the Constitution of Romania, and Law no. 340/2004 and Law no. 554/2004 establish the express competence of the prefect in the form of the public guardianship control[13].

To accept the theory according to which the territorial and administrative division, by means of its executive authority, namely the mayor, is entitled to appeal before the contentious administrative court, the resolutions adopted by its deliberative authority, respectively the local council or, as the case may be, the General Council of Bucharest, means that the mayor acquires the prerogative of the public guardianship control. Given that the public guardianship control is expressly and restrictedly

[10] Iuliana Riciu, *Procedura contenciosului administrativ* (Hamangiu Publishing House, Bucharest, 2009), p. 131 and the following.
[11] The court panels for the settlement of matters of law, published in Official Journal, Part I no. 773 of 2015.
[12] Published in Official Journal no. 690 of October 2nd, 2003.
[13] Iuliana Riciu, *Procedura contenciosului administrativ*, p. 132: „*The public guardianship control is achieved by a higher hierarchical level authority and shall be exercised only by means of the contentious administrative court, which will rule on the lawfulness or opportunity of the control acts, but there are also opinions which note that this control relates only to lawfulness and not to opportunity. (…) It is important to note that the public guardianship body cannot annul an act deemed to be illegal which was issued or adopted by the body under guardianship, this power belonging only to the contentious administrative court, upon the referral of the body in charged with the public guardianship*".

provided within the constitutional level, by means of art. 123 par. (5) of the Constitution, and, within the organic law level, by means of art. 115 par. (7) of Law no. 215/2001, art. 19 par. (1) letter e) of Law no. 340/2004 and art. 3 par. (1) of Law no. 554/2004, as a prerogative of the prefect, the court of law is not able, by way of interpretation of the provisions in force, to grant to certain competent public authorities something they were not granted by the lawmaker.

Whereas, within the current legislative frame, the lawmaker did not expressly acknowledge the right to file court actions, although when he wanted to acknowledge at the same time the right of several subjects of law to exercise similar or identical powers, he achieved this by introducing express provisions, the High Court of Cassation and Justice admitted the referral and established the following: under the terms of Law no. 215/2001 of the local government, republished, as further amended and supplemented, and of Law no. 554/2004 of the contentious administrative, as further amended and supplemented, the territorial and administrative division, by means of its executive authority, respectively the mayor, is not entitled to appeal before the contentious administrative court, the resolutions adopted by its deliberative authority, respectively the local council or, as the case may be, the General Council of Bucharest.

2.4 Decision no. 13/2015

The last decision analyzed by this study is Decision no. 13/2015[14] on the appeal filed by the Board of the Court of Appeal of Constanta on the interpretation and application of the provisions of art. 2 par. (1) letter f) and art. 10 of Law no. 554/2004 of the contentious administrative, as further amended and supplemented, respectively art. 94 and 95 of the Code of civil procedure, on the nature of and the jurisdiction[15] over the cases contemplating the claims whereby a general directorate of social assistance and child protection requests the obligation of a county or local council or of another general directorate of social assistance and child protection to bear the living costs for the persons benefiting from protection measures provided by Law no. 448/2006[16] on the protection and promotion of the rights of persons with disabilities, republished, as further amended and supplemented, and Law no. 272/2004 on the protection and promotion of child rights, republished, as further amended and supplemented.

In what concerns this recourse in the interests of the law, it is noted that the litigations covered by the referral fall under the scope of the contentious administrative, taking into account the capacity of public authorities of the parties, and their scope consists of the dismissal to settle a petition concerning a right provided by the law.

The legal nature of the correlative rights and obligations to finance the social assistance system is specific to the administrative law, due to the fact the application of the legal provisions claimed in the referral covers the organization and establishment of the powers of the local government bodies and the relations between these bodies.

According to the provisions of art. 32 letter c) and art. 37 of Law no. 47/2006[17] on social assistance national system (in force until December 22nd, 2011) the county councils establish and organize under their subordination, general directorates of social assistance with financial and technical responsibilities in order to support social services; the social assistance is mainly financed from funds allocated by the state budget or local budgets, and according to art. 40 par. (1) of the same law, the county budgets allocated funds for the financing of social services organized within the county and for the financing of social works established under the resolutions of the county councils and municipalities, of the towns and communes or under special law, as the case might be.

In relation to the provisions of Law no. 554/2004 of the contentious administrative, as further amended and supplemented, the legal nature of the relation referred to judgment obviously belongs to the administrative law, due to the fact the application of the legal provisions claimed by court actions cover the organization and fulfillment of the responsibilities of the local government bodies and the relations between these bodies – the powers of the local council and of the county council, on the one hand, and the financing of the general directorate of social assistance and child protection, on the other hand, all of them involving the local government body.

The source of the obligation of payment of the amounts representing the balance between the monthly average costs and the monthly living contribution incumbent on the social assistance services beneficiaries – persons with domiciles in other localities – is an administrative act[18].

[14] The panel with competence to judge the recourse in the interests of the law, published in Official Journal, Part I no. 690 of 2015.

[15] On the one hand, the first opinion considered that these litigations have a civil nature, and the jurisdiction belongs, depending on the value of the claim, to the court of law or to the tribunal, as common law courts. On the other hand, the second orientation of the case law considered that these cases are contentious administrative litigations, and the jurisdiction belongs in the first instance to the tribunals.

[16] Published in Official Journal, Part I no. 1 of 03/01/2008.

[17] Published in Official Journal, Part I no. 239 of 16/03/2006.

[18] Antonie Iorgovan, *Tratat de drept administrativ. Vol. II* (Editura All Beck, editia 4, Bucuresti, 2005), p. 25: „*administrative act is that main legal form of the activities of the local government bodies, which consists of an unilateral and express manifestation of will of granting, modifying or removing rights and obligations, in the fulfillment of public power, under the main lawfulness control of the courts of law*".

In the application of the regulations in the field of social assistance, the local government bodies shall be bound to establish under administrative act the contribution of the community to the financing of the activities for the protection of disadvantaged persons.

The content of the administrative law relations consists of the rights and obligations of the subjects of this relation, the peculiarity of which is that the exercise of the subjective rights is a legal obligation.

It should be stressed out that, according to art. 2 par. (2) of Order no. 468/2009 of the Chairman of the National Authority for Persons with Disabilities on the approval of the Instructions for the application of art. 54 par. (4) of Law no. 448/2006 on the protection and promotion of the rights of persons with disabilities, the request of the leader of the general directorate of social assistance and child protection of the territorial and administrative division where the person with disabilities is domiciled, on the admission of the person in a public residential center of another county than the domicile county, is the administrative act whereby the settlement of the costs is performed.

Furthermore, the legal nature of the litigations having as scope the granting of social assistance benefits and the provision of social services – including those regulated by Law no. 448/2006, republished, as further amended and supplemented, and Law no. 272/2004, republished, as further amended and supplemented – obviously results from the provisions of art. 143 par. (1) of Law no. 292/2011 of social assistance.

According to this legal text, the administrative acts issued by the central and local public authorities on the granting of social assistance benefits and social services provision can be appealed before the contentious administrative, under the terms provided by Law no. 554/2004 of the contentious administrative, as further amended and supplemented.

The High Court of Cassation and Justice admitted the recourse in the interests of the law filed by the Board of the Court of Appeal of Constanta and therefore established that, in the interpretation and application of the provisions of art. 2 par. (1) letter f) and art. 10 of Law no. 554/2004 of the contentious administrative, as further amended and supplemented, respectively art. 94 and art. 95 of the Code of civil procedure, the litigations having as scope court actions whereby a general department of social assistance and child protection requests the obligation of a county or local council or of another general directorate of social assistance and child protection to bear the living costs for the persons benefiting from protection measures provided by Law no. 448/2006 on the protection and promotion of the rights of persons with disabilities, republished, as further amended and supplemented, and Law no. 272/2004 on the protection and promotion of child rights, republished, as further amended and supplemented, fall under the jurisdiction of the contentious administrative courts.

3 Conclusions

This study aimed to analyze four interpretations granted to certain texts of Law no. 554/2004 by the High Court of Cassation and Justice, on which the national courts raised either the issue of a non-uniform interpretation, or of the potential different interpretations of the law, which are yet unsettled by means of a recourse in the interests of the law.

The High Court of Cassation and Justice granted, by means of its interpretation, the clarity so much needed by the judge in the application of the law, having as final goal the confidence in the act of justice of the person subject to the law.

It should be noted that the New Code of Civil Procedure built such a mechanism enabling the access of the person subject to the law, to an uniform interpretation during the legal proceedings, without being necessary to wait the ruling of a final court decision.

The lawmaker made a great achievement for human justice, by guaranteeing to the persons resorting to the courts of law that they will benefit from all the procedural means to achieve a fair and equitable ruling.

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- Law no. 340/2004 on the prefect and prefecture, republished, as further amended and supplemented, published in Official Journal Part I no. 225 of 24/03/2008;
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THE INTERACTION OF INTELLECTUAL PROPERTY RIGHTS WITH THE OBJECTIVES AND COMPETENCES OF EUROPEAN UNION

Alina Mihaela CONEA*

Abstract

Even though, at least superficially seen, the primary law of the European Union did not conferred legislative competence in the field of intellectual property (IP) to the European decisional level, for many categories of IP rights European Union established its own protective systems. This paper assesses the evolution of the amendments to EU primary law that are incident to IP rights protection. It then circumstances the interaction of IP rights with the competences of the European Communities and the European Union. Finally, it highlights several aspects on the legal basis for the European Union action significant for IP rights. Overall, the paper points out the significance of the Court of Justice of the European Union jurisprudence that opened the possibility of a European intellectual property system.

Keywords: *European Union, intellectual property rights, objectives, competences, legal basis, approximation of laws.*

1. Introduction

From the normative point of view, at least apparently, the primary law of the European Union does not confer legislative competence in the field of intellectual property to the European decisional level.

Thus, the founding treaties of European Union (EU) mentions industrial property in just two articles: the first indicates industrial property as one of the possible exceptions to the free movement of goods and the second which states that the Treaties shall in no way prejudice the laws in Member States governing the system of property ownership. Despite that, European Union has established, or is about to do, its own protective systems[1] for the most important categories of intellectual property rights (IP rights).

In order to approach this contradiction, we find useful to analize it given the constitutional nature of primary norms, in their interaction with the intellectual property rights.

We will first address the evolution of the objective sets out in the founding treaties of European Union. Secondly, the paper presents the interaction of IP rights with the competences of the European Communities and the European Union. Finally, we highlight some aspects on the legal basis for the Community and European Union action significant for IP rights.

1. The objectives of the European Communities and European Union Treaties

European Community objectives were set out in Article 2 of the Treaty establishing the European Economic Community (TEC), in 1957:

"*It shall be the aim of the Community, by establishing a Common Market and progressively approximating the economic policies of Member States, to promote throughout the Community a harmonious development of economic activities, a continuous and balanced expansion, an increased stability, an accelerated raising of the standard of living and closer relations between its Member States."* [2]

The provision has been amended twice, by the Treaties of Maastricht[3] and of Amsterdam[4]. The Lisbon Treaty[5] repealed Article 2 TEC, which is replaced in substance by Article 3 Treaty on European Union (TEU).

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* Assist. lecturer PhD, Faculty of Law, "Nicolae Titulescu" University of Bucharest (e-mail: **alinaconea@gmail.com**).

[1] Hanns **ULLRICH** in William Rodolph **CORNISH**, *Intellectual property*, 4 ed. London: Sweet & Maxwell, 1999, p. 22.

[2] Treaty establishing the European Economic Community (Rome Treaty) (1957/1958).

[3] „The Community shall have as its task, by establishing a common market and an economic and monetary union and by implementing the common policies or activities (…), to promote throughout the Community a harmonious and balanced development of economic activities, sustainable and non-inflationary growth respecting the environment, a high degree of convergence of economic performance, a high level of employment and of social protection, the raising of the standard of living and quality of life, and economic and social cohesion and solidarity among Member States", Treaty on European Union (1992), *Official Journal C 191, 29 07.1992.*

[4] „The Community shall have as its task, by establishing a common market and an economic and monetary union and by implementing common policies or activities referred to in Articles 3 and 3a, to promote throughout the Community a harmonious, balanced and sustainable development of economic activities, a high level of employment and of social protection, equality between men and women, sustainable and non-inflationary growth, a high degree of competitiveness and convergence of economic performance, a high level of protection and improvement of the quality of the environment, the raising of the standard of living and quality of life, and economic and social cohesion and solidarity among Member States.", Treaty of Amsterdam amending the Treaty on European Union, the Treaties establishing the European Communities and certain related acts, *Official Journal C 340 of 10 November 1997.*

[5] Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, signed at Lisbon, 13 December 2007, OJ C 306, 17.12.2007, p. 1–271.

In context of the analysis of intellectual property rights within the European Union, of particular interest is the evolution of the objective *„to promote throughout the Community a harmonious development of economic activities"*. Thereby, following the first changes made in 1993 by the Treaty on European Union it becomes *„a harmonious and balanced development of economic activities throughout the Community"*, adding *„a high degree of convergence of economic performance"*. In the wording of Amsterdam Treaty the objective is to promote *„harmonious, balanced and sustainable development of economic activities"* and *a high degree of competitiveness and convergence of economic performance.*

The Lisbon Treaty, which entered into force on 1 December 2009, makes substantial amendments to provisions concerning the Union's objectives, in the context of the replacement of European Community with the European Union. Thus, article 3 of TEU sets, as regards the economic aspect, that the Union *shall work for the sustainable development of Europe based on balanced economic growth and price stability, a highly competitive social market economy*. Moreover, this article reiterates to the greatest extent the provisions of the Treaty establishing a Constitution for Europe[6].

The establishment of the *common market* was one of the instruments available to the Community to achieve its objectives[7]. The notion of *'common market'* did not benefit of a definition in the wording of the EC Treaty, but its scope was outlined in the provisions of Article 3 TCE, which detailed the activities of the Community to achieve its objectives.[8]

The concept of *unity of the market* was one of the basic principles of interpretation of Community law. Removing incompatible national rules *„it must therefore be sufficiently comprehensive to include the abolition of all pecuniary, administrative or other obstacles, for the purpose of achieving a unified market between the member states"*[9].

Within the Community/ EU law the *internal market* concept was shaped gradually[10] being established in the Treaty (with the Single European Act), in Article 26[11] of the Treaty on the Functioning of the European Union (TFEU)[12]. The concept of the *internal market* appears to be narrower than that of a *common market*, the definition of Article 26(2) TFEU providing that:

„The internal market shall comprise an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured in accordance with the provisions of the Treaties".

In the literature[13], it is believed that the language of the *common market* was centred mainly on economic issues; the *single market* has been used particularly in political discourse, while the concept of an *internal market* is typically found in European Union law and judicial decisions[14].

According to settled case-law, the concept of *common market* is defined by the Court of Justice of the European Union (CJUE) in the sense that it „(...) involves the elimination of all obstacles to intra-community trade in order to merge the *national markets* into a *single market* bringing about conditions as close as possible to those of a *genuine internal market*`"[15]. In this respect, the common market is considered as a step to achieve the internal market[16].

According to Article 2(2)(g) of the Treaty of Lisbon, the words "common market" is replaced by "internal market"[17].

The essential question of our analysis is how the intellectual property rights with these restrictions interrelate, given that by their nature they have an effect on intra-Community trade and the competitive structure of the market.

Thus, the EU's objective of establishing an internal market can be considered contrary to a legal

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[6] Treaty establishing a Constitution for Europe, *OJ C 310, 16.12.2004, p. 3–474.*

[7] Together with an economic and monetary union and by implementing common policies or activities referred to in Articles 3 and 4, according to Article 2 TEC.

[8] According to Barents the term "common market" is rooted in the concept of *Binnenmarkt* of German regulations arising in the 19th century. Negotiations on "common market" were based on various existing customs unions in Germany during the 19th century and the Union's common market between Belgium and Luxembourg (1921) and Benelux (1958). EC adds to these common elements the expansion on the free market to services and capital. Barents, René, The autonomy of community law, European Monographs, The Hague: Kluwer Law International, 2004, p. 200.

[9] Judgment in *Sociaal Fonds voor de Diamantarbeiders*, Joined cases 37 and 38-73, EU:C:1973:165, paragraph 7.

[10] Jacques Pelkmans, 'Economic Approaches of the Internal Market', *Bruges European Economic Research Papers (BEER)* 13 (2008).

[11] Which corresponds to former Article 14 TEC.

[12] Consolidated version of the Treaty on the Functioning of the European Union , Official Journal C 326 , 26/10/2012 P. 0001 – 0390.

[13] Paul Craig, "The Evolution of the Single Market", *The Law of the Single European Market: Unpacking the Premises*, Hart Publishing, 2002, p. 40.

[14] There are also opinions that consider the three notions meaning the same in the context of European law: Davies Gareth, *EU internal market law*, London: Cavendish, 2003, p. 3.

[15] Judgment in *Gaston Schul Douane Expediteur BV, C- 15/81, EU:C:1982:135*, paragraph 33.

[16] Helen Wallace and William Wallace, *Elaborarea Politicilor în Uniunea Europeana*, 5. ed. (București: Institutul European din Romania, 2005). p. 91.

[17] This provision repeats, however, the similar provision of the Treaty establishing a Constitution for Europe, *Official Journal* C 310, 16.12.2004, p. 3–474.

situation in which intellectual property rights are within the exclusive national competence. The consequence of this kind of an approach facing towards the national level of regulation is that legislation will be in a considerable extent oriented and elaborate so as to protect the domestic industry of the Member States. This type of regulation could result in a protective system in varying degrees, which can be detrimental to other Member States[18].

Therefore, this national approach to regulation and protection of intellectual property rights appear to conflict with Article 3(3) TEU which provides that *„The Union shall establish an internal market. It shall work for the sustainable development of Europe based on balanced economic growth (...)"*.

Intellectual property rights have a major impact on the economic market[19]. A holder of intellectual property rights has the right to exclude potential competitors from certain actions, such as manufacturing and importing products that infringe its right. It can also impose certain fees. By their nature and their economic purpose, intellectual property rights falls under the rule of the Treaty. Because of the importance of granting such exclusive rights to boost technical and economic progress, Member States were reluctant to subject national rules on intellectual property protection to the principles and norms of the European Union.

Thus, the Court of Justice of the European Union[20] held, regarding the protection of copyright, that,

„Such a prohibition, which would legitimize the isolation of national markets, would be repugnant to the essential purpose of the Treaty, which is to unite national markets into a single market. That purpose could not be attained if, under the various legal systems of the member states, nationals of those states were able to partition the market and bring about arbitrary discrimination or disguised restrictions on trade between member states"[21].

Furthermore, in the case *Polydor v Harlequin*[22], the CJUE stated that,

„The scope of that case-law[23] *must indeed be determined in the light of the community's objectives and activities as defined by articles 2 and 3 of the EEC Treaty. As the court has had occasion to emphasize in various contexts, the treaty, by establishing a common market and progressively approximating the economic policies of the member states, seeks to unite national markets into a single market having the characteristics of a domestic market`.*

Regarding the legal status of the objectives of the European Communities, Koen Lenaerts[24] appreciated that according to the Court of Justice of the European Union, the aims on which the establishment of the Union is based cannot have the effect of "*imposing legal obligations on Member States or of conferring rights on individuals*[25]`. Legal impact will be limited to guiding interpretation of European Union law.[26] A significant example regarding our matter of study, concerns the identification of Community competencies under the provisions of the Treaty, interpreted in the light of Article 2 and Article 3 TEC.

„the principles to be considered in the present case are those concerned with the attainment of a single market between the Member States, which are placed both in part two of the Treaty devoted to the foundations of the Community, under the free movement of goods, and in article 3(g) of the Treaty which prescribes the institution of a system ensuring that competition in the common market is not distorted"[27].

3. Competences of the European Communities and the European Union

Express or implied powers

Under the principle of conferral[28],

„*The Union shall act only within the limits of the competences conferred upon it by the Member States in the Treaties to attain the objectives set out therein. Competences not conferred upon the Union in the Treaties remain with the Member States*."[29]

The doctrine[30] considers that on the matter of intellectual property, jurisdiction of the Court was

[18] Inge Govaere, *The Use and Abuse of Intellectual Property Rights in E.C. Law: Including a Case Study of the E.C. Spare Parts Debate* (London ; Toronto Ont.: Sweet & Maxwell, 1996). p. 42.

[19] CJA Consultants Ltd, European Policy Advisers, *Study on patents: "What are patents actually worth? - the value of patents for today's economy and society*, Britain and Brussels , Report in the project ETD/2004/IM/E3/77, realized for the European Commission, Directorate General Internal Market, 23.07.2006.

[20] The reference will be to Court of Justice of the European Union even for the Court of Justice of European Communities.

[21] Judgment in *Deutsche Grammophon Gesellschaft*, Case 78-70, EU:C:1971:59, paragraph 12.

[22] Judgment in *Polydor/ Harlequin*, Case 270/80, EU:C:1982:43, paragraph 16.

[23] In that case the Court was asked to apply the jurisprudence developed in the field of intellectual property rights and free movement of goods to an external agreement concluded by the EC with Portugal.

[24] Koen Lenaerts, *Constitutional Law of the European Union*. 2 ed. London: Thomson/Sweet & Maxwell, 2006, p. 84

[25] Judgment in *Alsthom Atlantique*, C-339/89, EU:C:1991:28, cited by Lenaerts, ibidem.

[26] Lenaerts, ibidem.

[27] Judgment in *Deutsche Grammophon Gesellschaft*, Case 78-70, EU:C:1971:59, paragraph 8.

[28] Relevant also in the institutional framework, Augustin Fuerea, *Manualul Uniunii Europene*, București, ed. a V-a, Universul Juridic, 2011, p. 83.

[29] Article 5(2) TEU.

[30] Hanns Ullrich in, *Intellectual Property, Public Policy and International Trade* (New York: P.I.E. Peter Lang, 2007).

initially *indirect*[31] in the sense that it resulted from the Court's role as guardian of the principles of internal market integration.

The Treaty establishing the European Community mentions industrial property in just two articles: the first indicates industrial property as one of the possible exceptions[32] to the free movement of goods and the second in which it`s states that the Treaties shall in no way prejudice the rules in Member States governing the system of property ownership.

In this context, an important consideration is that the Lisbon Treaty retains intact the provisions of the two articles. Therefore, CJUE jurisprudence maintains a fundamental significance.

First, Article 36 TFEU (ex Article 30 TEC) provides that,

„The provisions of Articles 34 and 35 shall not preclude prohibitions or restrictions on imports, exports or goods in transit justified on grounds of (...) protection of industrial and commercial property".

Second, Article 345 TFUE (ex Article 295 of TEC) states that,

„The Treaties shall in no way prejudice the rules in Member States governing the system of property ownership"

At first sight, Article 36 TFEU seems to indicate that intellectual property rights does not operate as quantitative restrictions or measures having equivalent to quantitative restrictions, as they are exempted from the rules on the free movement of goods. This argument was, moreover, initially relied upon to support that protection of intellectual property rights must remain the exclusive competence of the Member States[33].

However, exactly this exemption from the free movement of goods principle and the limitation of the second sentence, argued the opposite view, that intellectual property rights are within the competence of Community law. The argument is that if the protection of industrial and commercial property was to be considered by the authors of the Treaty as potential measures having equivalent effect to quantitative restrictions, they would not have included the reference to them in Article 36 TFEU, nor the second sentence of the article would have any sense[34].

The Court stated in one of his first decisions[35] on intellectual property rights that,

„Articles 36, 222 and 234 of the Treaty[36] relied upon by the applicants do not exclude any influence whatever of Community law on the exercise of national industrial property rights".

In 1977, in the case *Carlo Tedeschi v Denkavit*, CJUE has ruled that,

„Article 36 is not designed to reserve certain matters to the exclusive jurisdiction of member states but only permits national laws to derogate from the principle of the free movement of goods to the extent to which such derogation is and continues to be justified for the attainment of the objectives referred to in that article"[37].

As pointed out by Inge Govaere, this paragraph contains two important elements. The first is an expression of that Article 36 TFEU does not confer exclusive jurisdiction to the Member States and therefore, European Union law is applicable to the exceptions provided therein. The rules on free movement of goods are essentially addressed to the Member States. The first objective is to address the restrictions that may be made to intra-communitarian market by the existence of divergent national legislation. CJUE clarified that the exceptions to that rule, as provided by Article 36 TFEU, may allow the national legislation, under certain conditions, to deviate from the principle of free movement of goods.

The second element is the addition of a new limitation to the possibility of invoking Article 36 TFEU, along with that provided by the second sentence of the article. This provision can be seen as a safety measure to ensure that exceptions will not be unduly relied upon.

Therefore, as a general rule, in order to comply with Article 36 TFEU, national legislation must be proportionate and justifiable according to the first sentence and must not conflict with those referred to in the second sentence of Article 36 TFEU.

From this perspective, the CJUE had to decide on the scope of exceptions to the free movement of goods and services within the meaning of Article 36 TFEU. Thus, in 1971, in *Deutsche Grammophon* judgment, the CJUE stated that,

„Article 36 refers to industrial and commercial property.

On the assumption that those provisions may be relevant to a right related to copyright, it is nevertheless clear from that article that, although the treaty does not affect the ***existence*** *of rights recognized by the legislation of a member state with regard to industrial and commercial property, the*

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[31] Prof. Hanns Ullrich, cited above, calls this first step in the interaction of the Court of Justice with the protection of intellectual property rights as a"resilience and respect" approach, p. 206.

[32] **Augustin Fuerea, Drept comunitar al afacerilor, ed. a II-a, Universul Juridic, Bucureşti, 2006.**

[33] Marcel Gotzen: La propriété industrielle et les articles 36 et 90 du Traité instituant la Communauté Economique Européenne, Revue Trimestrielle de Droit Commercial 1958, p. 262- 279, cited by Inge Govaere, *The Use and Abuse of Intellectual Property Rights in E.C. Law: Including a Case Study of the E.C. Spare Parts Debate*. London; Toronto Ont.: Sweet & Maxwell, 1996, p. 43.

[34] Inge Govaere, ibidem.

[35] Judgment in *Établissements Consten/ Grundig-*, Joined cases 56 and 58-64, EU:C:1966:41.

[36] Article 30, 295, 307 TCE in the numbering of the Treaty of Amsterdam; Article 36, 345, 351 TFEU in the Lisbon Treaty numbering.

[37] Judgment in *Carlo Tedeschi v Denkavit*, Case 5-77, EU:C:1977:144, paragraph 34.

exercise *of such rights may nevertheless fall within the prohibitions laid down by the treaty.*

Although it permits prohibitions or restrictions on the free movement of products, which are justified for the purpose of protecting industrial and commercial property, article 36 only admits derogations from that freedom to the extent to which they are justified for the purpose of safeguarding rights which constitute the ***specific subject-matter*** *of such property"*[38].

From the normative point of view, it is remarkable that the two articles[39] of the Treaty on the property were not modified by any of the subsequent amendments to the treaties[40].

However, resuming the disposal of the Treaty establishing a Constitution for Europe and according to Article 118 TEU in the consolidated version of the Treaty of Lisbon[41], the Union acquired competence, covered in an express manner, to establish European titles for industrial property protection.

`In the context of the establishment and functioning of the internal market, the European Parliament and the Council, acting in accordance with the ordinary legislative procedure, shall establish measures for the creation of European intellectual property rights to provide uniform protection of intellectual property rights throughout the Union and for the setting up of centralised Union-wide authorisation, coordination and supervision arrangements.

The Council, acting in accordance with a special legislative procedure, shall by means of regulations establish language arrangements for the European intellectual property rights. The Council shall act unanimously after consulting the European Parliament[42].

Harmonization and unification

Regulatory approach regarding intellectual property rights in the European Union can be of approximation of laws based on Article 114 and 115 TFEU (ex Article 94, ex Article 95 EC Treaty) or the unification at the EU level, based on Article 352 TFEU (ex Article 308 TEC).

Harmonising protection keeps intact the principle of territoriality. Thus, to the extent that intellectual property rights can be obtained, transferred, abandoned or invalidated on the basis of national territoriality, this can cause conflicts that lead to territorial limitation of the market. Harmonization can minimize this effect, but it cannot remove it.

What is significant in the field of intellectual property, is that, except copyright[43], the European Union has established, or is about to do, its own protective systems for the most important categories of intellectual property rights, and also for certain specific matter or sector[44].

The question is whether unification can lead to reverse the effects of territorial limitation of the market. The answer to this question can only be hesitant, as shown by Hanns Ulrich. One argument is that companies are not obliged to have recourse to the Community system of protection that is offered optionally[45].

Legal basis for the Community and European Union action

To remove existing barriers to intra-Community trade due to application of Article 30 TEC (Article 36 TFEU), it can be adopted at EU level harmonization measure, as analysed in the previous section. The possibility of adopting harmonizing measures is based on the fact that Article 30 TEC (Article 36 TFEU) does not confer exclusive jurisdiction in matters concerned to the Member States.

Before the entry into force of the Single European Act, such harmonization measures were adopted on the basis of Article 94 TEC[46].

This article provides that,

`The Council shall, acting unanimously on a proposal from the Commission and after consulting the European Parliament and the Economic and Social Committee, issue directives for the approximation of such laws, regulations or administrative provisions of the Member States as directly affect the establishment or functioning of the common market."

As a result, harmonizing measures were to be undertaken based on unanimity in the Council

The doctrine[47], indicates that this legal basis, Article 94 TEC, has the valence to deprive Article 30 TEC of substance, leaving it inapplicable to matters subject of harmonization directives. The reason is the

[38] Judgment in Deutsche Grammophon Gesellschaft, Case 78-70, EU:C:1971:59, paragraph 11.

[39] Article 36 TFEU (Article 30 Treaty establishing the European Economic Community) and Article 345 TFEU (Article 295 Treaty establishing the European Economic Community).

[40] This is also valid for the Treaty of Lisbon.

[41] Consolidated version of the Treaty on the Functioning of the European Union, Official Journal C 326, 26/10/2012 P. 0001 – 0390.

[42] Article 118, Treaty on the Functioning of the European Union, *Official Journal* C 326, 26/10/2012 P. 0001 – 0390.

[43] Hanns **ULLRICH** in William Rodolph **CORNISH**, Intellectual *property*, 4 ed. London: Sweet & Maxwell, 1999, p. 22.

[44] Council Regulation (EEC) No 2081/92 of 14 July 1992 on the protection of geographical indications and designations of origin for agricultural products and foodstuffs, repealed by Council Regulation (EC) No 510/2006 of 20 March 2006 on the protection of geographical indications and designations of origin for agricultural products and foodstuffs, *OJ L 93, 31.3.2006, p. 12–25.*

[45] Hanns **ULLRICH** in D. Vaver and Lionel Bently**,** *Intellectual Property in the New Millennium: Essays in Honour of William R. Cornish*. Cambridge University Press, 2004, p. 37.

[46] Article114 TFEU.

[47] Inge Govaere, The Use and Abuse of Intellectual Property Rights in E.C. Law: Including a Case Study of the E.C. Spare Parts Debate. London; Toronto Ont.: Sweet & Maxwell, 1996, p. 48.

CJUE judgement in the case *Denkavit*[48]. According to it, the recourse to Article 30 is no longer justified once in that matter was adopted a harmonization directive.

As pointed out by Inge Govaere, Article 94 TEC constituted an important potential base for the harmonization of national laws on intellectual property. However, in practice this has proved difficult, the Member States were reluctant to operate the transfer of competence in regulating the matter of intellectual property[49].

Given the unanimity in the Council provided for by Article 100 TEC (Article 115 TFEU) to avoid blocking decision at EU level when using this legal basis, the Single European Act introduced a new procedure based on Article 100a TEC (Article 114 TFEU).

This allows for the adoption of harmonization measures in codecision and the vote was to be taken in the Council by qualified majority. Loss of veto was counterbalanced by regulating of safeguard measures[50] in Article 100a(4) TEC (Article 114(4) TFEU). Thus,

`If, after the adoption of a harmonization measure by the Council acting by a qualified majority, a Member State deems it necessary to apply national provisions on grounds of major needs referred to in Article 36, or relating to protection of the environment or the working environment, it shall notify the Commission of these provisions`.

In this regard, Inge Govaere believes that, at least potentially, the Single European Act was a return to the situation in which Member States could invoke exceptions to free movement based on Article 114(4) TFEU (ex Article 95(4) TEC). According to Article 352 (1) TFEU (ex Article 308 TEC),

`If action by the Union should prove necessary, within the framework of the policies defined in the Treaties, to attain one of the objectives set out in the Treaties, and the Treaties have not provided the necessary powers, the Council, acting unanimously on a proposal from the Commission and after obtaining the consent of the European Parliament, shall adopt the appropriate measures. Where the measures in question are adopted by the Council in accordance with a special legislative procedure, it shall also act unanimously on a proposal from the Commission and after obtaining the consent of the European Parliament`.

A relevant analysis[51] regarding the legal basis for design protection is carried out by Hanns Ullrich.

The author wonders whether the establishment of unregistered Community design is not a case of "priority through pre-emption". It further considers that the protection of intellectual property rights at the EU level definitely has the potential to replace long-term national protection by mere reason of economy in terms of cost protection. This can be particularly evident in the case of Community Design where protection is granted by simply registration.

A problematic aspect is considered to be extending protection to unregistered EU design. The question is whether Article 352 TFEU (ex Article 308 TEC) authorize the Union to legislate having a pre-emptive effect on intellectual property rights, while, according to Article 36 TFEU (ex Article 30 TEC) and Article 345 TFEU (ex Article 295TCE) Member States have retained at least sovereignty to maintain their own security systems.

4. Conclusions

Accepting that the EU's objective of establishing an internal market can be considered contrary to a legal situation in which intellectual property rights are within the exclusive national competence, CJUE revealed the EU law incidence in the IP rights matter.

We share the view that without imposing legal obligations on Member States, the legal impact of the objectives set out in the Treaties will be limited to guiding the interpretation of European Union law. CJUE ruled, moreover, that the intellectual property rights "must be determined in light of the objectives and Community action".

On the matter of intellectual property, jurisdiction of the Court was initially indirect in the sense that it resulted from the Court's role as guardian of the principles of internal market integration. An important consideration is that the two articles[52] of the Treaty on the property were not modified by any of the subsequent amendments to the treaties. As a result, the Court of Justice of European Union jurisprudence upholds so far a central significance.

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[48] Judgment in *Firma Denkavit*, Case 251/78, EU:C:1979:252, paragrapf 14: `The court of justice has held in its judgment of 5 october 1977 in case 5/77 Carlo Tedeschi v. Denkavit Commerciale (1977) that article 36 is not designed to reserve certain matters to the exclusive jurisdiction of member states but only permits national laws to derogate from the principle of the free movement of goods to the extent to which such derogation is and continues to be justified for the attainment of the objectives referred to in that article . Consequently when, in application of article 100 of the treaty, community directives provide for the harmonization of the measures necessary to guarantee the protection of animal and human health and when they establish procedures to check that they are observed, recourse to article 36 is no longer justified and the appropriate checks must be carried out and the protective measures adopted within the framework outlined by the harmonizing directive`.

[49] Inge Govaere, ibidem., p. 48.

[50] Augustin Fuerea, Drept comunitar al afacerilor, București: Universul Juridic, 2006.

[51] Hanns Ullrich in Vaver, D. and Lionel Bently. Intellectual *Property in the New Millennium: Essays in Honour of William R. Cornish*. Cambridge University Press, 2004, p. 39.

[52] Article 36 TFEU (Article 30 Treaty establishing the European Economic Community) and Article 345 TFEU (Article 295 Treaty establishing the European Economic Community).

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- Council Regulation (EC) No 510/2006 of 20 March 2006 on the protection of geographical indications and designations of origin for agricultural products and foodstuffs, OJ L 93, 31.3.2006, p. 12–25.

MATTERS REGARDING THE HUMAN RIGHTS' PROTECTION IN THE LEGAL SYSTEM

Maria-Irina GRIGORE-RĂDULESCU[*]
Corina Florenţa POPESCU[**]

Abstract

Under the conditions of the existence of the division and balance of the state powers, it arises the human rights' protection issue by each of the titular authorities of the state functions. It is, therefore, asserted an analysis of the judiciary and its enforcement bodies' role in connection to the effectiveness' assurance of the legitimate rights and interests of the holders who bore them and request their defence, observance and protection. At the same time, we propose a comparative approach of the regulation level of the fundamental human rights at international, regional (federal) and national level.

Keywords: *human rights, protection, judicial authority.*

1. Introduction

The human rights issue represents a fundamental pillar of the internal and international public life and, as consequence, the observance of the human's fundamental rights and freedoms embodies a *sine qua non* condition for any democratic governance as well as for any political party, organization, institution or public authority.

The importance of the analysed concept is sustained by the commitment at national, regional and international level of the fundamental rights and freedoms; between the three regulation levels one can observe differences only as formal matter and not as substantive one. Also, the complementarity between the subsidiarity of the commitment and international guarantee of the human rights towards their commitment and guarantee at the domestic level, on one hand and the superiority of the international norms with regard to the human rights towards the domestic regulations, on the other hand and the direct applicability of the international norms with regard to the human rights in the domestic law represent as many arguments in the sense of showing the primary nature of the human rights concept[1].

By approaching the issues regarding the observance of the human rights in the judiciary, we propose to identify the contribution of the legal authority to the human rights' defence and protection, noticing, within this sense, that within the protection guarantees' mechanism of the human fundamental rights, a particular role is given to the judiciary, due to the constitutional commitment of the division and balance of the state powers as well as of the functions assured by the judiciary and the principles on which its establishment and performance is based[2].

Understood as „the general status of the society which is accomplished through the assurance for each individual and for all the individuals, collectively, of the satisfaction of the legitimate rights and interests"[3], the judiciary has as aim the assurance of a similar legal treatment to all the legal entities which are found in similar legal situations, contributing, therewith, to the achievement of the purpose of the legal norms in force[4], being able even to dominate them in certain situations[5] within a historical and philosophical approach too. In other words, the ambivalent relationship between the judiciary and the human rights' protection is supported by the belief had by the humans that the judiciary defends their legitimate rights and interests when these are broken.

In the legal dogma, the term of ‚judiciary' was analysed having two meanings respectively, the legal bodies system on one hand and the activity of solving the legal trials, delivering the sanctions,

[*] Reader, PhD, Faculty of Law and Administrative Sciences, Ecological University of Bucharest (e-mail: **radulescuirinaro@yahoo.com**).
[**] Associated Scientific Researcher, "Acad. Andrei Rădulescu" Institute of Legal Research of the Romanian Academy (e-mail: **coripopescu@yahoo.com**).

[1] Corina Florenţa Popescu, Maria-Irina Grigore-Rădulescu, *The legal protection of the human rights*, (Bucharest: Universal Juridic Publishing Company, 2014), 38 and foll.

[2] See, Ion Suceavă, Nicoleta Diaconu, Nicolae Purdă, Laura Macarovschi, Roberto Ştefan Ababei, Daniela Gavril, *The observance of the human rights within the activity of the police departments*, (Bucharest, 2015), 46.

[3] Nicolae Popa, *General Theory of Law*, 3rd Edition, (Bucharest: C. H. Beck Publishing Company, 2008), 100. To the same sense, Octavia Maria Cilibiu, "Reflections regarding the justice, the judiciary and the administrative judiciary", *Annals of "Constantin Brâncuşi" University from Târgu Jiu, Legal Sciences Series*, 4 (2012): 66.

[4] Maria-Irina Grigore-Rădulescu, *General Theory of Law*, The second edition, reviewed and amended, (Bucharest: Universul Juridic Publishing Company, 2014), 69.

[5] Iulia Boghirnea, *General Theory of Law*, (Craiova: Sitech Publishing Company, 2011), 47.

resettling the broken legitimate rights and interests[6], on the other hand. We consider that both meanings are complementary because the activity described in the explanation of one of the term's meanings cannot be made but by the legal bodies system, as an independent and disinterested state authority.

Interrelated with the judiciary's idea and spirit, there have been developed the jurisdictional bodies which run jurisdictional activities, whose aim is to solve the legal conflicts and assure the laws' observance, on basis of special procedures characterized by an absolute objectivity and impartiality, the most representative type of bodies being the Constitutional Court and the Ombudsman[7].

2. The capacity of the physical person to invoke the rights acknowledgement in front of the judicial bodies

The acknowledgement of the human rights can be invoked in front of the judiciary by the physical person which can be either victim or defendant, the two perspectives offering a different range of rights.

Therefore, if found in the victim hypostasis, the physical person is provided with social and protection rights, as well as with the right to an equitable remedy[8]; one must keep in mind for the purpose of defining the concept of victim and, at the same time, the recognised rights, the distinction operated in the Statement of the Fundamental Legal Principles referring to the victims of criminality and the victims of power abuse, enacted in 1985 by the General Assembly of the United Nations by the Resolution 40/34.

As pointed out in the statement's title, within its content is established a difference between the victims of criminality and the victims of power abuse, a difference noticed in the definition of the concepts and special treatment applicable to each cathegory of victims.

At the statement's first point, the victims of criminality are defined as persons which, individually or colectively, suffered a damage, especially a prejudice of the physical or psychic integrity, a moral anguish, a material loss or an important prejudice of the fundamental rights, by means of actions or omissions which break the criminal laws in force from a state- party, being included here also the ones which sanction the power abuses, no matter of the race, colour, gender, age, religion, nationality, political or any other kind of opinion, faith, opportunity, birth, family status, ethnic and social background and physical capacity.

Within the meaning of the statement, the term of ‚victim' includes, both the person who suffered the prejudice and the family's closest members, the persons found in the direct care of the victim as well as the persons who suffered a prejudice by intervening to help the victim or to stop the victimisation.

Therewith, from the statement's analysis it follows that a person is considered a victim no matter if it suffered as consequence of a deed whose criminal is unknown, prisoner, chase or declared guilty and regardless of its kin relationships with the criminal.

The victims of the power abuse are the persons which endured a pain, a material loss, a severe prejudice of the fundamental rights, a prejudice of the physical or psychic integrity, by means of actions or inactions which do not constitute violations of the judicial legislation but represent violations of the judicial norms recognised with regard to the human rights[9].

As we mentioned, the victims of criminality and the victims of power abuse benefit of the freedom to access the justice and the right to recover the endured prejudice, according to the legislation of the state on whose territory was committed the criminal act and they have to be informed in relation to their acknowledged rights in order to receive the remedy.

As a guarantee for the accomplishment of the victims' acknowledged rights, the mentioned statement committs action directives in the activity of the national judicial and administrative body, represented by: the information of the victims about their role within the procedures and the available possibilities regarding the data and the procedures' run, especially when it is about severe crimes and when this information is requested; the easing of the presentation and examination by the court of the victims' concerns regarding the accomplishment of their interests in question, without being prejudiced their right to defence during the criminal trial; the assistance provision for the victims during the entire period of the trial; measures taken to limit as possible the hardships of the victims, by protecting when needed their private life and assuring the security of their family's members against the disincentives and revenge acts; the avoidance of the unjustified delays regarding the effective grant of remedies to the victims.

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[6] Nicoleta Diaconu, Nicolae Purdă, Laura Macarovschi, Roberto Ştefan Ababei, Daniela Gavril, *The observance of the human rights within the activity of the police departments*, 45.

[7] Regulated in the domestic law of the states, these bodies or institutions can have different names but bear the same meaning of the jurisdictional function.

[8] Ionel Cloşcă, Ion Suceavă, *Treaty of human rights*, 2nd Edition, (Bucharest: V.I.S. Print Publishing Company, 2003), 177; Nicolae Purdă, Nicoleta Diaconu, *Legal protection of the human rights*, The second edition, reviewed and amended, (Bucharest: Universul Juridic Publishing Company, 2011), 166.

[9] Ionel Cloşcă, Ion Suceavă, *Treaty of human rights*, 2nd Edition, 179.

The second capacity under which a physical person can invoke in front of the judiciary the acknowledgement and the observance of its rights is the one of defendant, concept by which is understood, according to the art. 82 from the Civil procedure code, the person against whom was proceeded the criminal trial. Within an extended meaning of the dogma, by criminal is understood the person who is investigated or judged for the committment of a crime, without restriction of freedom or with restriction of freedom[10].

The mechanism of the international judicial and administrative guarantees regarding the protection of the human rights asserts the displayed concerns regarding the formation of a special regime applicable to the defendants, among the rights[11] which can be pleaded by them, one can keep in mind: the pressumption of innocence, the life right, the right to not be subject to torture and inhuman or degrading treatments, the right to defence, the right to an equitable trial, the right to an effective appeal, the right to a double degree of jurisdiction with regard to the criminal offence, the right to not be judged twice for the same offence, the right to receive remedies in case of judicial error[12].

Without conducting an analysis of each of the mentioned rights, we consider necessary to point out that the presumption to innocence embodies the most important guarantee of the human dignity and freedom, starting from the fact that it represents a constitutional principle and, in the same time, the principle under which is subordinated the entire judicial and jurisdictional activity. By virtue of the presumption to innocence, any person is considered not guilty as long as against it was not delivered any final sentence of a judge regarding its conviction, giving therefore, a complete guarantee of the persons' protection during the criminal trial against the arbitration, with regard to the ascertainment and the call to criminal account[13].

In the Romanian law, according to the provisions of the art. 4 par. (1) from the Civil procedure code, „any person is declared not guilty until the establishment of its guilt by a final judge's decision".

Hereinafter, at the second paragraph of the mentioned article, it is shown that 'after the use of all the evidence, any doubt of the judicial bodies to make an apprehension about the trial is understood in favour of the suspect or defendant", confirming the credibility of the logical argument *in dubio pro reo*.

Intercorrelated with the presumption to innocence, the right to defence represents both a fundamental civic right as well as a judiciary's fundamental principle, benefiting of a complete system of guarantees set up during all the stages of the civil and criminal trial and in relation to all the judicial bodies.

The right to defence is regulated at international, regional and national level and, in-line, was the object of some ample doctrinary debates, basically keeping in mind the use of the term with two meanings, a substantive respectively a formal one[14].

Substantially, the right to defence represents the entirety of procedural rights and guarantees regulated by the law which gives to the person (party) the possibility to defend its legitimate rights and interests; formally, the right to defence embodies only the possibility of the person (party) to hire for itself a defender, a purpose taken in consideration by the judicial and constitutional regulation (art. 24) provided in the Law no. 304/2004, republished, with the further changes and completions (art. 15).

Another right with an indisputable value and which benefits of a regulation upon all three levels[15] – international, regional and national – is the free access to judiciary, based on which, any person can approach the judiciary about the defence of its legitimate rights, freedoms and interests. The access to justice cannot be restricted.

Ultimately, all persons have the right to an equitable trial and to the solving of all the causes as soon as possible and expected, by a disinterested and independent court, established according to the law. The concept of „equitable trial" is regulated by the

[10] Nicolae Purdă, Nicoleta Diaconu, *The legal protection of the human rights*, The second edition, reviewed and amended, 167.

[11] According to the art. 83 from the Civil procedure code „During the criminal trial, the defendant has the following rights: a) the right to not make any statement during the criminal trial, its attention being drawn that if it refuses to make statements it will not bear any unflattering consequence and if it will make statements these will be used as evidence against it; a^1) the right to be informed regarding the offence for which it is investigated and the judicial framing of the offence; b) the right to see the file, under the conditions of the law; c) the right to have a chosen lawyer, and if it does not appoint one, for the cases in which is required the mandatory assistance, the right to be granted a public defendant; d) the right to propose the use of evidence under the conditions provided by the law, to claim exceptions and to conclude; e) the right to express any other requests which are in connection to the solving of the criminal and civil angle of the offence; f) the right to benefit for free of a translator when it does not understand, does not speak properly or cannot speak at all Romanian; g) the right to ask for a mediator, in the cases allowed by the law; g^1) the right to be informed regarding its rights; h) other rights provided by the law.

[12] For a detailed analysis of the listed rights, see, Raluca Miga-Beșteliu, Catrinel Brumar, *The international protection of the human rights*, Lecture notes, 5th Edition, (Bucharest: Universul Juridic Publishing Company, 2010), 132-170.

[13] Nicoleta Diaconu, Nicolae Purdă, Laura Macarovschi, Roberto Ștefan Ababei, Daniela Gavril, *The observance of the human rights in the activity of the police departments*, 48.

[14] Maria Fodor, *Civil procedural law*, (Bucharest: Universul Juridic Publishing Company, 2014), 107.

[15] See, for this purpose, art. 8 and 10 from the Universal Declaration of Human Rights, art. 6 par. 1 from the European Convention of Human Rights, art. 21 from the Romanian Constitution and art. 6 from the Law no. 304/2004, republished, with the further changes and completions.

art. 10 from the Universal Declaration of Human Rights, art. 14 point 1 from the International Pact regarding the Civil and Political Rights, art. 6, par. 1 from the European Convention of Human Rights, art. 47[16] from the Charter of the Fundamental Rights of the European Union as well as by the art. 21 par. (3) from the Romanian Constitution and the art. 6 par. (1) from the Law no. 304/2004, republished, with the further changes and completions.

3. The concept of judicial authority. Conceptual confinements.

The judicial authority represents a concept which is widely witnessed within the debates regarding the principle of division and mutual control of the powers, to the support of this idea one should keep in mind the comparison between the three powers embodied in the Essay 78 from the series of the American Constitutional Essays (Federalist Papers) according to which: the executive body bears the community's sword; the legislative approves the budget; the judges have only the mind and the judgment[17].

Preserving the comparative approach of the relationship between the state powers, in the dogma it was assessed that the „Judicial power does not have neither the Strength nor the Will, but only the Judgment (Discernment); and has to, eventually, depend on the support of the Executive power so that its decisions can be put into practice"[18].

Within the regulation of the Romanian Constitution, reviewed, the system of the judicial bodies embodies: the judicial courts (art. 124-130), The Public Ministry (art. 131-132) and the Superior Council of Magistracy (art. 133-134).

The justice is achieved by the judicial bodies, also commonly named judicial courts[19].

According to the disposals of the art. 126 from the Romanian Constitution, the justice is accomplished by the High Court of Cassation and Justice and by the other judicial courts provided by law. The capacity of the judicial courts and the judgment procedure are provided only by law.

With regard to the enforcement of the constitutional norms, according to the disposals stated in the Law no. 304/2004[20] regarding the judicial settlement, republished, with the further changes and completions, the judicial power is enforced by the High Court of Cassation and Justice and by the other judicial courts provided by law. The Superior Council of Magistracy is the guarantor of the judiciary's independence.

The headnote of the Law no. 304/ 2004, republished, sets up the general objectives of this regulatory document; therefore, the judicial settlement is set up having as purpose to assure the observance of the fundamental rights and freedoms of the appointed person stated, mainly, in the following documents: The International Charter of Human Rights, The Convention for the defence of the fundamental human rights and freedoms, The Convention of the United Nations upon the Child's Rights and The Charter of the Fundamental Rights of the European Union, as well as to certify the observance of the Constitution and the country's laws. The judicial settlement has also as primary objective the assurance of the right to an equitable trial and the judgment of the trials by law courts, impartially and independently of any extraneous influences.

The Law no. 304/2004 in connection to the judicial settlement, republished, establishes the cathegories of judicial courts, i.e.: The High Court of Cassation and Justice, courts of appeal; courthouses; special courthouses; judicatures.

By the Law no. 56/1993[21] was regulated the settlement and the functioning of the High Court of Cassation and Justice. Hereby, this court is set up in five departments, a panel of nine judges and the united departments, each having its own expertise. In the art. 1 of this law it is shown that the supreme court follows up the correct and united enforcement of all the laws by all the judicial courts.

Each of the appellate courts executes its inherent expertise within a district which embodies a series of courthouses. Therefore, there have been set up 15 courts of appeal, respectively at: Alba Iulia, Bacau, Brasov, Bucharest, Constanta, Cluj, Craiova, Galati, Iasi, Oradea, Pitesti, Ploiesti, Suceava, Timisoara and Targu Mures. They adjudicate, in the first instance, the cases received by them by law. As courts of appeal, they judge the appeals claimed against the sentences delivered in the first instance by the courthouses and as recourse courts, the recourses stated against the decisions delivered by courthouses with regard to the appeal as well as other cases provided by law.

The courthouses act only in the county seats and in Bucharest city. They judge by their expertise, in the first instance, a series of trials given to them expressly, as courts of appeal in the appeals stated

[16] Art. 47 refers to "the right to equitably solve the issue".

[17] http://www.constitution.org/fed/federa78.htm

[18] Traian Cornel Briciu, *Judicial institutions. Judiciary's settlement principles. Magistracy. Law practice.* (Bucharest: C.H. Beck Publishing Company, 2013), 42.

[19] With regard to the meaning of the concept of 'court', see, Maria Fodor, *Civil procedural law*, 172-173.

[20] Published in the Official Gazette of Romania, Part I, No. 576 from 29 June 2004 and republished in the Official Gazette of Romania, Part I, No. 653 from 22 July 2005.

[21] Published in the Official Gazette of Romania, Part I, No. 159 from 13 July 1993 and republished in the Official Gazette of Romania, Part I, No. 56 from 8 February 1999, with the further changes and completions.

against the decisions delivered by the judicatures in the first instance. As recourse courts, the courthouses judge the recourses against the decisions delivered by judicatures which, according to the law, are not submitted to appeal.

The judicatures represent the conventional courts, which run in every county and in Bucharest city.

Within the limits provided by law, the military courts are also settled and run, respectively the Military Courthouse, The Territorial Military Courthouse and The Military Court of Appeal.

According to the art. 131 from the Romanian Constitution, reviewed, within the judicial activity, the Public Ministry represents the society's general interests and defends the order of law as well as the rights and freedoms of the citizens.

The Prosecutor's Offices act nearby the law courts, run and control the criminal research activity of the judicial police, under the law. The Public Ministry executes its responsabilities through the prosecutors, established in prosecutor's offices, nearby each judicial authority, under the authority of the Ministry of Justice[22]. The responsabilities of the prosecutors are regulated by the disposals of the Law no. 304/2004, republished, with the further changes and completions.

As we mentioned, with reference to the disposals of the fundamental law, the Supreme Council of Magistracy[23] is the guarantor of the justice's independence, bearing the role to ensure the balance within the judicial system, as well the one between the judicial system and other state powers provided by the Romanian Constitution. In other words, the Supreme Council of Magistracy contributes to the assurance, by means of mechanisms specific to the division of state powers, of the independence of the magistrates' activity and its assurance, for the benefit of the democracy and state subject to the rule of law[24].

In the context of a complete analysis of the bodies with attributions and capacities with regard to the justice's achievement, we consider necessary to also mention the activity of the National Anticorruption Directorate[25], which runs as an independent structure, with legal personality, within the Prosecutor's Office nearby the High Court of Cassation and Justice, being independent in relation to the judicial courts and the prosecutor's offices nearby them as well as in the relationships with other public authorities, as well as the activity of the Terrorism an Organized Crime Investigation Department[26], which runs within the Prosecutor's Office nearby the High Court of Cassation and Justice, as a structure with legal personality, specialized in combating activities of terrorism and organized crime.

According to the art. 124 par. (2) from the Romanian Constitution, reviewed, the judiciary is unique, disinterested and equal for all, fact which assumes that there is only one judiciary, accomplished by the same bodies, being prohibited the existence of some extraordinary courthouses, under the constitutional disposals of the art. 126 par. (5) according to which „it is prohibited the settlement of extraordinary courts".

The constitutional principle of the uniqueness, disinterestedness and equalty of the judiciary assumes the use in similar causes of the same procedural rules and the grant of the procedural rights equally to all the trial's participants.

By the art. 21 of the Constitution is made a differentiation between the right to a trial in judiciary, whose titulary can be any person and the obligation to protection which goes to the judicial authorities, only in relation to the legitimate rights and interests, the legitimate or illegitimate character of the claims submitted to the judiciary arising after the case's judgment and being ascertained only by an order of a court.

Against the orders of a court, the concerned persons and the representatives of the Prosecutor' Office can carry out remedies at law, under the law's conditions, which represent procedural means by which it is requested and obtained the cancellation or the partial or total amendment of an order of court[27].

4. Conclusions

The protection and the observance of the human rights represent one of the main scopes of the state subject to the rule of law, a fundamental and

[22] The Ministry of Justice contributes to the proper working of the judicial system and to the assurance of the conditions required for the justice's achievement as public service, the defence of the order of law and civic rights and freedoms, according to the disposals of the art. 2 from the Government Decision no. 652/2009 regarding the establishment and the functioning of the Ministry of Justice, published in the Official Gazette of Romania, Part I, No. 443 from 29 June, with the further changes and completions.

[23] The High Council of Magistracy was established by the Law no. 317/2004, published in the Official Gazette of Romania, Part I, No. 599 din 2 iulie 2004, republished in the Official Gazette of Romania, Part I, No. 827 from 13 September 2005 and, afterwards, in the Official Gazette of Romania, Part I, No. 365 from 30 May 2012.

[24] Traian Cornel Briciu, *Judicial institutions. Judiciary's settlement principles. Magistracy. Law practice.* 61.

[25] The National Anticorruption Directorate runs its activity on basis of the Government Emergency Ordinance no. 43/2002, published in the Official Gazette of Romania, Part I, No. 244 from 11 April 2002, with the further changes and completions.

[26] The establishment, the settlement and the functioning of the Terrorism and Organized Crime Investigation Department was regulated by the Law no. 508/2004, published in the Official Gazette of Romania, Part I, No. 1089 from 23 November 2004, with the further changes and completions.

[27] Nicoleta Diaconu, Nicolae Purdă, Laura Macarovschi, Roberto Ștefan Ababei, Daniela Gavril, *The observance of the human rights in the activity of the police departments*, 49.

extremely important role being referred to, in this sense, to the judiciary. The international, regional and national commitment of the fundamental human rights and the settlement of a system of guarantees with regard to the protection of these rights in the judiciary leads to the conclusion that the essence and the substance of the state of law can be ascertained also from the perspective of the relationship between the activity of the judicial authorities and the accomplishment degree of the fundamental human rights.

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THE PEACEFUL SETTLEMENT OF INTERNATIONAL CONFLICTS, A RIGHT OR DUTY OF STATES?

Dan GUNĂ*

Abstract

The current article aims to establish if the peaceful settlement of conflicts is a duty of international law entities, which must generate a certain active attitude of cooperation, of looking for suitable solutions for international conflicts or, on the contrary, if it is a right whose exertion is left to the sovereign attitude of the states. Moreover, it will also be established which is the legal content of this duty or right of the states and which are the principles guiding the conduct of the states in this field. In the specialized literature, several opinions have been expressed, starting from the one that this duty does not exist, whether we speak of legal or political conflicts, continuing with opinions stating that this duty exists only when it comes to the conflicts referred to by article 33 of the U.N. Chart, namely those whose extension could endanger the peace keeping process and international security. Moreover, there have also been expressed opinions according to which this duty exists and has a general nature, concerning any type of conflict. In our opinion, the spirit of the UN Chart, the clear provisions of article 2 correlated with article 33, completed by several resolutions of the UN General Assembly adopted by mutual agreement, but also some provisions for this matter from the statutes of the main international organizations, establish a duty to settle conflicts peacefully.

Keywords: *peaceful settlement of conflicts, the UN Chart.*

1. Introduction

The issue debated by the current study is of a real interest taking into account the international contemporary context, troubled by conflicts like those in Ukraine and Syria, but also by the terrorist damage which keeps spreading around, by taking advantage of the instability generated by the internal or international conflicts. The unexpected consequences of the absent fast peaceful settlement of conflicts, irrespective of their nature, prove us that this settlement must be a priority for the foreign policy of both the states involved and the international community. We are speaking, among others, about the crisis generated in the E.U. by the phenomenon of the emigration of the population affected by these conflicts and not only. The serious border incident involving Turkey and Russia, which culminated with the crash of a Russian military plane, followed by tensions in the bilateral relation, but also the reaction of NATO (where Turkey is an important member) point out the considerable importance of the current study. By reference to the strictly theoretical aspects related to this tensioned international situation, we can reach the conclusion that the peaceful settlement of conflicts is an extremely actual field, even if it has been studied in the specialized literature and cross-border practice for a long time. Specialized literature contains several studies regarding the methods for the peaceful settlement of conflicts, but we consider that the researches in the field must also converge towards consolidating this duty, for both the states directly involved and the international community. The passive attitude adopted by some states, but also international organizations, with important consequences upon international stability, represent solid grounds for the current study.

In order to establish whether there is a duty to settle conflicts peacefully, the current study shall take into account several international documents which emerged in the conventional UN practice, but also of some important regional organization like OAS, AU, A.S.E.A.N and the bilateral practice of states. We also find relevant for the issue under research examining the legal practice of the International Court of Justice, but also the main opinions expressed by the specialized literature regarding the aspects analyzed.

2. The duties of international law subjects on the basis of the principle related to the peaceful settlement of international conflicts

Before the actual analysis of these duties, we consider appropriate presenting some controversies which emerged in regard to them, both in the international law literature and practice.

First of all, it must be established if there is a duty to settle international conflicts, and if it exists, which are its nature and the types of conflicts that it concerns. There are authors who consider that states are not bound to settle their international conflicts, this consideration being valid both for serious legal conflicts, but also for side political procedures[1]. There are points of view according to which this duty regards only the conflicts referred to by article 33 of

* **Assistant Professor**, "Valahia" University of Târgoviște, Faculty of Law and Administrative Sciences, Târgoviște, Romania, (e-mail: **gunadan@yahoo.com**).

[1] Malcolm N. Shaw, *International Law*, Sixth edition, Cambridge University Press, 2008, p.1012.

the UN Chart, namely those whose extension *could endanger the peace keeping process and international security*[2]. Moreover, there are also points of view which consider that the duty has a general nature, concerning any type of conflict[3]. Some authors have various points of view, that there is no duty to settle conflicts, but if the states want for this settlement to take place, then they must do it on a peaceful way[4].

In the analysis of this controversy, we consider necessary to take into account the purpose of public international law, but also the way in which it is reflected in international normative acts. Generally, the accepted purpose of international law is the maintenance of international peace and security. In order to reach this purpose, the peaceful settlement of conflicts must be, by any means, the only manner to resolve disputes, a conclusion imposed by the fact that nations gave up at the use of force and the threat to use force. This objective of international order can be found in several international treaties and documents. Therefore, the UN Chart provides at article 1 that the purpose of the United Nations is to maintain international peace and security, an objective for which the organization shall take effective collective measures in order to prevent and remove the threats against peace and stop any aggression act or other peace infringement. Moreover, article 2 point 3 establishes that "all the Organization members shall resolve their international conflicts by peaceful means, so that international peace and security, but also justice, are not endangered". The Chart takes over article 33, referring to those conflicts whose extension could endanger international peace and security.

The principle is also present in several resolutions adopted by the UN General Assembly, like: Resolution 42/150 from December 1987 on the peaceful regulation of the conflicts between the states, Resolution 2625 from 1970 on the friendly relations between the states, Resolution 37/590 from December 1982 on the peaceful regulation of international conflicts, Resolution 43/51 from December 1988 on the prevention and elimination of disputes and situations which can affect international peace and security and the role of the UN in this field. We have mentioned only some of the most important resolutions (many of them being adopted by mutual agreement), but the list can continue, as the matter presents interest FOR the Organisation and specialists in the field. Going back to the analysis of the duty to resolve international conflicts, in the legal literature but also international practice, some controversies emerged starting from the existence of this duty, but also from other aspects like the types of conflicts concerned by the duty. Some authors claimed that there is no such general duty in the absence of a special agreement and especially as long as there is no threat to use force or to the actual use of force[5]. Moreover, it is also invoked the practice of PCIJ, more concretely the file case from 1923between Finland and Russia regarding East Karelia, in which the court ruled by giving the opinion from July 1923, according to which no state can be forced against its will to make a dispute subject to mediation, arbitration or any other form of peaceful settlement of conflicts. It is also invoked the ICJ legal practice, namely the opinion from 1949 regarding the amends for the damage suffered in the UN service; among others, it is underlined that no pretention can be subject to the jurisdiction of an international court without the agreement of the concerned state. Regarding these arguments, we can make the following observations:

- first of all, reducing the conduct of the states only to not using the force in case of disputes would mean ignoring the UN Chart, but also its spirit, requiring an active attitude of cooperation between the states, which could lead to the peaceful settlement of conflicts.

- secondly, the practice of PCIJ mentioned before took place before the UN Chart, which changed the vision regarding the attitude of the states when it comes to settling disputes. We agree that a state cannot be made to accept the jurisdiction of international courts in the absence of its consent, a fact established for instance by the ICJ statute, at article 36, which is the natural consequence of the sovereign equality of states. Moreover, we can agree that, in the absence of its consent, a state cannot be in principle forced to take part in a procedure for the settlement of conflicts, no matter if it has a jurisdictional character or political-diplomatic one. But this statement is merely theoretical, in the current circumstances of the development of international law. First of all, we are taking into account the spread of cross-government organisations, of international courts, but also an increase of international treaties as legal sources. The common point of all these international realities is the fact that they are based on the principle (among others) related to the peaceful settlement of conflicts. International organisations provide for the duty to resolve conflicts peacefully in their statutes, rendering available several

[2] Alain Pellet, *Peaceful Settlement of International Disputes*, Max Planck Encyclopedia of Public International Law, Heidelberg and Oxford University Press, 2012, p.5.

[3] Alexandru Bolintineanu, Adrian Năstase, Bogdan Aurescu, *Drept internațional Public*, 2nd edition, All. Beck Publ. House,2000, p180, Giorgio Bosco, *New trends on peaceful settlement of disputes between states*, North Carolina Journal of International Law and Commercial Regulation, 1991, p.235.

[4] Martin Dixon, *Textbook of International Law* , 3rd edn., Blackstone Press, 1996, p.248.

[5] Richard B. Bilder, *An Overview of International Dispute Settlement*, Legal Studies Research Paper Series Archival Collection, Emory Journal of International Dispute Resolution, Vol. 1, No. 1 (Fall 1986), p.7.

mechanisms for this purpose. A state, once it has become a member of an organisation, takes upon these duties. The best example is UN, which provides for the duty of a peaceful settlement of conflicts, leaving to states the freedom to choose the way to accomplish it. Under the circumstances in which almost all the world states are UN members, the duty to settle conflicts peacefully is a general one. Moreover, there are several regional organisations including the duty of the peaceful settlement of conflicts in their statutes. For instance, the OAS Chart, at Chapter V, article 24, the Chart of African Union, at article 4, the A.S.E.A.N. Chart at chapter VIII, article 23. The bilateral practice points out an increase of the preoccupations for establishing mechanisms to settle disputes even in relatively new fields of the international law, like the international environmental law. The analysis of international contemporary relations points out that states, in most of the cases, are interested in resolving their disputes, and that this resolution is usually sought ever since the beginning of the dispute. Moreover, states have become more preoccupied with preventing disagreements, there being created cooperation, communication and early warning mechanisms. A major interest of the international community but also of the states which are parts in a dispute is to maintain peace in order to settle a conflict. This interest, stipulated in the UN chart ever since the beginning justifies, in certain conditions, the intervention of the international community in the internal affairs of a state, a fact which any state naturally wants to avoid[6]. Another general reason for the resolution of disputes is avoiding material and human damage. This interest is first of all of the states involved, but also of other states like the neighbouring ones or in an alliance relation. States have a common interest not only in removing the state of danger for the international peace and security, but also in the existence of friendship and good cooperation relations. In this climate, states can develop advantageous economic and cultural relations. The fact that states remove the state of danger for international peace does not mean that it disappears completely, as it can get reactivated in favourable conditions. For this reason, the attitude of states must be that of an active collaboration for the settlement of disputes. We agree that the existence of some disputes does not constitute an impediment in these relations, but the essential thing is the nature and gravity of the disputes and not least the attitude of the parties. Specialized literature has upheld the idea that, sometimes, states are interested in leaving certain conflicts unresolved[7]. Thus, if it is foreseen that the result of negotiations would do nothing but raising tensions even more, it is better for the conflict to be "frozen". As an example, we can mention the 1959 Antarctic Treaty, saying at article IV that the parties were not waiving by means of that treaty their territorial claims or sovereignty rights regarding Antarctica. In these situations, states conclude agreements according to which they do not waive their claims but they do not make others either and they also commit not to perform anything capable to modify the initial statute. In these situations, it is preferable for the states to fulfil their duty to act for the peaceful settlement than resorting to the use of force. Regarding these situations encountered in international relations, we agree that a temporary compromise solution is preferable to an apparent complete resolution of the conflict. In our opinion, the settlement of some conflicts can last for longer, but solid solutions are preferable, obtained after many years of negotiations, instead of apparent settlement solutions.

The opinions expressed in specialized literature state that the principle of the peaceful settlement must be interpreted, as it does not forbid the states to decide by means of an agreement that they will not settle a conflict, as long as this solution does not endanger international peace. Consequently, if a dispute has such a potential, the duty to settle it is also a consequence of the interdiction to use force or to threat to use force[8].

Consequently, we believe that the debate whether there is a settlement duty is no longer actual, as more important for us are the aspects concerning the length of this duty (both in regard to the field and persons involved), but also its nature, considering if it is a result or behavioral one. For determining these aspects it is necessary to analyze some provisions of the UN Chart, some provisions of the Resolutions of the General Assembly with relevance in the field but also the legal practice of the ICJ. There will also be taken into account similar provisions from the constitutive acts of some important regional organizations like: OSCE, OAS, AU and ASEAN.

As for the UN Chart, article 2(3) of it provides for the duty of the states to settle their international disputes by peaceful means, so that the international peace and security, but also justice, are not endangered. Some authors have interpreted that the purpose of the article is for the settlement to be done peacefully, but it is not instituted the duty of settlement[9].

Other authors have interpreted that this article establishes a negative duty in its essence, namely that the states must not settle their disputes by means which would endanger international peace. In our opinion, this article institutes a duty to settle international conflicts and this duty has a general nature, as the text does not make any distinction when speaking of conflicts and when no distinction is made by law, then we shouldn't make one either. We cannot say that it is instituted a

[6] D **N** Hutchinson, *The Material Scope of the Obligation Under the United Nations Charter to Take Action to Settle International Disputes*, Australian Yearbook of International Law, 1993, vol 14, p.8.

[7] Richard B. Bilder, *quoted works*, p.6.

[8] Alain Pellet, *quoted works*, p.2.

[9] Martin Dixon, *quoted works*, p.275.

negative duty of not using force, as this is the consequence of the provisions of article 2(4), which institutes the principle of not using force or the threat to use force. The text imposes a positive duty to act for the peaceful settlement of the conflict. What it should be underlined here is the fact that the text clearly speaks of "international conflicts", unlike article 33, which uses the expression "any conflict" and makes a slightly vague reference to justice, which is no longer present at article 33.

Starting from the content of article 33, which presents the category of conflicts which shall be settled peacefully, namely those whose extension could endanger the peace and security keeping process, some authors have upheld the idea that only the category mentioned above is mandatory[10]. We consider that the text should be interpreted in correlation with article 2(3), which institutes a general settlement duty. In relation to this text, article 33 appears as a special norm, underlining the need for a peaceful settlement of the more serious conflicts. Article 2(3) institutes a principle for the peaceful settlement of any conflict, even more of those referred to by article 33. We can also speak of an argument of texts topography, article 2 being included in the introductory part of the Chart regulating principles, while article 33 is part of a special chapter dedicated to the peaceful settlement of conflicts. As a consequence, we believe that the two do not exclude one another, but complete each other, determining the regulation area. Regarding the notion of dispute which must be peacefully settled, it can be noticed that article 2(3) speaks of an "international dispute", while article 33 refers to "any dispute". This expression from article 33 generated another controversy related to whether only international conflicts must be peacefully settled or also the internal ones which, due to their gravity, endanger international peace and security. The analysed field is extremely sensitive, due to the requirements of the sovereignty principle and the lack of intervention in the internal affairs, also generating controversies about the intervention right based on humanitarian reasons. For this purpose, we can give the example of several civil wars which affected and still affect Africa and Europe (the case of Yugoslavia). In our opinion, we believe that the text must be interpreted that any dispute, even the internal ones, *which damages the international peace and security*, must be settled in accordance with the principles established by the UN Chart, including that related to the peaceful settlement. Some interesting interpretations also emerged in the international practice in regards to the existence or the absence of a dispute. The enforcement of a peaceful settlement method, be it political or jurisdictional, depends on the existence of a dispute[11]. At least one of the parties must prove the existence of a conflict, even if the other denies it. The ICJ ruled like this for the East Timor, when Australia argued that it was not part of a relevant international dispute. The case was referring to the objections of Portugal regarding the negotiation and the conclusion by Australia and Indonesia of the 1989 Treaty on the East Timor, which according to Portugal was transgressing its administration rights, but also the right to make decisions of the population in Timor. As a reply, Australia claimed that the dispute of Portugal was in fact with Indonesia. The Court ruled that it was not relevant whether the true dispute was between Portugal and Indonesia, as Portugal had the right, justified or less, of not complaining against Australia. Consequently, as long as there is a contradiction between the parties regarding the legality or the facts, it is clear that a dispute between Australia and Portugal emerged.

Regarding the field of the entities subject to the duty to settle disputes peacefully, it must be underlined that the logics of the UN Chart was directed particularly towards the states. But this changed starting with 1945, due to the evolution of international law. Therefore, in our opinion, among the international law subjects which have international law related duties, like the one in question, should also be found the international cross-government organizations. Regarding the international liberation movements, they enjoy the legal right to use force, but we believe that they should seek first of all to meet their objectives peacefully, and only if this is not possible to use force in exerting their self-governing right. But in the contemporary international reality it can be noticed an increase of civil wars and of internal conflicts with a potential impact upon the regional security. As a consequence, the UN Security Council and General Assembly resorted to non-state actors (particularly the factions involved in civil wars) to find peaceful solutions[12]. Starting with the end of the '70s, both the Council and the Assembly have urged all the interested parties, including the NGO-s, to find peaceful solutions. Since states allow private entities (natural or legal persons) to settle the conflicts with them by means of international law (as it happens with the human rights or direct investments), the more necessary it becomes to enforce the duty to settle conflicts peacefully also in this relation private-state[13]. We also share this point of view, as irrespective of the nature of the subject involved in the conflict, the value transgressed are the same, namely life, health and freedom of the people. These fundamental human values must be observed by both the legal collective and individual subjects

[10] Alain Pellet, *quoted works*, p.5.

[11] Donald R. Rothwell, Stuart Kaye, Afshin Akhtarkhavari, Ruth Davis, *International Law: Cases and Materials with Australian Perspectives*, Cambridge University Press, 2010, p.206.

[12] For instance: the Resolutions of the Security Council No. 389/ 22.04.1976 on East Timor, 435/19.09.1978 regarding Namibia, 1906/23.12.2009 regarding the situation in the People's Republic of the Congo, 1781/15.10.2007 regarding the situation in Georgia.

[13] Alain Pellet, *quoted works* p.6.

From the perspective of the moment when the duty to settle conflicts peacefully appears, this duty applies all the time, even when the conflict has become an armed one. Article 3 of the Hague Convention from 1907 establishes this. Moreover, resolution 2625 of the General Assembly establishes that states must seek the fast resolution, ever since the start of a conflict. The resolution must be fair. The resolution also underlies that this duty continues to be applied even in the eventuality of the failure in using a method.

Another important aspect related to the duty to settle conflicts peacefully is the good faith which states must show when looking for solutions for settling the conflict. Good-faith means an attitude of honour, honesty and fairness, which states must show in resolving conflicts. The good faith principle can also be found in several international treaties, first of all in the UN Chart, at article 2(2)[14]. According to some opinions expressed in specialized literature, when introducing the article above in the Chart, the objective pursued was, among others, to insure a balance between political and legal interests, but also between the influences of the UN members[15]. Thus, while states benefit equally from rights on the basis of their sovereignty, the good faith clause insures an honest observance of the duties committed to by means of the Chart.

The observance of the good-faith principle when it comes to the resolution of conflicts has also been underlined by the ICJ legal practice in file cases such as Gabcikovo-Nagymaros, the Lanoux Lake and the air incident between Pakistan and India from 1999. References to good faith can also be found in the statutes of other international courts, like the International Criminal Court, at article 86, and at article 23 from the statute of CIRDI. The International Tribunal for the Law of the Sea used in its activity article 294 of the Convention regarding the Law of the Sea, which explicitly calls for the settlement of disputes in the good faith spirit[16].

3. Conclusions

In conclusion, we believe that we can speak of the existence of a duty to settle disputes (irrespective of their gravity) which belongs to all the international law subjects, as a result of the following arguments:

the purpose of international law is to maintain international peace and security and, for accomplishing this goal, states must show an attitude of cooperation and good faith, which involves including the peaceful settlement of the conflicts emerging between them. We cannot speak of international cooperation and normal relations between states which have unresolved "frozen" conflicts. Freezing the conflict must not be a long term solution, but a first step at most towards the ultimate settlement of disputes, avoiding losses of human lives and material damage. States must continue to negotiate in good faith until reaching a fair solution. For this purpose, they are free to use any settlement method they want, as long as this is a peaceful one.

the most important multilateral regulations, like the UN Chart and the statutes of the other regional organizations, provide for the settlement duty. Several bilateral agreements follow the same regulation line.

the spread of international courts and organisations constitute a clue regarding the will of the states to cooperate and settle disputes. For the same purpose, states have become more preoccupied with preventing disagreements, so that several cooperation, communication and early warning mechanisms have been created.

We consider that the specialized literature must approach the issue of the peaceful settlement of internal conflicts, the way in which the international community must intervene, but also the issue of the accountability for not observing the duty to settle disputes peacefully, irrespective of their nature.

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[14] According to it, "All the Members of the Organisation, in order to insure for all the rights and advantages emerging from their quality as Member, must fulfil in good faith the duties assumed according to the present Chart".

[15] JP Müller, *Vertrauensschutz im Völkerrecht, Max-Planck—Institut für Ausländisches Öffentliches Recht und Völkerrecht, Beiträge zum ausländischenöffentlichen Recht und Völkerrecht*, Band 56 , Köln, Carl Heymanns Verlag, 1971, p.226.

[16] Marion Panizzon ,*Good Faith in the Jurisprudence of the WTO,* Hart Publishing, Portland, OR, 2006, p. 15.

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BRIEF CONSIDERATIONS ON THE PRINCIPLES SPECIFIC TO THE IMPLEMENTATION OF THE EUROPEAN UNION LAW

Augustin FUEREA[*]

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 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.

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[*] Professor, PhD, Faculty of Law, "Nicolae Titulescu" University, Bucharest (e-mail: **augustinfuerea@yahoo.com**).

[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").

[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.

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.
- 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

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[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.

[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.**

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.

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

[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.
[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 Dumitraşcu**, „*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.

which initiated the draft 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 consulted[23].

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].

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 States27: 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 instance28 by punishing infringements of EU law, as strictly as infringements

[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.

[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:

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 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 TEC[35], 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 features[37]: 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".

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.

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[29] http://europa.eu/legislation_summaries/institutional_affairs/decisionmaking_process/l10125_ro.htm

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[32] 27 September 1988, case 204/86 http://curia.europa.eu/juris/celex.jsf?celex=61986CJ0204&lang1=ro&lang2=FR&type=NOT&ancre=

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[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

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[37] According to **Guy Isaac, Marc Blanquet**, *op. cit*., pp. 101-102.

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UN SECRETARY- GENERAL'S FORMS OF INVOLVEMENT IN THE PEACEFUL SETTLEMENT OF INTERNATIONAL DISPUTES. THE DIPLOMATIC MEANS

Oana-Adriana IACOB[*]

Abstract

The United Nations Secretary- General is a symbol and an instrument of the peaceful settlement of international disputes, with a proven effectiveness in the prevention and resolution of conflicts, even in the most difficult political contexts. The configuration of this distinguished function is largely the result of a long evolutionary process which ultimately provided the occupants with a repertoire of practices that define a powerful and influential role in maintaining the international peace and security. The UN Secretary General's endeavours in the field of peaceful resolution of conflicts may include traditional diplomatic means, such as good offices, mediation and international inquires. Nevertheless, sometimes the traditional techniques of diplomatic approach require the complementary use of unofficial, discreet diplomatic means (such as secondary diplomacy - track two diplomacy - and hybrid diplomacy - track one and a half diplomacy)which may enable a superior information and trigger new ways of action. The present study aims to explore the political and diplomatic means, as forms of involvement of the UN Secretary-General in the peaceful settlement of international disputes and as part of the wider and powerful role in the maintenance of international peace and security.

Keywords: *United Nations, Secretary-General, peaceful settlement, diplomatic means.*

1. Introduction

Evolving from the concepts of idealism in international politics, that have emerged in the first half of the twentieth century, inspired by a new vision on the evolution of the international system, the United Nations Organization has proved countless times its centrality in the maintenance of international peace and security. The foundation of the United Nations Organization was not, however, inspired simply by an idealistic enthusiasm, but also by the international community's necessity of ensuring a favourable environment for the consolidation of inter-state harmony, cooperation and structural peace. Beyond the common goals and principles, agreed by the Member States with the adoption of the UN Charter, given the genesis and composition of the Organization, there is a risk that the Organization's work is subjected to a combination of national interests. Often in UN 's history, even if the Organization acted as an independent structure, Member States (whether it was a single powerful state or several states with common interests) tried to impose their own interests and influence UN's actions to their own benefit. In such a context, antagonisms and subsequent blockages have emerged, inevitably, within the main deliberative and executive bodies.

In this institutional context, marked by various combinations of national interests, there was a great necessity for an impartial, neutral agent that would protect the UN's highest ideals and principles. It would be the Secretary General of the United Nations, head of one of the Organization's main bodies (the Secretariat), that, despite the function's lack of decisional powers, through its position and role in the institutional structure of the UN, was enabled to exert enough influence in order to effectively intervene as a pacificator agent and as a defender of UN's principles. Perhaps, initially, UN's founders did not foresee the potential of this high function, but a number of factors - like the configuration, in rather vague terms, of the High Official's attributions in the UN Charter, the continuous challenges that the international political context posed to the various occupants of this function and, not least, the latter's remarkable personalities and knowledge that influenced greatly the evolution of the function - endowed the position of the UN Secretary General with some unique features.

One of the key features of this position, underlying every action taken by the Secretary General for the maintenance of international peace and security, is impartiality. Impartiality is a guarantee of efficiency for actions undertaken for the peaceful settlement of international disputes, as well as for any other activity implemented by the Secretary General with the scope of preventing or defusing antagonisms that may endanger international peace and security. Any breach of impartiality could cast a shadow on the High Official's reputation and prestige as well as on the usefulness of the office and ultimately on the Organization's role in the maintenance of international peace.

The Secretary General's involvement in the processes of peaceful settlement of disputes can take various forms. For instance, mediation, good offices and international enquiries undertaken by the High

[*] Oana - Adriana Iacob, PhD candidate, Faculty of Law, "Nicolae Titulescu" University of Bucharest (e-mail: **oana.iacob.a@gmail.com**).

Official have proven to be efficient in numerous cases of international disputes. Gradually, the international developments and the emergence of new concepts in international law, have also imposed new types of approach to conflictual situations.

This study aims to explore, through descriptive and logical analysis, from a legal and historical perspective, the political and diplomatic means, as forms of involvement of the Secretary General in the peaceful settlement of international disputes. The elaboration of the study is based on the analysis of the UN Charter's provisions regulating the peaceful settlement of international disputes, as well as of the subsequent legal developments consecrated by other international documents and of the relevant regulations of UN Secretary General's role and attributions. The analysis of the legal basis for the Secretary General's involvement in the peaceful settlement of disputes also has in view some of the author's previous research findings, as reflected in the study "Configuring the role of the United Nations Secretary - General in the peaceful settlement of international disputes. Relations with the Security Council and the General Assembly"[1].

Various Secretary Generals' reports and speeches, revealing important theoretical constructions, inspiring new directions in the evolution of the function and revolutionizing the techniques used for the peaceful settlement of disputes, have been analysed and cited as primary sources. In addition, the paper also has in view the existing literature on the role of the Secretary General.

2. Stages of conflicts and the UN Secretary General's involvement in their peaceful resolution

Previous research in the field of conflict resolution showed that conflicts are dynamic processes, "composed of alternating cycles of escalation and de-escalation".[2] Usually, researchers and specialists illustrate graphically this dynamic process through a curve or a chart, divided so as to represent the different stages identified in the evolution of a conflict[3]: latent conflict, emergence of conflict, escalation, stalemate, de-escalation, dispute settlement and peace-building. It must be said, however, that, most often, in practice, conflicts do not go through a pre-established trajectory and the transition from one phase to another is very difficult to determine.[4]

Theoretically, the Secretary-General may intervene - including by making use of diplomatic means of peaceful settlement - in either phase of the conflict. However, it was demonstrated that the intervention of the Secretary General is generally more efficient in the early stages of the conflict, through activities of preventive diplomacy, undertaken with the purpose of averting the conflict or stopping its escalation. Boutros B. Ghali[5] stated, in his well known report "An Agenda for Peace: preventive diplomacy, peacemaking and peacekeeping", that "the most desirable and efficient employment of diplomacy is to ease tensions before they result in conflict - or, if conflict breaks out, to act swiftly to contain it and resolve its underlying causes."[6]

The intervention of the UN Secretary General can also be effective in times of calmness and de-escalation subsequent to outbursts of aggression, through diplomatic activities within peacemaking, that entail actions undertaken with the purpose of bringing closer the views of the parties in conflict, using the means of peaceful settlement provided in Chapter VI of the UN Charter.[7] The Secretary-General may also intervene when the communication between the parties is irretrievably blocked, in situations that require the establishment of peace-keeping operations, as well as within subsequent missions of peace-building, conducted with the purpose of identifying and consolidating post-conflict structures in order to avoid a relapse of conflict.

Activities of peaceful settlement may be mandated by the deliberative bodies or undertaken independently by the Secretary General. Any intervention of the Secretary General must take place in accordance with the Charter's provisions, within the limits of the international law.

3. Legal basis for the UN Secretary General's involvement in the peaceful settlement of disputes

The UN Secretary General's involvement in the peaceful settlement of disputes is legally based

[1] See Oana - Adriana Iacob, *Configuring the role of the United Nations Secretary - General in the peaceful settlement of international disputes. Relations with the Security Council and the General Assembly* - paper presented at the International Conference "Challenges of the Knowledge Society", the 6th Edition, Bucharest, 11-12 May 2012.

[2] Magdalena Denisa Lungu, *Rolul organizațiilor internaționale în soluționarea pașnică a diferendelor internaționale*, (Bucharest, Universul Juridic, 2010), p. 52.

[3] *Ibidem*, p. 53.

[4] *Ibidem*, p. 52.

[5] Boutros Boutros - Ghali was an Egyptian politician and diplomat who served as the sixth Secretary-General of the United Nations from January 1992 to December 1996.

[6] Boutros B. Ghali, *An Agenda for Peace. Preventive Diplomacy, Peacemaking and Peace-keeping*, 17 iunie 1992, A/47/277 –S/24111, para. 23, available http://www.un-documents.net/a47-277.htm, accessed 12.02.2016.

[7] *Ibidem*, para. 20.

on the UN Charter's provisions, being implemented under the function's attributions contained therein.

Activities with the scope of peacefully settling international disputes are undertaken under Article 98 (for mandated tasks) and Article 99 (for independent actions). But neither Article 98, nor Article 99 could be implemented effectively unless in perfect complementarity and strict compliance, in letter and spirit, with Article 100 of the UN Charter. Article 100 highlights the necessity of ensuring the Secretary General's total independence from any influences coming from the Member States.[8]

When implementing an activity, either mandated or undertaken independently, the Secretary General must use the available means and resources, among which an utmost importance have: the principles and purposes of the UN Charter, the legal doctrine and precepts, complementing the UN Charter's principles and reflected in the content of the the resolutions adopted by the UN main bodies.[9]

3.1. Article 98 of the UN Charter - the Secretary General's assignments mandated by the UN main bodies

In accordance with Article 98 of the UN Charter, the General Assembly and the Security Council may mandate the Secretary-General to execute their political decisions, which may take, among others, the form of mediation, good offices, international enquiries or peacekeeping missions. Often, the vague wording of mandates allowed the Secretary General a degree of discretion in the execution of the mandated tasks, even in the sensitive area of political inter-state differences.

Especially in the first decade of UN's activity and existence, the Secretary General's actions were most often undertaken under the mandate of the Security Council and of the General Assembly, being, thus, subordinated, to their instructions.[10] Even so, in order to implement a mandated task, the High Official found a way of exerting some influence on the respective action, through his own specific interpretation of the resolutions. Of course, the Secretary General's degree of discretion depends on how accurately the assigned tasks are configured by the mandate. However, it must be said that the mandates, usually being the result of compromises between states, often have a rather vague formulation, offering a wide area for interpretation. Nonetheless, one should take into consideration the fact that, in delicate political situations, the Secretary General's discretion may be seriously impeded by restrictions imposed by the Security Council, by the General Assembly or even by some powerful and influential Member States. In reverse, it has been argued that in such circumstances, limitations imposed by the deliberative bodies are actually beneficial for the Secretary General, protecting the impartiality and neutrality of his function, as well as the prestige of his office, which may be subject to strong political pressure.

Over time, the function of UN Secretary General has established itself as a diplomatic instrument of great value, importance and exceptional efficiency not only at the operational level, as "impartial intermediary, investigator of abuses and voice of world conscience"[11], but also symbolically, as an interpreter and defender of the true ideals of the United Nations. Generally, the Secretary General's prestige is a fairly accurate barometer for the importance and utility of the Organization's activity. Therefore, the deliberative bodies should be particularly cautious when mandating the Secretary General's tasks. In order to ensure efficiency in the execution of the mandated tasks and protect the prestige and credibility of the Secretary General's function, the deliberative bodies should avoid the High Official's involvement in extremely delicate circumstances. One such situation would be that of assigning to the Secretary General tasks of peaceful settlement of disputes that are impeded by the total lack of will of the parties to communicate and reach a compromise or by the refusal of the Member States to contribute with funds and personnel or, simply, by the general disinterest of the international community in resolving the dispute in question at that specific time. There were also situations (especially in the first decades of UN's existence) when the deliberative bodies, faced with difficult, controversial situations, being on the verge of failure, but, nevertheless, wishing to create the illusion of action, sought to transfer the responsibility to the Secretary General.[12]

On the other hand, however, it must be said that, despite the risky, controversial character of such situations, that were specific to the general context of the Cold War, Secretary Generals have excelled in identifying original ways of tackling this challenges, prompting new directions in the evolution of the function. Although there have been situations that may or could have overshadowed, to a greater or lesser extent, the reliability of the function, the High Official's efforts in the peaceful

[8] Eric Stein, *Mr. Hammarskjöld, the Charter Law and the Future Role of the United Nations Secretary-General,* in "The American Journal of International Law", Vol. 56, No. 1, 1962, p. 14

[9] Dag Hammarskjöld, *The International Civil Servant in Law and in Fact,* UN Secretary General's lecture delivered at Oxford University, 30th of May 1961, available at http://www.un.org/depts/dhl/dag/docs/internationalcivilservant.pdf, accessed 21.02. 2016.

[10] See for instance the UN Security Council's Resolution no 203 / 14.05.1965 regarding the situation in the Dominican Republic or UN Security Council's Resolution no 294 / 15.07.1971 regarding the conflict between Portugal and Senegal.

[11] T.M. Franck, *The Secretary-General's Role in Conflict Resolution: Past, Present and Pure Conjecture,* 6 EJIL (1995), p.366.

[12] *Ibidem.*

settlement of disputes have proved many times their efficiency even in such controversial circumstances.

However, to ensure the protection of his office, it was often felt necessary to introduce a public or private instrument through which the Secretary General could decline the tasks considered to be faulty in their conception or insufficiently supported by the Member States. One such instrument was created by Dag Hammarskjöld[13], during the American hostage crisis in China, in 1954-1955 - the so-called "Peking formula". In this particular conjecture, the Secretary General dissociated himself from the wording of the General Assembly's Resolution (Resolution 906/1954) - which authorized him to provide good offices for the release of the "unlawfully detained" American war prisoners - and adopted a neutral and impartial position, absolutely necessary for the successful fulfilment of the mission. In front of the Chinese officials, who felt offended by the critical text of the resolution, Hammarskjöld explained his position in the affair, by citing the responsibility he has, by virtue of the general principles and purposes of the UN Charter.[14] Through "the Peking formula", Hammarskjöld created a model that was subsequently emulated in an entirely different international conjecture, by Javier Perez de Cuellar[15] in 1990, in the context of the first Gulf war, when he dissociated himself from the Security Council's Resolution no 664 of 18 august 1990, which assigned to him the role of good offices provider.[16] Also, in 1998, in the context of the crisis of the alleged presence of weapons of mass destruction on Iraqi territory, Kofi Annan[17] made use of Hammarskjöld's formula, in order to separate his good offices from US and UK's firm position, as expressed within the Security Council.[18]

3.2. Article 99 of the UN Charter - activities undertaken independently by the Secretary General

The provision of Article 99 is based on a genuine political authority with which the UN Secretary General is endowed. According to this article, the Secretary General "may bring to the attention of the Security Council any matter which in his opinion may threaten the maintenance of international peace and security". Apart from the recognition of a valuable right of initiative for the Secretary General, that doesn't have any equivalent in other international structures, this article is particularly relevant for the peaceful settlement of disputes, as it provides the legal basis for a significant part of the activities undertaken by the Secretary General in this field. Thus, through a broad interpretation of this provision (absolutely justified from a conceptual and logical perspective, as well as from a functional point of view), by virtue of the political authority conferred to him by Art. 99 of the UN Charter, the Secretary General may investigate conflictual situations and be involved in their regulation by initiating investigative operations, good offices and other forms of diplomatic activity, conducted with the scope of maintaining the international peace and security. [19]

A logical and systemic analysis of Article 99, including a research of its application and its logical integration within the UN Charter's regulatory system, reveals that only such a broad interpretation of this provision could ensure its utility and applicability. In order to be able to distinguish the potential danger of a situation and subsequently refer the matter to the Security Council, the Secretary General must keep a high level of information, based on the development of a vast network of formal and informal contacts.

It is true that Article 99 was rarely invoked in its letter, for various reasons related, in general, to the reluctance of the Secretary Generals towards assuming the risk of expressing an official opinion, representing an assessment of a situation, which, even if it is well documented, retains a degree of subjectivity that can arouse controversy. However, the provision has proved extremely useful in the field of peaceful settlement of disputes, precisely through its logical extrapolation.

In this regard, Dag Hammarskjöld has developed a comprehensive theory on the role of the UN and its Secretary-General, which was the basis for his initiatives when the issue of intervention for the appeasement of potential conflictual situations was raised. Dag Hammarskjöld's theoretical construction (largely expressed in his entries to his annual reports) has influenced significantly the evolution of the Secretary General's position, all his successors driving their inspiration from this construction when assuming political functions in accordance with the "spirit" of Article 99. U Thant[20], for instance, reiterated the Secretary General's role of good offices provider, recalling, at the same time,

[13] Dag Hammarskjöld was a Swedish diplomat and economist who served as the 2nd Secretary General of the United Nations Organization, from April 1953 until September 1961.

[14] Jorge E. Vinuales, *Can the U.N. Secretary-General Say 'No'? Revisiting the 'Peking Formula',* (July 28, 2006), b*epress Legal Series* Working Paper 1478, available at http://law.bepress.com/expresso/eps/1478, accessed 25.02.2016, p. 11.

[15] Javier Perez de Cuellar is a Peruvian diplomat who served as the 5th Secretary-General of the United Nations, from January 1, 1982 to December 31, 1991.

[16] *Ibidem,* p. 16.

[17] Kofi Annan is a Ghanaian diplomat who served as the seventh Secretary-General of the United Nations from January 1997 to December 2006.

[18] *Ibidem,* p.18.

[19] Magdalena-Denisa Lungu, *op. cit.*, p. 282.

[20] U Thant was a Burmese diplomat who served as the third Secretary-General of the United Nations from 1961 to 1971.

the legal basis of his actions. Corroborating Article 99 with Article 2.3.[21] and Article 33[22], which compel the parties to a dispute to seek its settlement by peaceful means, U Thant believed that if the parties seek or accept the Secretary-General's involvement in fulfilling their obligations under the Charter to identify a solution to the dispute, the Secretary General is manifestly competent to do so.[23]

3.3. Article 100 - the UN Secretary General's impartiality

Impartiality is an essential requirement for the Secretary General in order to effectively conduct activities in the field of peaceful settlement of disputes, as well as a guarantee for the utility of this function.

According to Article 100: "1. In the performance of their duties the Secretary-General and the staff shall not seek or receive instructions from any government or from any other authority external to the Organization. They shall refrain from any action which might reflect on their position as international officials responsible only to the Organization. 2. Each Member of the United Nations undertakes to respect the exclusively international character of the responsibilities of the Secretary-General and the staff and not to seek to influence them in the discharge of their responsibilities."

The impartiality of the Secretary-General has been extensively debated in the first decades of the UN's existence. In the turbulent context of the Cold War, characterized by a climate of mistrust and irreconcilable differences of vision, the impartiality of the Secretary General, defining an independent structure that represents the interests of the international community as a whole, did not enjoy the unanimous consent of the Member States. Although there were more or less obvious political pressures, from each of the two powers - US and USSR - the most intense controversy was aroused by the Soviet bloc. As a result of these controversies, Dag Hammarskjöld has developed an interesting theory, in his efforts to explain some aspects that seemed vague at the time.

Thus, the Soviet bloc argued that "while there are neutral countries, there can be no neutral men". "There can be no such thing as an impartial civil servant in this deeply divided world. "The kind of political celibacy, which the British theory of the civil servant calls, is in international affairs a fiction." [24]

In fact, in the High Official's vision, to be neutral, the Secretary General does not have to be apolitical, but rather it is necessary that its policies are not formally joined with the governmental policies of some states. The Secretary General should not pursue or support the interests of certain states.[25]

Since the UN Charter doesn't offer any guarantees for the impartiality of the Secretary General in the execution of his tasks, there is a dilemma on the appropriate operational approach that would ensure the total neutrality of his actions. Dag Hammarskjöld addressed this dilemma, invoking the strict compliance with the High Official's international obligations, as agreed within the UN Charter. The Secretary General's impartial position should be translated into the absence of any adherence to particular national or ideological attitudes and interests. Indeed, even when his tasks are mandated by the deliberative bodies, the Secretary General retains a degree of discretion when implementing the mandate, based on his freedom of interpretation and assessment. Of course, interpretations and assessments are delivered in accordance with the UN Charter, within the limits set by international law. It is true that any interpretation implies some degree of subjectivity, however this does not necessarily constitute a breach of impartiality. In order to reduce discretion and ensure that his position is representative for the Organization as a whole, the Secretary General should use constitutional means such as "consultations with permanent missions to the United Nations, safeguarded by diplomatic privacy"; advisory committees "composed of representatives of the governments most directly concerned, and representing diverse political positions."[26]

If, however, the Secretary General inevitably retains a generous area of assessment, risking to become the subject of political controversy, Hammarskjöld considers that "the international civil servant cannot be accused of lack of neutrality simply for taking a stand on a controversial issue when this is his duty and it cannot be avoided. But there remains a serious intellectual and moral problem, as we move within an area inside which personal judgement must come into play. Finally, we

[21] UN Charter - Article 2.3. - 'All Members shall settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered.".

[22] UN Charter - Article 33 - "The parties to any dispute, the continuance of which is likely to endanger the maintenance of international peace and security, shall, first of all, seek a solution by negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice.".

[23] A. Pellet & Cot, J. P., *La Charte des Nations Unies. Commentaire article par article,* (Paris, Editions Economica, 1987), p. 1323.

[24] Dag Hammarskjöld, *The International Civil Servant in Law and in Fact*, UN Secretary General's lecture delivered at Oxford University, 30th of May 1961, p. 1, available at http://www.un.org/depts/dhl/dag/docs/internationalcivilservant.pdf, accessed 21.02. 2016.

[25] Howard Lentner, *The Diplomacy of the United Nations Secretary-General*, "The Western Political Quarterly", Vol. 18, Nr. 3 (Sep., 1965), p. 533.

[26] Eric Stein, *op. cit.,* pp. 20-21.

have to deal here with a question of integrity or (...) conscience. (...) and if integrity in the sense of respect for law or respect for truth were to drive him into positions of conflict with this or that interest, then that conflict is a sign of his neutrality and not of his failure to observe neutrality".[27]

4. Diplomatic means of peaceful settlement

The activities implemented by the UN Secretary General in the field of the peaceful settlement of disputes, whether they are mandated by the deliberative UN bodies or undertaken independently, often take the form of one or another of the political and diplomatic means consecrated by the UN Charter. The role of third party pacificator - which has proven its efficiency countless times, even in the most difficult and delicate circumstances, during missions of good offices or mediation involving the High Official - is the one that conferred popularity and visibility to this function. But the Secretary General's demarches in this field are not confined to this role, which generally corresponds to the use of the specific methods of traditional diplomacy.

The High Official's position in the institutional framework of the United Nations, based on the essential requirement of impartiality in the performance of his duties, opened the opportunity for the development of a dense network of contacts, including at an informal level, allowing the Secretary General to effectively intervene in various delicate situations. Due to his position, the Secretary General can also opt for an informal approach to conflictual situations, making use of alternative diplomatic means, such as those that are specific to the unofficial type of diplomacy - track II diplomacy - or to the hybrid type of diplomacy (which combines official and unofficial diplomatic means).

4.1. Traditional diplomatic means

Often, the Secretary General's involvement in the peaceful settlement of disputes corresponds to the use of traditional diplomatic means, circumscribed to a set of classical procedures, flexible and accessible to the parties involved in a dispute, perfectly compatible with situations in which there is a genuine will to compromise.

The use of such means is concordant with the provision of Article 33 of the UN Charter stipulating that: "The parties to any dispute, the continuance of which is likely to endanger the maintenance of international peace and security, shall, first of all, seek a solution by negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice."

The most popular diplomatic means used by the High Official are mediation and good offices, as traditional procedures of peaceful resolution of disputes that involve the participation of a third party and are, therefore, compatible with the role and functions of the UN Secretary General. Also conducting international enquiries, based on a previous mandate or undertaken independently, is one of the means often used by the Secretary General, with the purpose of clarifying certain aspects or collecting information on a dispute or a potential conflictual situation.

Typically, the use of diplomatic means is especially compatible with disputes that have a predominantly political character. Nevertheless, in the recent period, the use of soft, flexible, diplomatic means generally enjoys a certain prevalence to the detriment of the use of jurisdictional means of peaceful settlement, regardless of the disputes' typology.[28]

International conciliation, although is one of the diplomatic means consecrated by the UN Charter, that require the intervention of a third party (a commission), combining elements of mediation and enquiry, has certain features that make it resemblant to the jurisdictional means, constituting a somewhat transitory procedure between the two categories (diplomatic and jurisdictional). As international conciliation usually involves the activity of an established body (a permanent or an ad hoc commission), this means of peaceful settlement is less compatible with the role of Secretary General. However, in the past, the High Official participated in processes of international conciliation, providing assistance and advice for the establishment of various international commissions of conciliation.[29]

It must be said that generally the diplomatic means of peaceful settlement are derived or inspired from the spirit of negotiations. It is common in the international practice that the use of a diplomatic procedure, implemented in the spirit of negotiations, can not be accurately categorized as it combines specific features of different diplomatic means (for example, when passing imperceptibly from good offices to mediation).[30]

Although the diplomatic means are traditional procedures, that have known a historical evolution and developed within the framework of the official

[27] Dag Hammarskjöld, *op. cit.,* pp. 19-20.

[28] Magdalena-Denisa Lungu, *op.cit.,* pp. 64-65.

[29] For instance, the General Assembly, in its resolution 1474 (ES-IV) of 20 September 1960, requested the Advisory Committee on the Congo to appoint, in consultation with the Secretary-General, a conciliation commission for the settlement of the Congo issue. (*Handbook on the Peaceful Settlement of Disputes Between States,* Office of Legal Affairs, United Nations, New York, 1992, p. 48, available at http://www.un.org/law/books/HandbookOnPSD.pdf, accessed 12.02.2016).

[30] Magdalena-Denisa Lungu, *op.cit.,* pp. 64-65.

inter-state diplomacy, their flexibility and adaptability make them quite compatible with the more modern types of diplomacy - track II diplomacy and hybrid diplomacy.

The specific features of the diplomatic means make them fit to the UN Secretary General's functions and popular in the international practice. Parties to a dispute experiencing blockages in their direct communication during the process of peaceful settlement can benefit from the Secretary General's prestigious and impartial position, that many times proved to be very efficient in the prevention or appeasement of conflicts. The use of the diplomatic procedures of peaceful settlement always requires the consent of the parties. Even when this use is mandated to the Secretary General by UN's deliberative bodies, the respective resolutions do not impose it on the parties to the dispute, but only recommend it. Also, if the parties accept the Secretary General's intervention as a third party pacificator, the High Official cannot impose on them the identified compromise solution. The parties always enjoy the freedom of option between accepting or rejecting any such proposal.

4.1.1. Good offices and mediation

The UN Secretary General often intervenes for the peaceful settlement of disputes through good offices or mediation missions. Good offices or mediations may be mandated by the UN deliberative bodies, offered independently by the Secretary General or requested directly by the parties. Sometimes, parties can show a reluctance towards asking themselves for the Secretary General's good offices.[31] It is preferred that the good offices are either recommended by the General Assembly or by the Security Council or offered independently by the Secretary General.

In the first years of the UN's existence, missions of good offices and mediation were usually mandated by the deliberative bodies. But the often vague wording of the mandates conferred to the Secretary General an extensive discretion in the implementation of the mandates, stimulating the evolution his role of good offices provider, to such extent that, in a short time, the Secretary General had established himself as a valuable agent of peace, with an independent political role.

The two diplomatic means - the mediation and the good offices - are very similar. Their common objective is that of ensuring a favourable environment for negotiations. The difference between the two means resides in the intensity of the third party intervention, which in the case of the good offices is moderate.

Good offices are not expressly consecrated by the UN Charter as a peaceful procedure for the settlement of disputes (being considered a mild variant of mediation). Nevertheless, they were mentioned in the Hague Conventions of 1899 and 1907. Subsequently, good offices find their consecration in international documents adopted by the UN, such as the General Assembly Declaration in 1982 at Manila, on the peaceful settlement of international disputes.

This diplomatic procedure entails the amicable intervention of the Secretary General in order to appease the contradictions and unblock the negotiations between the parties, previously obstructed by political antagonisms and / or legal differences. Therefore, the role of the Secretary General, during the good offices procedure is to facilitate contacts between the parties, by providing a neutral and secure environment, in order to stimulate a common approach that would cover the divergent points of view to a sufficient extent that the parties should be able to reinstate negotiations.

The good offices procedure consists of activities of exploration and information (to this end, enquiries and informal contacts with non-state actors could also be used), in order to provide an adequate communication channel between the parties, that would enhance their exchange of ideas and opinions and, eventually, would serve their efforts to formulate the objectives of the process of peaceful settlement (including the determination of the specific rights and obligations of each party) and to agree on the necessary procedures for initiating or resuming negotiations.[32]

The main qualities that recommend the intervention of the UN Secretary-General as good offices provider are his impartiality, objectivity, credibility, prestige and, not least, the high level of expertise and information regarding the international context. Adequate knowledge of the situation, of the parties to the dispute and of the characteristics of their differences is a key factor for the efficiency of the peaceful settlement process.

In a good offices procedure, the UN Secretary General's role as a third party intervener ceases with the resumption of negotiations. In a mediation procedure, on the other hand, the Secretary General's intervention goes even further and deeper.

As a mediator, the Secretary General performs a variety of tasks from the examination of the actual substance of the issue in dispute to providing a communication channel and support for the parties in the configuration of their key objectives, offering them an objective and impartial assessment as a foundation for their peaceful settlement. In addition to offering a neutral environment, conducive to

[31] *Ibidem.*

[32] Craig Collins, John Packer, *Options and Techniques for Quiet Diplomacy,* Conflict Prevention Handbook Series, Folke Bernadotte Academy, p. 12, available at http://www.corteidh.or.cr/tablas/29575.pdf, accessed 10.02.2016.

negotiations, the Secretary-General performing his functions as a mediator, shall formulate concrete proposals for the identification of a compromise solution and for the definitive resolution of the dispute. The role of the Secretary General in the mediation process ceases either when his compromise solution is accepted by the parties or when it is rejected by them or when it is found that the hostilities between the parties have resumed, the possibilities of communication being irremediably blocked, in the respective circumstances.

In practice, both diplomatic means - mediation and good offices - are often used in the context of the same dispute, a strict delimitation between the two being very difficult to distinguish.

Mediation, as well as good offices, can be used both in the initial stages of a conflict within the framework of preventive diplomacy - often with the scope of clearly defining the substance of the issue in dispute and of identifying a compromise solution that would address the claims of the parties - as well as in the more advanced and difficult phases of the conflict within the diplomatic interventions of peacemaking - sometimes with the purpose of identifying an interim solution (for instance, concluding a ceasefire) and prepare the ground for future negotiations.[33]

The problem of the most adequate timing for a third party intervention through mediation is crucial for the effectiveness of the peaceful settlement process. An untimely intervention can seriously affect the usefulness of the approach. If for instance, an offer of mediation is made prematurely and, therefore, meets the acceptance of only one of the parties, it can create the impression of bias. In addition, it can be assumed that the party who rejected the offer deems itself to be the stronger one, with greater chances of imposing its demands in the process of peaceful settlement and, therefore, sees the third party intervention as being detrimental to it. Such situations give the impression of an unequal relationship between the parties, which would ultimately lead to the indefinite blockage in communication, suppressing their willingness to initiate or continue negotiations. If, on the other hand, the offer of mediation is belated, the parties refusing to communicate and lacking any will of reaching a compromise, the chances of a successful mediation are very low. Usually, the best time for a third party intervention is that of mutual exhaustion or generalized stalemate.[34] To identify this moment, the Secretary General can call on his network of formal and informal contacts to obtain adequate information on the status of the dispute.

In processes of peaceful resolution of conflicts, the UN Secretary General does not intervene as a third party from a position of strength. In the practice of international relations, in the past, powerful states would often intervene to mediate regional conflicts, applying sanctions or rewards in order to stimulate the communication between the parties. Naturally, the UN Secretary General cannot use such means.[35] At the core of the High Official's diplomatic procedures there is persuasion, not coercion. The Secretary General's strengths are his impartiality, his objectivity, his prestige, that confer him availability within a dialogue, without criticizing, judging or condemning. This unique position enabled the Secretary General to conduct mediations even in extremely delicate situations, between governments that had no diplomatic relations or did not recognize each other.

It must be said that in the practice of the United Nations, as well as within the international documents adopted under its aegis, the semantics of the term "good offices" is very flexible, often covering a variety of juxtaposed diplomatic processes[36] implemented in a cumulative manner for the peaceful settlement of a dispute, such as international enquiries, use of special envoys[37], mediation activities. "Good offices" is a "very flexible term as it may mean very little or very much." The most modest role that the UN Secretary General can assume as a provider of good offices is that of simple channel of communication between the parties. A more active involvement entails facilitating exchanges of information between the parties. The Secretary General's role becomes even more important when it implies the his efforts to explain and interpret objectively the information exchanged between the parties in order to avert misunderstandings, build confidence and prevent possible negative reactions. To this end, the High Official may use a variety of tools such as his network of formal and informal contacts, international enquiries or special envoys. Also, in the general, extensive sense of the term, during a "good offices" process, the Secretary General may suggest possible procedures to be initiated for further exchanges and negotiations between the parties and may go even further, suggesting compromise solutions. There were rare cases in which the parties to a dispute have agreed in advance to accept as binding the solutions identified by the Secretary-General. In these cases, actually the procedure would

[33] Magdalena Denisa Lungu, *op.cit.*, p. 105.

[34] Kjell Skjelsbæk, *The UN Secretary-General and the Mediation of International Disputes*, "Journal of Peace Research", Special Issue on International Mediation (Feb., 1991) Vol. 28, Nr. 1, p. 100.

[35] Howard H. Lentner, *op. cit.*, p. 539.

[36] One such example, would be Hammarskjold's activity in Congo, consisting of a variety of procedures.

[37] For instance, Folke Bernadotte, dr. Ralph Bunche and Ambassador Gunnar Jarring represented the Secretary General during his missions in the Middle East.

surpass the usual limits of the diplomatic means used by the High Official. [38]

4.1.2. Fact-finding missions

For the effectiveness of a peaceful settlement process, the UN Secretary General must acquire and maintain a high level of information. In order to ensure a proper level of information, indispensable for any active and effective involvement in a peaceful settlement process, regardless of the chosen diplomatic procedure or the status of the conflict, it is imperative that an additional research is conducted. This research takes the form of international enquiries (fact-finding missions) as an adjacent means with the role of elucidating certain matters of fact, that are subject to a dispute.[39]

According to the Declaration on Fact-finding by the United Nations in the Field of the Maintenance of International Peace and Security (A/RES/46/59), from 9 December 1991, fact-finding is defined as "any activity designed to obtain detailed knowledge of the relevant facts of any dispute or situation which the competent United Nations organs need in order to exercise effectively their functions in relation to the maintenance of international peace and security".[40]

Therefore, investigations within the UN framework will be circumscribed to the facts, namely to that information correspondent to the objective reality, without referring exclusively to physical entities (they may, for example, refer to government policies or to instructions and intentions of decision makers in relation to a physical entity).[41]

According to the above-mentioned Declaration, "the sending of a United Nations fact-finding mission to the territory of any State requires the prior consent of that State".

Fact-finding missions can be undertaken under the mandate of the Security Council or of the General Assembly, at the Secretary General's own initiative or at the request of the parties.

Often, when the deliberative bodies mandate to the Secretary General tasks related to preventive diplomacy or diplomatic interventions during peacemaking, for the proper execution of these instructions, the High Official needs concrete, detailed and precise data, which can only be obtained through a series of investigative activities that can be carried out even they are not expressly stipulated within the given mandate.

Fact-findings can be conducted by the Secretary General independently, based on the extensive interpretation of Article 99 of the UN Charter, even prior to the existence of any dispute, but justified by other reasons which fall within the area of maintaining international peace and security (for instance, protection of human rights or the fight against terrorism). When the use of a fact-finding mission is seen as an adjacent means within a process of peaceful settlement, it is usually carried out at the Secretary General's own initiative or at the request of the parties.[42]

To conduct a fact-finding operation, the Secretary General must have extensive means for the collection of data, as well as human, financial and technological resources. Often, when conducting an operation of data collection, the Secretary General makes use of his informal network of contacts, which was created by virtue of his position within the UN structure.

Once the Secretary General collects the necessary data, the information is analysed and selected, so that, in the end, the relevant pieces are distinguished and retained. In case of contradictory information, coming from different sources, a more thorough investigation is deemed necessary, including through interviewing witnesses or consultation with third parties.

It often happens that the information collected by the Secretary General and considered essential for the maintenance of the international peace and security is related, to a similar extent, to the vital interests and the national security of certain states. In such cases, strict confidentiality is required. Although in some cases the development of an efficient system for the protection of confidential data is recommended, on the other hand, in order to avoid controversies that could endanger the prestige of the Organization, the general use of transparent methods is deemed necessary.[43]

Nevertheless, investigations conducted by the Secretary General are usually extremely discreet operations, as confidentiality often proved to be a guarantee for the efficiency of the activities undertaken by the High Official.

Although a fact-finding mission is not in itself a means of peaceful settlement, a fair and accurate understanding of the facts is essential to the identification of an acceptable solution in the shortest time. In addition, the mere deployment of

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[38] In 1986, during the Rainbow Warrior Affair, Perez de Cuellar's mediation of the dispute between New Zealand and France, surpassed the classical procedure of mediation, resembling a political arbitration.

[39] Magdalena-Denisa Lungu, *op.cit.,* p.129.

[40] Declaration of the General Assembly on Fact-finding by the United Nations in the Field of the Maintenance of International Peace and Security, 9 decembrie 1991 A/RES/46/59, pct. 3, available at http://www.un.org/documents/ga/res/46/a46r059.htm, accessed 12.02.2016.

[41] **A. Walter Dorn, *Keeping Watch for Peace: Fact-Finding by the United Nations Secretary-General in* „**United Nations Reform: Looking Ahead After Fifty Years", *E. Fawcett, and H. Newcombe, Science for Peace/Dundurn Press, Toronto, 1995, pp.138–154.*

[42] Declaration of the General Assembly on Fact-finding by the United Nations in the Field of the Maintenance of International Peace and Security, 9 December 1991 A/RES/46/59, pct. 3, available at http://www.un.org/documents/ga/res/46/a46r059.htm, accessed 12.02.2016.

[43] **A. Walter Dorn, *op.cit.*, pp. 138-154.**

international investigation operations can have beneficial effects, relieving tensions and encouraging the communication between the parties.

4.2. Alternative diplomatic means

In some cases, especially in the more recent international practice, official diplomacy, that makes use of traditional channels and requires the participation and consent of all the parties involved, cannot ensure the efficiency of the processes of peaceful settlement. The Secretary General is frequently involved in the settlement of sensitive issues, in which the outcomes and the evolution of the process can not be made public without risking its obstruction, especially when it is conducted in the early stages of a conflict, with a preventive scope.

Through his role and his central position, the Secretary General has the opportunity to develop a dense network of contacts both at a formal, official level, involving high-ranked governmental actors, as well as at an informal level, involving unofficial or lower ranked actors (sometimes even non-governmental entities). In time, these informal contacts proved to be extremely valuable for regulating politically sensitive situations.

Certainly, the occupant of this position needs a period of time to develop such informal contacts, depending, of course, on his previous diplomatic experience. However, many of these informal contacts are preserved and transmitted to the new occupant of the office. Some of these informal relationships may also come from other members of the Secretariat, with diplomatic experience.

Informal diplomacy (secondary diplomacy), based on the subtle and personal interaction with lower ranked or non-state actors can ensure a higher level of information, allowing timely intervention and supporting the efforts of official diplomacy. This type of diplomacy can be used in any stage of the conflict previously, concurrently or subsequently to the use of specific means of official diplomacy.

Also, unlike the traditional type of diplomacy, circumscribed to inter-state relations, informal diplomacy is compatible with interventions for the settlement of internal conflicts. After the end of the Cold War, when several outbreaks of internal instability were activated, it was found that most threats to international peace and security had their source in internal antagonisms with the potential of degenerating into conflicts that could disrupt the international relations (especially having in view the increasing inter-dependencies between states) and could destabilize large regions of the globe. As a result, the popularity of the secondary diplomacy has augmented significantly.

Informal diplomacy allows a disaggregated approach to the conflict, making it possible to address the causes of the conflict and to identify communication channels and areas of action that are less visible. Also, this type of "quiet diplomacy" allows the Secretary General to enjoy a greater freedom of movement and enables him to establish valuable bridges between the parties to the dispute.

Besides secondary diplomacy, in order to better respond to a variety of situations, another type of diplomacy was developed - the so-called hybrid diplomacy (track one and a half diplomacy). Hybrid diplomacy entails the use of means of official diplomacy in a less formal setting. For instance, decision making actors of the states involved in the conflict may confer to non-state actors the authority to represent them, to negotiate and act on their behalf.[44] Hybrid diplomacy has proven especially efficient for interventions in civil conflicts (but not only), when the Secretary-General had to provide a channel of communication between officials actors and unofficial entities.

5. Structures that support the UN Secretary General's activity in the peaceful settlement of disputes

The Secretary General's activities in the field of peaceful settlement of disputes are supported by the staff of the Secretariat (he may even may appoint special representatives and envoys to carry out good offices and mediation on his behalf) and by other structures in order to ensure the effectiveness of these interventions. One such structure would be the "Group of Friends"[45] that consisting of a number of UN member states, acting to support the Secretary-General to find a solution for the peaceful settlement of a specific crisis. If within a mediation process, apart from the UN Secretary General, there are also other third parties acting as mediators, the "Group of Friends" will make efforts in order to determine them to act in the same direction during the mediation. The "Group of Friends" acting under the coordination of the Secretary General, can not undertake activities for the peaceful settlement of disputes unless they are requested to do so. Groups of states, supporting the Secretary General's good offices were more frequent in the early 1990s, after the end of the Cold War. Nowadays, there has been a departure from these groups as they have been conceived in the 1990s. There is, however, a

[44] Magdalena Denisa Lungu, *op. cit.*, p. 69.

[45] At the origin of the "Group of Friends" stays Hammarskjold's idea of using advisory committees to support him in the creation and management of the peacekeeping operations. Such committees were used, for instance, for UNEF (United Nations Emergency Force) and for ONUC (United Nations Operation in the Congo). The first Group of Friends was created during Javier Perez de Cuellar for the El Salvador situation. (Teresa Whitfield, *Good Offices and „Groups of Friends"* in Simon Chesterman, „Secretary or General? The UN Secretary General in World Politics", New York, Cambridge University Press, 2007, pp. 87-88).

proliferation of groups, both within the UN framework and beyond it.[46]

Within the Secretariat, a structure with an important role in conducting processes of mediation and good offices is the Department of Public Affairs, within which there is a Policy and Mediation Division. This department carries out a variety of activities, including activities with the scope of conflict prevention, by monitoring political developments and assisting the Secretary General in activities of preventive diplomacy. In mediation processes, the Department of Public Affairs defines and plans the mission, also offering support and guidance to special representatives and mediators.[47] Recently, a Mediation Support Unit was established within the Policy and Mediation Division of the Department of Political Affairs and, within this unit, a Standby Team of mediation experts was created with an important role in supporting operational activities and projects aimed at achieving sustainable peace.

6. Conclusions

The UN Secretary General is a symbol and an instrument of peaceful settlement, which has proven its effectiveness in preventing and settling conflicts, even in the most difficult political contexts. The Secretary General's functions, as they are currently configured, are largely the result of a long evolution which, ultimately, provided the occupants with a repertoire of practices that define a strong and influential role in the maintenance of international peace and security.

This role entails a specific approach to international problems, which can be influenced both by objective factors related to the evolving international context and by subjective factors, related to the occupants' personal traits.

The current international context is characterized by a strong interdependence between international actors so that any threat to peace and security, regardless of its location, becomes a problem for the entire international community. In this context, when there is a situation that may endanger international peace and security, the Secretary General must have a multilateral approach, as an impartial agent, representing the interests of the international community.[48]

The Secretary General's actions may involve the use traditional diplomatic means, such as good offices, mediation and international enquiries, either under the mandates of the UN deliberative bodies, or independently, at his own initiative or at the request of the parties, in accordance with the provisions of Article 99 of the UN Charter. Sometimes the traditional diplomatic approach is completed by the use of unofficial diplomatic processes, with a discreet character, that can provide a superior level of information and new directions in the process of peaceful settlement. In fact, the Secretary-General's involvement in the process of peaceful settlement of disputes is often a discreet one, his actions usually being perceived by the states as credible and reliable.

In time, the discreet character of the Secretary General's interventions, especially when they involve the use of diplomatic means of peaceful settlement, was deemed as an essential condition and as a guarantee for the effectiveness of the activities undertaken. In this regard, Perez de Cuellar declared that "no one will ever know how many conflicts have been prevented or limited through contacts that have taken place in the famous glass mansion, which can become fairly opaque when necessary."[49]

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[46] *Ibidem*, p. 92.
[47] Magdalena Denisa Lungu, *op. cit*., p. 284.
[48] Dag Hammarskjöld, *New Diplomatic Techniques in a New World,* Address to the Foreign Policy Association, New York, 21 October 1953, p. 7, available at http://www.un.org/depts/dhl/dag/docs/newdiplomatic.pdf, accessed 15.02.2016.
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ASPECTS REGARDING INTERNATIONAL RESPONSIBILITY BY ANALYSING THE AGENCY RELATIONSHIP BETWEEN THE INTERNATIONAL ORGANIZATION AND THE STATE

Ovidiu-Emilian IVĂNESCU[*]

Abstract

The study analyses the consequences for the responsibility of the organization and the relevant state of an agency relationship between an international organization acting as a principal and a state acting as its agent. It is prouved that an international organization may be responsible for damage caused by the conduct of the state. We can also sustain that the state itself may bear responsability for having established or for not having terminated the agency relationship if it commits wrongful conduct on behalf of the international organization.

Keywords: *Responsibility, International Organization(s), Agency Relationship, Wrongful, Conduct.*

Introduction

The concept of an agency relationship is a private law concept but it can be also transposed to international law. Indeed, international practice shows that a state sometimes acts on behalf of another state, with the legal consequence that the conduct performed by the state acting in the name of the other state has the same legal effect for the latter as if it had acted itself.[1] For instance, two states can conclude an agreement whereby one state undertakes to exercise certain sovereign powers on behalf of the other state, including all of its international relations.[2] Another instance of an agency relationship between two states can be found when a state exercises diplomatic protection in the interest of the citizens of another state in conformity with a mandate conferred upon it by the latter state. With the development of the powers of international organizations, it is also conceivable to see as an agency relationship the situation where an international organization acts on behalf of one or more states in order to implement some of its powers.[3] It is today no longer contested that international organizations enjoy their own international legal personality.[4] Therefore, an agency relationship could be constituted between an international organization and one or more state(s), both being distinct international legal subjects, the state(s) acting as the principal(s) and the international organization acting as the agent. Conversely, and this is the situation dealt with by this article, an agency relationship can exist between an international organization and one or more states, where the state(s), seen as the agent(s), act(s) on behalf of the international organization, regarded as the principal.

The effects of an agency relationship between an international organization and a state, for the responsibility, under international law, of the parties to the agency relationship, can of course be regulated by an explicit agreement concluded between the relevant international organization and the state. This article will analyse the consequences of an agency relationship between an international organization, as the principal, and a state, as the agent, for the responsibility of the parties toward third parties under general international law. Specific agreements, on the allocation of responsibility between an international organization and a state, that may have been concluded will not be taken into account. This article will argue that, as in domestic private law, the implication of an agency relationship between an international organization and a state, where the organization is the principal, is the responsibility of the principal, the organization, for wrongful acts committed by the agent, the state, within this relationship. Furthermore, this analysis will explain that the state may also be responsible for wrongful acts carried out on behalf of the international organization.

This study demonstrates that the international organization is, logically, responsible for wrongful acts committed by the state or state acting as its

[*] Phd Candidate, Faculty of Law, "Nicolae Titulescu" University of Bucharest (e-mail: **ovidiuemilian80@yahoo.com**).

[1] A.P. Sereni, 'Agency in International Law', 34 *AJIL* (1940) p. 638 .

[2] ICJ, *Case Concerning Rights of Nationals of the United States of America in Morocco (France* v. *United States of America)*, Judgment of 27 August 1952, *ICJ Reports* (1952) p. 176 at p. 188. The Court emphasised that Morocco, the state on behalf of which international relations should be conducted, remained a sovereign state.

[3] D. Sarooshi studied the agency relationship between a state acting as a principal and an international organisation acting as its agent. 'Conferrals by States of Powers on International Organizations: The Case of Agency', 74 *BYIL* (2003) p. 308-332.

[4] T. Gazzini, 'Personality of international organizations', in J. Klabbers and A. Wallendahl, eds., *Research Handbook on the Law of International Organizations* (Cheltenham, Edward Elgar 2011) p. 33 at p. 33.

agent(s). The article further argues that the state(s) may however also bear responsibility for wrongful conduct that it has committed on behalf of an international organization. In such a situation, the victim would then have the choice between obtaining a remedy from the international organization or from the state(s).

Content

1.The effects for the responsibility of an international organization

1.1. For wrongful acts consistent with the agency relationship

In accordance with Article 7 of the DARIO, if an organ of a state is placed at the disposal of an international organization and if that international organization exercises effective control over the conduct of that organ, this conduct is attributed to the international organization alone. [5]As shown above, such a situation, where a state places one of its organs at the disposal of an international organization, which exercises effective control over the conduct of that organ, corresponds to an agency relationship between the international organization and the state where the organization acts as the principal and the state as the agent. Therefore, in accordance with Article 7 of the DARIO, there is an exclusive attribution of all acts committed by a state to an international organization, when the acts are performed in conformity with an agency relationship between the international organization acting as the principal and the state acting as the agent. The international organization is the only subject responsible for wrongful acts carried out by the state within the agency relationship. In the absence of any agreement providing otherwise, the state does not assume any responsibility for those wrongful acts. The consequence of an agency relationship between an international organization and a state is that the acts by the state on the basis of the agency relationship engage the sole responsibility of the international organization if they infringe one of its international obligations.

When the DARIO was adopted, there was hardly any practice supporting the rule of its Article 7. However, on the other hand, no state criticised the content of Article 7.[6] There is also a scholarly consensus that effective operational command or control by an organization exercised over an act leads to the attribution of that act to the organization. [7] Reference can also be made to the similar principle, which is well established in general international law, that acts of non-state actors are attributable to a state when such actors act under the control of the state.[8] It seems indeed fair to attribute conduct to that subject of international law that exercises control over that conduct and to engage its responsibility if the conduct is wrongful. Responsibility should be located with the actor who is in a position of control over the wrongful act. Such a regime deters the commission of the wrongful act, and prompts compliance with the law.[9] Given the absence of state protests, recent court practice, and its appropriateness in the law of responsibility, it is argued that the rule of attribution of Article 7 is an emerging rule of customary international law.

1.2. For wrongful acts contrary to the agency relationship

The DARIO are not explicit concerning the attribution to the international organization or to the state of an act committed by the state contrary to the agency relationship established between the organization, as the principal, and the state, as the agent. Reference can however be made to the rule attributing certain *ultra vires* acts carried out by an organ of an international organization to that organization. The International Court of Justice has admitted attribution to an international organization of an act committed by one of the organization's organs, taken within the functions of the organization, even if the organ exceeded its competence.[10] Furthermore, the Court also stated that: 'it needs hardly be said that all agents of the United Nations, in whatever official capacity they act, must take care not to exceed the scope of their functions, and should so comport themselves as to avoid claims against the United Nations'. This implies that acts of United Nations agents that exceed their official competence may be attributable to the organization and may engage its responsibility. This case law was considered by the International Law Commission in its DARIO. In accordance with its Article 8: 'the conduct of an

[5] Draft Articles on the Responsability of International Organizations, with Commentaries, 2011, p. 6, p.19.

[6] C. Ryngaert, 'Apportioning Responsibility between the UN and Member States in UN Peace-Support Operations: An Inquiry into the Application of the "Effective Control" Standard after *Beh-rami*', 45 *Israel L Rev.* (2012) p. 151 at p. 164.

[7] See, for instance, P. Klein, 'The Attribution of Acts to International Organizations', in J. Crawford, A. Pellet and S. Olleson, eds., *The Law of International Responsibility* (Oxford, OUP 2010) p. 297 at p. 300; N. Gal-Or and C. Ryngaert, 'From Theory to Practice: Exploring the Relevance of the Draft Articles on the Responsibility of International Organizations (DARIO) – The Responsibility of the WTO and the UN', 13 *German LJ* (2012) p. 511 at p. 529; M. Zwanenburg, *Accountability of Peace Support Operations* (Leiden, Martinus Nijhoff Publishers 2005) pp. 100-103.

[8] Draft Articles on the Responsibility of States for Internationally Wrongful Acts, with Commentaries, at pp. 47-48-art. 8 and commentary

[9] C. Ryngaert, 'Apportioning Responsibility between the UN and Member States in UN Peace-Support Operations: An Inquiry into the Application of the "Effective Control" Standard after *Behrami*', 45 *Israel L Rev.* (2012) p. 151 at p. 154.

[10] Certain Expenses of the United Nations, Advisory Opinion of 20 july 1962, ICJ Reports(1962), p.151-168.

organ or agent of an international organization shall be considered an act of that organization under international law if the organ or agent acts in an official capacity and within the overall functions of that organization, even if the conduct exceeds the authority of that organ or agent or contravenes instructions'.[11] This provision thus provides for the attribution of a certain kind of *ultra vires* conduct to an international organization. The conduct can take two different forms: it can either be the conduct of an organ or agent adopting an act that is not within its competence; it can also be the conduct of an organ or an agent acting contrary to the specific instructions given by the international organization. An *ultra vires* act is attributable to an international organization only if its author acted in an official capacity. Furthermore, the act must remain within the functions of that organization.[12]

One reason for the attribution to an international organization of an *ultra vires* act of an organ or agent of that organization, who acted in an official capacity and within the functions of the organization, is the protection of third persons. An international organization can organise itself within the limits of its constitutive treaty: it can create subsidiary organs or recruit agents who will exercise its functions. Therefore, it is sometimes difficult for a third party to realise that an act of an international organization was not carried out by a competent organ or agent.[13] An act adopted by an organ or agent of an international organization may rightly remain an act of that organization even if it has been adopted contrary to the delimitation of the competence of the relevant organ or agent. Another explanation for the attribution of an *ultra vires* act to an international organization relies on the notions of fairness and effectiveness. The organization that employs the wrong-doer is in the best position, in comparison with other subjects, to control its organs and agents. Those are normally subject to the internal direction of the organization. Therefore, if an organ or agent of an international organization commits an *ultra vires* act when acting in its official capacity and within the functions of the organization, the international organization that did not properly supervise the relevant organ or agent should logically assume responsibility for the act.[14]

In accordance with Article 2 of the DARIO, an 'organ' of an international organization is 'any person or entity which has that status in accordance with the rules of the organization' whereas an 'agent' of an international organization means: 'an official or other person or entity, other than an organ of an international organization, who is charged by the organization with carrying out, or helping to carry out, one of its functions, and thus through whom the organization acts'.[15] The word 'organ' in Article 2 of the Draft Articles does not refer to the organ of a state placed at the disposal of an international organization. Indeed, the Draft Articles distinguish the attribution of the conduct of organs or agents of an inter-national organization (Art. 6) from the conduct of an organ or organs of a state placed at the disposal of an international organization (Art. 7). The difference between organs or agents of an international organization and organs of a state put at the disposal of an international organization lies in the fact that organs or agents of an international organization are fully seconded to an international organization. This is not the case when organs of a state are placed at the disposal of an international organization.

The rule of attribution in Article 8 of the DARIO can however be transposed to the attribution of some conduct of an organ of a state placed at the disposal of an international organization in accordance with Article 7 of the Draft Articles. A wrongful act adopted by an organ of a state placed at the disposal of an international organization is attributable to the organization, even if the act did not comply with the instructions given by the organization to the organ when two requirements are fulfilled. First, the act must relate to the functions of the organization. Second, the conduct of the state's organ must have been under the effective control of the international organization when it committed the act. Indeed, even if placed under the effective control of an international organization, the organ of a state may not have understood the instructions given by the organization and may have committed an act contrary to them. In other words, if the rule of attribution of Article 8 is applied to an agency relationship between an international organization acting as a principal and a state acting as an agent, it appears that an international organization is responsible for the wrongful conduct of a state that is its agent, even if this conduct is contrary to the instructions given by that organization, if it was committed within the agency relationship established between the relevant organization and the state. The reason for attributing responsibility to the interna-tional organization for acts of an organ of a state contrary to the instructions given by the organization, but still attached to the functions to be fulfilled by the state on behalf of the organization, lies in the effective control exercised by the organization over the state's organ.

[11] Draft Articles on the Responsibility of International Organizations, with Commentaries, *2011*, p. 26.
[12] Draft Articles on the Responsibility of International Organizations, with Commentaries, *2011*, p. 26.
[13] A. Tzanakopoulos, *Disobeying the Security Council*(Oxford, OUP 2011), p. 32.
[14] M. Hirsch, *The Responsibility of International Organizations Toward Third Parties* (Dordrecht, Martinus Nijhoff Publishers 1995) p. 77.
[15] Draft Articles on the Responsibility of International Organizations, with Commentaries, 2011, p. 6.

In conclusion, the implication of an agency relationship between an international organization, acting as the principal, and a state, acting as the agent, for the responsibility of these two subjects of international law is that wrongful acts committed by the state within the agency relationship engage the responsibility of the organization if they are consistent with the agency relationship and sometimes even if they are contrary to the terms of the agency relationship. Are there any consequences of the agency relationship for the responsibility of the state? Does the international organization assume exclusive responsibility? Or is there a dual responsibility of the international organization and the state for wrongful acts committed by the state?

2. The consequences for the responsibility of the state in case of any international obligation of the international organization is violated

Article 58 of the DARIO provides for the responsibility of a state that aids an international organization in the commission of a wrongful act when the state does so with knowledge of the circumstances of the wrongful act and when the act would be considered wrongful under international law if committed by the state itself.[16]

The responsibility of the state acting as an accomplice is a different responsibility than that of the international organization because the former derives from the violation of another obligation, namely not to assist an international organization in the commission of a wrongful act. At the same time, the responsibility of the state is in another sense also derived, because it depends on the commission of a wrongful act by another international subject, the international organization. Article 58 is similar to Article 16 of the DARS.[17] The latter provision embodies a norm of customary international law.[18] State practice is too limited to confirm that Article 58 also includes a similar norm of customary international law. However, it is generally accepted that the principles of the law of the international responsibility of states can apply by analogy to the international responsibility of international organizations.[19] It is therefore reasonable to argue that the provisions of Article 58, which are similar to those of Article 16 of the DARS, are at least, a progressive development of the law.

What then counts as aid triggering responsibility for the supporting state? The International Law Commission does not provide an answer to this question in its commentary on Article 58. The commentary on Article 16 of the DARS can help to interpret the similar provision contained in Article 58 of the DARIO. For the International Law Commission, no particular kind or level of assistance is required, as long as the aid or assistance materially facilitates or contributes significantly to the performance of the wrongful act.[20] Therefore, Article 58 of the DARIO can be applied in a situation where a state places one of its organs at the disposal of an international organization knowing that the organization will then commit a wrongful act. The rule of Article 58 is to be implemented in the case where a state agrees to an agency relationship between an international organization, acting as the principal, and itself, acting as the agent, and where the state knows that the purpose of the agency relationship is the adoption of a wrongful act by the organization. Furthermore, in accordance with the requirements for the application of Article 58, the wrong-ful act should also be wrongful for the state if it were attributed to it. In other words, the state should also be bound by the obligation that the organization is violating. Indeed, it would be problematic to hold a state responsible for having aided an international organization in the commission of an act that would not be wrongful if made by the state.[21] If the state acting as an agent does not know that the act is wrongful for the international organization, its responsibility is not engaged. If the conduct would not be wrongful if committed by the state on its own behalf, the responsibility of the state is not engaged either. In both situations, the international organization is solely responsible for the damage.

Can Article 58 of the DARIO also be applied to the situation where a state *becomes* aware that an international organization is committing a wrongful act through an organ of the state that has been at the disposal of the organization for a certain time? In other words, can Article 58 be implemented not only at the beginning but also in the course of an agency relationship between the international organization, being the principal, and the state, being the agent? An agency relationship between an international organization and a state is based on the consent of both parties. The counterpart of consent to the

[16] Draft Articles on the Responsibility of International Organizations, with Commentaries, 2011, p. 90.

[17] Draft Articles on the Responsibility of States for Internationally Wrongful Acts, with Commentaries, p. 65.

[18] *Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (*Bosnia and Herzegovina* v. *Serbia and Montenegro*), Judgment of 26 February 2007, *ICJ Reports* (2007) p. 43 at p. 217, para. 420. See also G. Nolte and H.P. Aust, 'Equivocal Helpers – Complicit States, Mixed Messages and International Law', 58 *ICLQ* (2009) p. 1 at p. 7-10; H.P. Aust, *Complicity and the Law of State Responsibility* (CUP, Cambridge 2012) p. 191.

[19] P. Klein, 'The Attribution of Acts to International Organizations', in J. Crawford, A. Pellet and S. Olleson, eds., *The Law of International Responsibility* (Oxford, OUP 2010) p. 297.

[20] Draft Articles on the Responsibility of States for Internationally Wrongful Acts, with Commentaries, 2001, p. 66, para. 5.

[21] H.P. Aust, *Complicity and the Law of State Responsibility* (CUP, Cambridge 2012) p. 250.

agency relationship is the possibility, for both parties, of terminating the agency relationship, temporarily or permanently.[22] If the agency relationship is based on a treaty, the termination of the treaty should comply with the provisions of the treaty. If the treaty establishing the agency relationship does not contain any provision regarding its termination – which is the most usual situation – the treaty should be revocable at the discretion of the parties in conformity with Article 56 of the 1986 Vienna Convention on the Law of Treaties. The argument runs that a treaty establishing an agency relationship between an international organization and a state is a consent-based agreement and should be revocable at any time if it does not contain any provision regarding termination.[23] The concerned state is then free to withdraw from the treaty setting out an agency relationship between it and an international organization. If the agency relationship is not based on a treaty but is an implicit *ad hoc* agency relationship, to be deduced from the effective control exercised by an international organization on the organ of a state placed at its disposal, the state should also be able to withdraw from the agency relationship. Indeed, it is the case that the relevant state is not completely seconded to the organization and should be able to take back effective control over its organ placed at the disposal of the international organization. In conclusion, a state is able to withdraw from an agency relationship between an international organization that is the principal and itself as the agent. Hence, a state should be considered as helping an international organization in the commission of a wrongful act if it does not withdraw from an agency relationship between the international organization as the principal and itself as the agent, and if the known purpose of the agency relationship is the commission of a wrongful act.

The interpretation of Article 58 of the DARIO offered here can be supported by the rule of Article 61 of the Draft Articles according to which a state member of an international organization incurs international responsibility if it circumvents an obligation 'by causing the organization to commit an act that, if committed by the State, would have constituted a breach of the obligation'. Under Article 61, a state should bear responsibility if it places one of its organs at the disposal of an international organization so that the organization can commit an act that would be wrongful if attributed to the state.[24] The scope of Article 58 is however broader than the scope of Article 61. Contrary to Article 61, Article 58 can apply to the situation when the state does not intend to help an international organization in the commission of a wrongful act when it places one of its organs at the disposal of the organization, but it appears, in the course of the organization's activities, that the organization is using this organ to commit a wrongful act.

In practice, it is unlikely that a state will place one of its organs at the disposal of an international organization with the acknowledged purpose that it will com-mit wrongful acts under international law on behalf of that organization. It seems more likely that the state will learn about such acts in the course of the agency relationship.

However, the state will not be responsible for damage caused by isolated or minor violations of international law by one of its organs placed at the disposal of an international organization. Indeed, since the international organization, and not the state, exercises control over the conduct of the 'lent' organ of the state, the state cannot strictly supervise all the activities of that organ.

The state is responsible only 'to the extent that its own conduct has caused or contributed to the internationally wrongful act'. [25] In an agency relationship between an international organization and a state, where the organization is the principal and the state the agent, the international organization can proceed only with the intervention of the state that acts on its behalf. The degree of participation of a state in the fulfilment of wrongful conduct in an agency relationship between that state and an international organization, where the state acts as an agent, is as important as that of the international organization commissioning this wrongful conduct. Therefore, the extent of the responsibility of the state for damage caused by wrongful conduct within the agency relationship is analogous to the extent of the responsibility of the international organization under two conditions. The state is responsible if it carried out a wrongful act on behalf of the organization when it knew or ought to have known that the act was wrongful for that organization and when the act would be wrongful if attributed to the state. This is not a case of joint responsibility. The international organization and the relevant state are held responsible for different acts: the international organization for the original wrongful conduct committed on its behalf by the state in an agency relationship; and the state for having established the agency relationship or for not terminating the agency relationship when it knew or ought to have known about the wrongful conduct, when this conduct would also be wrongful for the state if it were attributed to it. A demand for compensation may

[22] D. Sarooshi, *International Organizations and their Exercise of Sovereign Powers* (Oxford, OUP 2005) p. 41-42.
[23] D. Sarooshi, *International Organizations and their Exercise of Sovereign Powers* (Oxford, OUP 2005) p. 42.
[24] Draft Articles on the Responsibility of International Organizations, with Commentaries, p. 93.
[25] Commentary of the International Law Commission on Art. 16 of the Draft Articles on the Responsibility of States for Internationally Wrongful Acts, with Commentaries,, p. 66.

therefore be made either to the international organization or to the state. If several states jointly perpetrate a wrongful act by acting as agents of an international organization – for instance, when they contribute together to a peace-keeping operation – they are jointly responsible for having set up the agency relationship or for not withdrawing from the agency relationship, provided that they were aware or ought to have been aware of the wrongfulness of the act and that the act would also be wrongful if imputable to the states. In that case, the victim can ask either the international organization or each of the joint perpetrator states for full reparation for the injury. In any case, the victim should not obtain compensation which is greater than the injury sustained.[26]

It has been demonstrated that a state has a narrow obligation of *due diligence* to ensure that the disposal of one of its organs to an international organization does not allow the international organization to commit wrongful acts. This obligation can be deduced from Article 58 of the DARIO.

3. Conclusions

Ad hoc agency relationships between an international organization acting as a principal, and a state or states acting as its agent(s), are the most usual agency relationships between an international organization and states. More often such agency relationships are implicit and can be deduced from the exercise of effective control by an international organization over the conduct of an organ of a state placed at the disposal of the international organization with the purpose of carrying out functions of that organization.

The International Law Commission only refers implicitly to the existence of an implicit *ad hoc* agency relationship between an international organization acting as a principal and a state acting as an agent, in Article 7 of the DARIO on the attribution of conduct to an international organization by an organ of a state placed at its disposal and under its effective control. The International Law Commission should have referred explicitly to the possibility of such an *ad hoc* implicit agency relationship and, more generally, to all the possible forms of an agency relation-ship between an international organization acting as a principal and one or more states acting as its agent(s). Indeed, if the International Law Commission had expressly taken into account the entire range of possibilities of an agency relationship between an international organization and a state, being a member or not of that organization, where the organization is the principal and the state its agent, it would have emphasised the possible dual responsibility of the international organization and of the state when the state commits a wrongful act on behalf of the organization. When an international organization is the principal in an agency relationship between it and a state, it is logically responsible for wrongful acts committed by the state acting on its behalf. This can be deduced from the DARIO. However, the International Law Commission did not expressly analyse the possible responsibility of the state acting as an agent in an agency relationship between it and an international organization. The state may also bear responsibility when it fulfils wrongful acts on behalf of an international organization. A state is free to establish an agency relationship with an international organization and is consequently also free to withdraw from an agency relationship once it is established. Therefore it is here argued that when a state commits a wrongful act on behalf of an international organization within an agency relationship between the organization and the state, the state bears responsibility for having established the agency relationship or for not terminating the agency relationship if it was obviously aware or ought to have been aware of the wrongfulness of the act for the organization and if the act were wrongful for the state itself if attributed to it. A narrow obligation of due diligence by states to ensure that the placing of one of their organs at the disposal of an international organization is not used for wrongful ends should develop in the future.

The above rule on the responsibility of the state is of particular practical importance. Indeed it is the case that when both an international organization and a state are responsible when a wrongful act is committed by the state within an agency relationship, more avenues of redress would be open. The victim will have a choice between suing the international organization or the state. In such a situation, the victim will have a better chance of receiving reparation for damage. Indeed, it is often easier to sue a state than an international organization given the lack of jurisdiction over international organizations. Furthermore, states generally have better finances than international organizations and are in a better position to award financial reparation. To emphasise the agency relationship between an international organization being the principal and a state being its agent leads to the perception of the possible responsibility of the state for damage caused by a wrongful act committed within the relationship and therefore to another and more effective means for the victim to obtain a remedy.

[26] Art. 47 (I) of the Draft Articles on the Responsibility of States for Internationally Wrongful Acts, with Commentaries., p. 124. See also *Case Concerning Oil-Platforms* (*Islamic Republic of Iran* v. *United States of America)*, Judgment of 6 November 2003, *ICJ Reports* (2003) p. 161, Separate Opinion of Judge Simma, paras. 75-78.

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THE LIMITS OF THE COURT OF JUSTICE OF THE EUROPEAN UNION'S JURISDICTION TO ANSWER PRELIMINARY REFERENCES

Iuliana-Mădălina LARION*

Abstract

Starting from a concise analysis of the Court of Justice's jurisdiction in the matter of preliminary references ratione materiae, ratione personae, ratione loci and ratione temporis, the study intends to highlight what preliminary questions this international court can and cannot answer and haw far can its rulings reach into the national law of the member states of the European Union.

Keywords: *article 267 of the Treaty on the Functioning of the European Union, preliminary question/reference, preliminary ruling/judgment, court of a member state, jurisdiction limits.*

1. Introductory notes

The jurisdiction of the Court of Justice of the European Union[1] is established, mainly, by article 19 of the Treaty on the European Union (TEU), by articles 256, 258-277 of the Treaty on the Functioning of the European Union (TFEU) and by its Statute[2]. The European Court can only act within the limits of the competence conferred upon it by the member states in the treaties establishing the European Union.

The Treaties provide two main roles for the Court of Justice of the European Union: an advisory one, to render oppinions and a jurisdictional one, to give preliminary rulings and judgments in direct actions. Whereas the preliminary ruling procedure is a noncontencious one[3], direct actions, such as annulment actions, actions regarding EU's institutions failure to act, EU's non-contractual liability or staff cases[4], undergo a contentious procedure.

These competences are divided between the Court of Justice, the General Court and the Civil Service Tribunal[5].

At present, in spite of the fact that article 256 paragraph 3 of Treaty on the Functioning of the European Union renders jurisdiction to the General Court to hear and determine questions referred for a preliminary ruling, in specific areas laid down by the Statute, only the Court of Justice can answer preliminary questions, since its Statute has not yet been modified in this respect. Article 3 of the Regulation (EU, Euratom) of the European Parliament and of the Council of 16 December 2015 amending Protocol No 3 on the Statute of the Court of Justice of the European Union states that the Court of Justice is to draw up a report acoompanied, where appropriate, by legislative requests, by 26 December 2017, for the European Parliament, the Council and the Commission, on possible changes to the distribution of competence for preliminary rulings.[6]

The study intends to analyse in a concise, structured manner the limits of the jurisdiction of the Court of Justice to render preliminary rulings *ratione materiae*, *ratione personae*, *ratione loci* and *ratione temporis* and the consequences of this limited competence.

Since preliminary rulings interpret EU law or decide on its validity and they are an instrument to ensure uniform interpretation and application of that law within the European Union, it is important for national courts to know what they can ask, when they can ask, how they must ask the preliminary questions and what types of answers they can expect to receive. It is meant to be a useful instrument for other legal practitioners as well, such as researchers or lawyers, especially since lawyers have the ability to ask the national courts to refer preliminary questions in pending disputes on behalf of the parties they assist or represent.

The objectives are to have more judgments of the Court on the grounds of the matter reffered to it and less orders of inadmissibility, to achieve an improved dialog and cooperation between the national courts and the Court of Justice. This should also ensure a diminished workload of the European Court with those references that are obviously outside the Court's jurisdiction and/or inadmissible.

* Judge at the Bucharest County Court and PhD candidate at the Faculty of Law, "Nicolae Titulescu" University, Bucharest (e-mail: **madalinalarion@gmail.com**).

[1] The Court of Justice of the European Union is a system composed of three courts: the Court of Justice (the former Court of Justice of the European Communities), the General Court and the Civil Service Tribunal.

[2] Protocol no. 3 to the Treaty on the Functioning of the European Union.

[3] See Şandru, Banu and Călin, *Procedura . . .*, 19-20.

[4] For more information about direct actions, see Fábián 2010, 358-407.

[5] See Craig and de Búrca, 2011, *EU Law …*, 477-478, Chalmers, Davies and Monti, 2010, 143-149.

[6] http://curia.europa.eu/jcms/jcms/Jo2_7031/, last accesed on 10 March 2016.

In order to achieve these objectives, the study shall include useful examples, relevant case law and references for further reading from prominent doctrinal works. The subject of the study has been covered in a form or another by authors from the member states, but efforts to aknowledge the existing contributions, to present them in a new light, to disseminate information must be made in a society of knowledge.

2. Jurisdiction of the Court of Justice to answer preliminary references

2.1 Ratione materiae

Article 267 of the Treaty on the functioning of the European Union provides the Court's jurisdiction to give preliminary rulings concerning:

a) the interpretation of the Treaties;

b) the validity and interpretation of acts of the institutions, bodies, offices or agencies of the Union.

The competence of the Court is restricted to the interpretation of the treaties establishing EU. At present, these are TEU[7] and TFEU[8], but it is agreed that this provision includes the founding treaties, the treaties that modified and amended these treaties, as well as the treaties of accession of the new member states, because they also modify the founding treaties.

The protocols and declarations annexed to the treaties[9] are a part of their content and have the same binding force. Hence, their provisions can be the object of a preliminary reference for interpretation.[10]

After 1 December 2009, the Treaty of Lisbon extended the Court's jurisdiction to the area of freedom, security and justice, integrated fully in TFEU, after the abolition of the three pillar system introduced by the Maastricht Treaty and to the Charter of Fundamental Rights of the EU, annexed to TFEU. However, "the jurisdiction of the Court is largely excluded in the area of the Common Foreign and Security Policy"[11] and with regard to general provisions[12].

These Treaties are primary sources of EU law, they are concluded by states, are instruments of international law and are subject to the will of their creators. Thus, the Court cannot decide on the validity of a provision from the Treaties.

The Court has jurisdiction to answer questions on the validity and interpretation of acts of the institutions, bodies, offices or agencies of the Union, such as regulations, decisions and directives[13], but also acts that are not mentioned in the Treaties[14]. Any EU act may be the object of a reference on validity or interpretation, regardless of its binding or non-binding effects[15], but its nature, its content and its effects may be of interest in determining whether it is relevant in the national dispute.

The jurisdiction of the Court to rule on the validity of such acts is complementary to its jurisdiction to review the legality of EU acts under article 263 of TFEU. As expressed in the doctrine: "Besides ensuring uiform interpretation, the preliminary ruling does also provide private parties with acces to the Court, when they have no *locus standi* to directly ask the Court to control the validity of Union acts."[16] But, if the party to the main dispute had standing to attack the EU act by way of an annulment action and did no do so in the time-limit established by the aforementioned article, the Court ruled it would be contrary to the principle of legal certainty to analyse the legality of that act by answering a preliminary reference.[17]

"References may also be made on whether a provision of Community law produces direct effect, that is, whether it confers rights on individuals which national courts are bound to protect. This is considered a question of interpretation."[18]

It seems the Court took the view that its own judgments may be interpreted by way of a

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[7] The Treaty on the European Union was signed at Maastricht on 7 February 1992 and entered into force on 1 November 1993. For the consolidated version see: http://europa.eu/eu-law/decision-making/treaties/index_en.htm, last accesed on 10 March 2016.

[8] The consolidated version of the Treaty establishing the European Economic Community, signed at Rome on 25 March 1957, in force since 14 January 1958, modified several times, last by the Treaty of Lisbon, signed on 13 December 2007, in force since 1 December 2009. For more information, see Fuerea, 2011, 32-83.

[9] For example: Protocol no. 2 on the application of the principles of subsidiarity and proportionality and the Declaration concerning the Charter of Fundamental Rights of the European Union.

[10] For a concurring opinion see Kaczorowska, 2009, 253. For the opinion that unilateral declarations of the Member States cannot be the object of a preliminary reference, see Smit, Herzog, Campbell and Zagel, 2011, 267-13, Broberg and Fenger, 2010, 103.

[11] Hartley, 2010, 289. See also Jacobs, 2012, 203-204.

[12] See order of 7 April 1995 in case C-167/94 Grau Gomis and others, paragraphs 5 and 6, http://curia.europa.eu/en/content/juris/c2_juris.htm, last accesed on 22 March 2016.

[13] For a presentation of the main sources of EU law, see Dumitraşcu, 2012, 107-184.

[14] See Fuerea, 2016, 98.

[15] See judgment of 13 December 1989 in case 322/88 Grimaldi/Fonds des maladies professionnelles, on the interpretation of recommendations, paragraphs 7-19, http://curia.europa.eu/en/content/juris/c1_juris.htm, last accesed on 10 March 2016 and judgment of 27 February 2007 in case C354/04 Gestoras Pro Amnistía and others/Council, on the jurisdiction to review common positions in the field of police and judicial cooperation in criminal matters, paragraphs 52-57, http://curia.europa.eu/en/content/juris/c2_juris.htm, last accesed on 22 March 2016.

[16] Mathijsen, 2010, 144.

[17] Judgment of 9 March 1994 in case C-188/92 TWD/Bundesrepublik Deutschland, paragraphs 10-26, http://curia.europa.eu/en/content/juris/c2_juris.htm, last accesed on 22 March 2016.

[18] Arnull, 2006, 104.

preliminary reference[19], but their validity cannot be questioned[20].

General principles of law cannot, in itself, form the object of a preliminary reference, but they can be interpreted and applied in order to determine the correct interpretation or validity of an EU act. However, the Court did answer questions on the infringement of fundamental rights when there was no explicit reference to these in the Treaties.[21]

International law provisions[22] and national acts of the member states cannot be interpreted by the Court, nor be declared invalid[23]. The Court can only interpret the EU act transposed in the national law or on which the national act is based.[24]

The Court cannot apply EU law or national law, nor can it decide if a provision of the national law is contrary to EU law. The Court stated: "When it gives an interpretation of the Treaty in a specific action pending before a national court, the Court limits itself to deducing the meaning of the Community rules from the wording and spirit of the Treaty, it being left to the national court to apply in the particular case the rules which are thus interpreted."[25]

In its case law, many times the Court left little doubt about the compatibility between national law and EU law.[26] "On occasion, the question has been reformulated so as to present the issue in non-fact-specific terms – although the essence of the question answered and its consequential effect as a compatibility decision remain unchanged."[27]

We agree that this may be caused, as some authors observed[28], by the fact that many questions are very detailed and require a specific answer. "The line between matters of Community law and matters of national law, between interpretation and application are more easily drawn in theory than in practice."[29]

In what agreements with non-member states are concerned, these may be regarded as acts of the EU institutions, since they are generally concluded by a decision of the Council. This seems to be the view adopted by the Court and the binding effects of its judgment concern only the agreement as part of EU law, not the non-member state.[30]

However, it has been emphasized that the party to the agreement is the EU itself, not the Council, so the act is not a unilateral act of an institution, but a bilateral or multilateral act of the Union. The Court does not interpret the Council's decision, but the bilateral act of the Union.[31]

If both the Union and the member states are parties to the agreement with the non-member state/states (mixed agreements), the jurisdiction of the Court extends only to those provisions falling within EU competence, not to the provisions falling within the member states'exclusive competence.[32]

It would seem that the Court only has jurisdiction to interpret an international agreement if it is formally a party to that agreement by means of an act of one of its institutions. Agreements between member states are excluded from the Court's jurisdiction[33], even if they are just subsidiary conventions, adopted to attain objectives set out in the Treaties.[34]

That is why the Court's decision to declare it has jurisdiction to interpret the General Agreement

[19] For example, judgment of 16 March 1978 in case 135/77 Bosch/Hauptzollamt Hildesheim, http://curia.europa.eu/en/content/juris/c1_juris.htm, last accesed on 22 March 2016. See also Andreşan-Grigoriu, 2010, 226-227.

[20] Order of 5 March 1986 in case 69/85 Wünsche/Germany, paragraphs 10-16, http://curia.europa.eu/en/content/juris/c1_juris.htm, last accesed on 22 March 2016.

[21] Judgment of 17 December 1970 in case 11/70 Internationale Handelsgesellschaft, paragraphs 3 and 4, http://curia.europa.eu/en/content/juris/c1_juris.htm, last accesed on 22 March 2016.

[22] See Brînzoiu, 2007, 85.

[23] Horspool and Humphreys, 2008, 114.

[24] For further reading, see Broberg, 2010, 362-389.

[25] Judgment of 27 March 1963 in joint cases 28 to 30/62 Da Costa en Schaake NV and others/Administratie der Belastingen, http://curia.europa.eu/en/content/juris/c1_juris.htm, last accesed on 22 March 2016. See also Schütze, 2012, 289-290.

[26] For example, see the judgments in cases C-402/09 Tatu and C-263/10 Nisipeanu, in which the Court stated that article 110 of TFEU must be interpreted as precluding a member state from introducing a pollution tax levied on motor vehicles on their first registration in that member state if that tax is arranged in such a way that it discourages the placing in circulation in that member state of second-hand vehicles purchased in other member states without discouraging the purchase of second-hand vehicles of the same age and condition on the domestic market. http://curia.europa.eu/en/content/juris/c2_juris.htm, last accesed on 22 March 2016.

[27] Craig and de Búrca, 2011, *The Evolution . . .*, 368. For example, see judgment of 29 May 1997 in case C-329/95 VAG Sverige, paragraphs 17-24, http://curia.europa.eu/en/content/juris/c2_juris.htm, last accesed on 10 March 2016.

[28] See Craig and de Búrca, 2009, 618.

[29] Steiner and Woode, 2009, 231.

[30] Judgment of 30 April 1974 in case 181/83 Haegemann/Belgian State, paragraphs 2-5, in which the Court ruled that it had jurisdiction to answer preliminary questions about the Agreement of association between the European Economic Community and Greece.

[31] Hartley, 2010, 291.

[32] Judgement of 16 June 1998 in case C-53/96 Hermès International/FHT Marketing Choice, paragraphs 22-29. The Court stated it had jurisdiction to interpret provisions from the Agreement on Trade-Related Aspects of Intellectual Property Rights since the Community was a part to this agreement and it applied to the Community trade mark, http://curia.europa.eu/en/content/juris/c2_juris.htm, last accesed on 10 March 2016.

[33] See Popescu, 2011, 251.

[34] See judgment of 15 January 1986 in case 44/84 Hurd/Jones, paragraph 20, http://curia.europa.eu/en/content/juris/c1_juris.htm, last accesed on 10 March 2016.

on Tariffs and Trade (GATT)[35], to which it did not fomally adhere, was subject to criticism in doctrine and considered to be a policy-based judgment, given only on the ground that it was desirable for the GATT to be covered by article 267 of TFEU (the former article 177 of TEEC)[36]. We agree that there was no legal basis for the Court to accept jurisdiction in the case of GATT, since it was not an act of an EU institution. The Court's arguments that the member states were all parties to this international agreement and that there was a need to prevent potential distortions in the unity of the commom commercial policy and in trade do not constitute formal grounds for jurisdiction.

2.2. Ratione personae and ratione loci

The Court can only answer preliminary references made by "courts or tribunals of a member state".[37]

As the Court stated in numerous occasions, the terms "court" and "tribunal" have an autonomous meaning in EU law, describing any national judicial body, established by national law, independent, permanent, that has the power to apply national law and render a definitive decision on legal rights and obligations, binding, after following an adversarial procedure[38] and applying rules of law.[39]

Only the Court can establish if a judicial body meets these criteria. The Court consistently refused to accept references form arbitration tribunals[40] and administrative authorities with no judicial functions.[41]

If the body does not have legal standing to ask a preliminary question or if the judicial body is acting outside its judicial function[42], the Court shall give an order of inadmissibility.[43] If the body receives such an order, it may not ask a new question.

It is for each member state to define its territory geographically[44], but EU law must be applicable in those territories as well[45].

Judicial bodies from non-members states are clearly excluded from the Court's jurisdiction, even if these non-members states are parties to an association agreement with the EU, with the exception of the situation when the right is enshrined in an international agreement concluded between EU and third countries, as it is in the Agreement on the European Economic Area, which authorises courts and tribunals of the European Free Trade Association member states to refer questions to the Court of Justice on the interpretation of an agreement rule[46].

International courts are also excluded, although this rule may be subject to exceptions, as the Court stated that the Benelux Court, a common court to Belgium, the Netherlands and Luxembourg, composed of judges from the supreme courts of these member states, did have standing to refer preliminary questions[47].

In our opinion, the Court's view on jurisdiction might be similar in the case of the European Court of Human Rights, a court that is common to all member states of the EU, parties to the Convention for the Protection of Human Rights and Fundamental Freedoms, adopted within the framework of another international organisation, the Council of Europe.[48] This court is competent to solve disputes between private persons and member states and, though it is not formally a part of the court system of the member

[35] Judgment of 16 March 1983 in joint cases 267, 268 and 269/81 Amministrazione delle finanze dello Stato/SPI and SAMI, paragraphs 14-19, http://curia.europa.eu/en/content/juris/c1_juris.htm, last accesed on 10 March 2016.

[36] Hartley, 2010, 291-292.

[37] For legal standing to refer preliminary questions, see Andreșan-Girgoriu, 2010, 72-145, Kaczorowska, 2009, 255-260 and Petrescu, 2011, 148-149.

[38] See judgment of 16 December 2008 in case C-210/06 Cartesio, paragraphs 54-63, http://curia.europa.eu/en/content/juris/c2_juris.htm, last accesed on 22 March 2016.

[39] See judgment of 6 October 1981 in case 246/80 Broekmeulen/Huisarts Registratie Commissie, paragraphs 8-17, available at http://curia.europa.eu/en/content/juris/c1_juris.htm and judgment of 17 September 1997 in case C-54/96 Dorsch Consult, paragraphs 22-38, available at http://curia.europa.eu/en/content/juris/c2_juris.htm, last accesed on 22 March 2016.

[40] For example, judgment of 23 March 1982 in case 102/81 Nordsee/Reederei Mond, paragraphs 7-16 and judgment of 27 January 2005 in case C-125/04 Denuit and Cordenier, paragraphs 11-17. The main argument to reject jurisdiction was that the parties are under no obligation, in law or in fact, to refer their disputes to arbitration. On the other hand, the national court that decides on the annulment of an arbitration award can refer preliminary questions, as it results from judgment of 1 June 1999 in case C-126/97 Eco Swiss.

[41] See judgment of 25 June 2009 in case C-14/08 Roda Golf & Beach Resort, paragraphs 31-42, http://curia.europa.eu/en/content/juris/c2_juris.htm, last accesed on 22 March 2016.

[42] See judgment of 15 January 2002 in case C-182/00 Lutz and others, paragraphs 11-17, http://curia.europa.eu/en/content/juris/c2_juris.htm, last accesed on 22 March 2016. The Austrian regional court was exercising a non-judicial function, in connection with the maintenance of the register of companies.

[43] For procedural aspects, see Petrescu, 2011 and Fábián, 2014.

[44] Judgment of 10 October 1978 in case 148/77 Hansen/Hauptzollamt Flensburg, with regard to the French overseas departments, http://curia.europa.eu/en/content/juris/c1_juris.htm, last accesed on 22 March 2016.

[45] Judgment of 3 July 1991 in case C-355/89 Department of Health and Social Security/Barr and Montrose Holdings, paragraphs 6-10, http://curia.europa.eu/en/content/juris/c1_juris.htm, last accesed on 22 March 2016.

[46] Article 107 of the Agreement on the European Economic Area and Protocol 34 annexed to it, available at http://www.efta.int/legal-texts/eea, last accesed on 22 March 2016.

[47] Judgment of 4 November 1997 in case C-337/95 Parfums Christian Dior/Evora, paragraphs 15-31, http://curia.europa.eu/en/content/juris/c2_juris.htm, last accesed on 10 March 2016.

[48] For a contrary opinion see Andreșan-Grigoriu, 2010, 88, Lenaerts, Arts and Maselis, 2006, 44.

states, its decisions are final and must be applied, producing binding effects in their legal system. It applies the Convention, but it is not impossible to imagine a situation in which it might need the interpretation of EU law, applicable in all member states of the EU and also parties to the Convention, especially since this has happened before in ECHR's case law[49]. It remains to be seen how this issue will be addressed in the context of EU's process of accession to this Convention.[50]

2.3. Ratione temporis

The Court does not have jurisdiction to give preliminary rulings if the facts of the national dispute occurred prior to the member state's accession to the EU.[51] In case C-283/10 the Court stated that it has jurisdiction to interpret the provisions of EU law only as regards their application in a new member state with effect from the date of that state's accession to the European Union. The dispute in the main proceedings concerned events which took place between May 2004 and September 2007, whereas Romania did not accede to the European Union until 1 January 2007. As the events occurred in part after the date of Romania's accession to the European Union, the Court decided it had jurisdiction to reply to the questions referred.[52]

Thus, it would seem the Court only denies competence for those past situations or events which have completely exhausted their legal effects prior to the date of accession of the new member state.[53]

The national courts may also ask preliminary questions on the application of EU law in intertemporal situations, since the application of EU law *ratione temporis* is a matter of interpretation.

"It is assumed that the ECJ grants immediate effect to procedural norms, whereas norms of substantive character are not immediately applicabile in every case."[54]

It is also necessary that the national dispute is in course[55] and it is a real one[56]. It does not matter in what stage of the proceedings[57], but it was recommended that the optimum time would be when the facts of the case have been established and questions of purely national law have been settled[58], in order to receive a helpful answer and not have the question rejected as being purely hypothetical[59] or for the lack of sufficient description of the facts[60].

3. Conclusions

Legal protection in the EU is ensured, largely, by national courts, acting as EU courts competent to apply and interpret EU law.[61] The preliminary reference procedure is an instrument of cooperation between the national courts of the member states and the Court of Justice of the European Union, in a common effort to interpret and apply EU law coherently and uniformly. There is no hierarchy between the first courts and the latter[62], but rather a clear separation of competence, which does not contradict their complementary roles.

The Court of Justice is the only one competent to decide if it has jurisdiction to answer a preliminary reference or not.[63] Some authors observed that, over

[49] See cases Cantoni against France, judgment of 11 November 1996, available at http://hudoc.echr.coe.int/eng#{"itemid":["001-58068"]} and Matthews against the United Kigdom, judgment of 18 February 1999, available at http://hudoc.echr.coe.int/eng#{"itemid":["001-58910"]}, last accesed on 22 March 2016.

[50] For details about EU's accession to the Convention for the Protection of Human Rights and Fundamental Freedoms, see Gâlea, 2012 and Jacobs, 2012, 204-206.

[51] Judgment of 10 January 2006 in case C-302/04 Ynos, paragraphs 34-38, judgment of 14 June 2007 in case C-64/06 Telefónica O2 Czech Republic, paragraphs 17-24 and judgment of 15 April 2010 in case C-96/08 CIBA, paragraphs 13-15, http://curia.europa.eu/en/content/juris/c2_juris.htm, last accesed on 10 March 2016.

[52] Judgment of 24 November 2011 in case C-283/10 Circul Globus București, paragraphs 27-29, http://curia.europa.eu/en/content/juris/c2_juris.htm, last accesed on 22 March 2016.

[53] See judgment of 2 October 1997 in case C-122/96 Saldanha and MTS Securities Corporation/Hiross, paragraph 14, judgment of 29 January 2002 in case C-162/00 Pokrzeptowicz-Meyer, paragraphs 46-57 and order of 6 March 2007 in case C-18/06 Ceramika Paradyż, paragraphs 20-25, http://curia.europa.eu/en/content/juris/c2_juris.htm, last accesed on 22 March 2016. See also Broberg and Fenger, 2010, 146-147.

[54] Póltorak, 2008, 1362.

[55] Lenaerts, Arts and Maselis, 2006, 45.

[56] Judgment of 11 March 1980 in case 104/79 Foglia/Novello, paragraphs 10-13, http://curia.europa.eu/en/content/juris/c1_juris.htm, last accesed on 22 March 2016. The Court considered that the parties to the main proceedings did not dispute with regard to the EU issue refered, but had the same opinion. They created an artificial dispute and inserted certain provisions in their contract in order to get an Italian court to decide on the compatibility of a French consumption tax with EU law, so the European Court denied jurisdiction to answer the preliminary questions refered by the Italian court.

[57] See Foster, 2009, 193.

[58] Judgment of 10 March 1981 in joint cases 36 and 71/80 Irish Creamery Milk Suppliers Association, paragraphs 5-9, http://curia.europa.eu/en/content/juris/c1_juris.htm, last accesed on 22 March 2016.

[59] Judgment of 5 February 2004 in case C-380/01 Schneider, paragraphs 20-32, http://curia.europa.eu/en/content/juris/c2_juris.htm, last accesed on 22 March 2016.

[60] Order of 7 December 2010 in case C-441/10 Anghel, http://curia.europa.eu/en/content/juris/c2_juris.htm, last accesed on 22 March 2016.

[61] Rusu and Gornig, 2009, 149-150. For Romanian case law on reasons not to refer preliminary questions, see Șandru, Banu and Călin, *Refuzul* . . ., 2013.

[62] Arnull et. al., 2006, 510.

[63] See judgment of 16 December 1981 in case 244/80 Foglia/Novello, paragraphs 18-21, http://curia.europa.eu/en/content/juris/c1_juris.htm, last accesed on 22 March 2016.

the years, due to its increasing case load, the Court's generous approach in accepting to answer preliminary questions has shifted to some extent by developing jurisprudence aimed at a better control of the types of cases it will hear.[64]

In this context, it is important to understand how far reaching is the jurisdiction of the European Court, under all its aspects: material, personal, territorial and temporal. These specific issues have been approaches in a synthetical manner, for a better understanding of what preliminary questions can find an answer on the grounds of the legal issue reffered. This can lead to a lighter work load for the European Court, to more confidence for national courts in starting an efficient dialogue and to the development of EU law.

The study did not cover all the reasons for declaring a reference as inadmissible, so further details may be presented on hypothetical problems, on the *acte claire* doctrine, on the precedent issue, on the lack of relevance of the question for the resolution of the national dispute or on the formal aspects of the references, like providing sufficient information about the facts of the case.

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EVOLUTION OF SOURCES IN ROMANIAN LEGAL SYSTEM

Horaţiu MĂRGOI*

Abstract

The mechanisms by which social relationships are strengthened depend of the law maker's capacity to create an optimal juridical environment. Social function of juridical messages emitted by the Legislator it can be completed by the role of jurisprudence and case law.

The reason of being of Laws is the citizens to be obedient to the prescriptions of rules. This must be the major interest of the Legislator and justifies efforts to make the Law easily perceived.

Protection against legislation's inflation is for certain what citizens ask from Legislator, but most of of, the justice seeker is demanding a predictability of justice.

The danger brought by the judge activity interference in legislative is no longer sufficient to offset the risk of perpetuating a non-unitary judicial practice.

The damage even of the smallest incoherent legal practices is felt among both judges and litigants and must be prevented.

Keywords: *Jurisprudence, case law, Preliminary decision, Sources of Law.*

Introduction

To say simply that the law is like a living organism, can be perceived easily and not without reason, as sophistry. Its total dependence upon society, but predestinates the right to a relentless dynamism which, in spite of dramatic formulations, can only have happy consequences.

However, this reality can sometimes lead the animosities between people meant to be beneficiaries the right and those who create it or enforce it. If only this argument requires a permanent and striking necessity to adapt the Law.

Dynamic normative, even in the presence of a legislative inflation, or perhaps especially in its presence, has been shown to be inferior to the increasing rate of the situations necessary to apply those rules.

The fact that any legal system is perfect can not be disputed. This is confirmed both by the appearance of Equity in the sixteenth century as a way of improving the common law and by the importance they acquire in the Roman-Germanic legal system jurisprudence and caselaw.

Conservative conceptions, although they certainly have their advantages, if taken to the extreme can be just as damaging as those which are trying to innovate at all costs.

Legal sciences are no exception to this principle, however, they are required, with even more rigor, the attainment of a stable balance between any exaggerated tendencies.

It can not be denied, rightly, that a lack of consistency of jurisprudence flaws the foundation of the seeker's confidence in the justice itself and directly leads to deformations in the judge's image in society. More seriously, the principle of juridical security relations itself is affected, which can only be harmful, regardless of such a signal receiver.

Ensuring legal guarantees against unpredictability[1], either normative or jurisprudential contributes to strengthening the principles of proper functioning of society. Meanwhile, the lack of guarantees irreparably erodes the construction of a solid constitutional state.

Romania joining the European Union takes effect and recognition the rule of Treaties which substantiates it, which had however, as reverse effect the appearance of a significant number of Decisions of the European Court of Human Rights that bring vehement criticism regarding the lack of a unit of practice at the level of our national courts.

At this level, it is sometimes identified an antagonism between the foreseeability of court proceedings and inconsistancy of Romanian jurisprudence, being an intolerable situation according to the European Court of Human Rights and, therefore, punishable.

A side effect of the admission was the monitoring of our country through the Mechanism for Cooperation and Verification, on which occasion, in 2013, it is stated in a report to the European Parliament and the Council, the advantages of the institution appeal and the proceedings freshly introduced the Preliminary Decisions pronounced by the High Court of Cassation and Justice.

We can not help throwing away a word that monitoring was undertaken by representatives of countries with perfect justice, customary endogenous criticism.

* PhD Student, Faculty of Law, "Nicolae Titulescu" University of Bucharest (e-mail: **margoi.horatiu@gmail.com**).

[1] Nicolae Popa, "Sistemul dreptului, un concept perimat" *Revista de Drept Public* 1 (2015): 16.

Social cohesion can not be perceived in terms of the role of law in society, in the absence of standards of behavior induced through concrete images to be integrated easily into the collective consciousness[2]. It is obvious that the current psychological heritage[3] of our society is enriched by televised Justice.

We consider that the efficacy of rules in regulating the behavior of modern man, as opposed to the power of the example set by intensely advertised caselaw and jurisprudence is crucial.

1. Content

The current Civil Code novel mentions only practices, maybe not in the best way, as sources of civil law, besides law and general principles,.

It should be made clear that practices are worth of being considered as a source of law only within the limits of the law, and the possible role ceases when its moral practices contravene public order. Their importance can never exceed that of the law, not having the power to recall it[4].

The notion of practices, or business practices is proper commercial terminology is but it is possible that the actual place to be determined by the embracement of monistic theory concerning the codification of private law.

However, there are areas of law in which customary law is totally inapplicable due to exclusivity in terms of sources of law, the written law, the effect of the principle of legality and incrimination.

Starting from this premise and taking into account the provisions of civil proceedings expressly forbid the judge to lay down generally binding directives by means of court orders given in cases inferable from his trials, we can only reach the conclusion officially stated by the Constitution according to which judges are subject only to the law.

It is well known that what mainly justifies the imperative as jurisprudence not to be accepted as a source of law is the very principle of separation of powers.

To enpower the judges with legislating force, given that they also enforce the law, implies, of course, some drawbacks if not real risks.

You do need lucidity and especially objectivity when analyzing the assigning institutional capacity to enforce the law. And, such an analysis does not require a special study in order to identify any administrative bodies, representatives of the executive, the courts in competition law enforcement. So the argument, according to which the possibility of creating law courts threatens the balance of powers, remains vulnerable.

It must also be introduced in this equation the role of another fundamental body of the state, with an aura of independent authority, without belonging to any of the executive or legislative powers law.

The Constitutional Court which, through its decisions, essentially influences the applicability of a legal text.

Unconcealed intentions of politicization of the Constitutional Court have a strong negative impact, perceptible or not to society at large, given the erga omnes binding force of caselaw that its decision creates .

Attracting the constitutional court in political disputes has the potential of a phenomenon with strong social impact, including, perhaps most importantly, the perception of partiality justice.[5] And this perception can seriously damage the perception of the unquestionably positive role that caselaw and judicial caselaw can have as a source of law.

Regarding the notions of jurisprudence and judicial caselaw, it should be referred to one of our great advantages as our law being right descendant from Roman-Germanic family of law. This allows us making a brief incursion in the history of jurisprudence, both etymologically speaking and legally or deep lawfully meaning.

None of the juridic languages of the countries belonging to the basin of juridical culture Roman-Germanic lack the notion of jurisprudence, its shape is similar and easily deductible as understood, especially in Latin countries but with the same sense and in terms of the German word for Rechtwissenschaft .

All decisions of courts that converge towards a certain rule of law are what shapes doctrine as the concept of jurisprudence.

Roman era of building the law, highlighted the need to establish boundaries between different categories of rules, to distinguish them on the legal or moral religious, at which required the notion of *Jus* [6].

Although they fundamented the rule of law related to that period, those rules have come to be complemented by the issuing legal solutions of Pretor since the Republican period and the emergence of Aebutia Laws and Iulia iudiciaria[7], until the advent of monarchy.

[2] idem 17.
[3] ibidem 17.
[4] Nicolae Popa, "Teoria Generala a Dreptului" (Bucuresti: C.H. BECK 2008), 152.
[5] Nicolae Popa, *Cuvant inainte* to *Actele Jurisdictionale ale Curtii Constitutionale*, by Dan Cimpoieru (Bucuresti: Wolters Kluwer, 2010), 13.
[6] Emil Molcut and Dan Oancea, *Drept roman* (Bucuresti: Sansa, 1993), 5.
[7] Mircea Dan Bob, Despre precedentul judiciar si valoarea sa de izvor de drept, accesed on April 7, 2016, http/juridice.ro/39497/ despre precedentul judiciar si valoarea sa de izvor de drept.html

Praetorian law loses its role with the work of codification of Justinian [8], moment at which the creative force of law jurisprudence, though inexhaustible, fades in the light sources of law.

Formal enforceability of law [9] is identified by the founders of modern schools of law, Savigny and von Ihering as relying solely on the specialist legal profession. Its mission is to design scientific norm which then have to translate into plain language.

It raises the problem of finding interdependence between the concepts of French origin, belonging them Fr. Geny, and Given and Built in Law, to analyze the optimization of the existing regulatory framework by jurisprudence.

It is indisputable sentencing jurisprudence to discovering ways of enforcing law, little contemplated by the legislator but which by their frequency or logic lead to improved forms of rule.

Consacration of the three doctrinal theories about the creative ability of law jurisprudence does not exclude criticism with solid arguments.

A pick-wide supremacy will of the legislature, without taking into account the imbalance between relatively limited regulation capacity and the possibility that an unlimited number of concrete situations are likely to come into conflict with the intent had when designing the legislative product, constitute the essential flaws of the exegetical theory.

In terms of evolutionary theory appeared in the field, claiming, without being able to be scientifically contradicted the fact that one of the legal fictions indispensable to the good functioning of the Roman-Germanic law system as *nemo censetur ingorare legem*, will be excluded when, litigants will be required to know,not only all normative acts but also judicial caselaws.

Forced distinction that seeks autonomy theory texts is vulnerable in terms of interpreting the will of the legislature as we replace with the judge who will enforce the law text abstract.

The actuality of Rene David's statements is certain, when he refers to the fact that the creative role of jurisprudence through the relationship with the law can only be evoked behind the apparent interpretation of the law[10] and untenable in its absence.

Any research measure influencing our legal system and jurisprudence of judicial caselaws and their potential sources of law must begin with an overview of the forms that are in current legislation.

In the foreground, the Constitutional Court decisions should be mentioned that, by their general compulsory ruled by Article 147, para. (4) of the Constitution, have undeniable value as creative.

To the extent that we wish the nuancing of the creative power of law of those decisions, we can initiate a discussion with point of departure that essentially and mainly by the subsequent verification of laws, the Constitutional Court has the call to render a law inapplicable.

It can therefore be highlighted, that the role of the constitutional court is not to create but to dematerialize an act contrary to constitutional precepts.

As shown in doctrine, generally binding decisions of the Constitutional Court are not influenced by the solution of admission or rejection of the objection.

The main argument in considering the practice of the Constitutional Court as being very close to the law is the abolition of legal provisions unconstitutional.

What makes the difference between declaring decisions as unconstitutional and the rejection of the objection, lies mainly in the fact that the Court can modify in the presence of new elements, the character originally established as constitutional.

The Constitution does not allow the reconsideration of a decision by which a legislative provision was previously declared unconstitutional.

Distinctive for Costitutional Court decisions is that not only the Decision but also its grounds are binding[11].

Failure of constitutional decisions can attract different legal sanctions, depending on the active subject of the violation thereof.

Thus, a sanction of the legislature or executive is considered to be the declaration as unconstitutional of the provision appealed in Court or of the direct censorship of the administrative provisions ruled by the court.

It is a different situation if the judiciary when, in addition to rebutting unconstitutional decision that ignores character can apply by virtue of Article 99, letter (s) of Law no.303 / 2004, including disciplinary sanctions.[12]

It should however be made more accurate that, under no circumstances can the sovereign attribute of the courts be appropriated by the Constitutional Court which is not competent to rule on the application and interpretation of the law.[13]

Another issue that must be addressed when analyzing the creative power of jurisprudence and case law decisions should have as their object High

[8] Andreea Ripeanu, *Drept roman* (Bucuresti: Pro Universitaria, 2008), 7.
[9] Nicolae Popa, *op. cit.*168.
[10] Rene David, *Les grandes systems de droit contemporaines* (Paris: Daloz, 1950), 139.
[11] Catalin-Silviu Sararu, *Examen critic al deciziilor Curtii Constitutionale* (Bucuresti: C.H. BECK, 2015) 5.
[12] idem 6.
[13] ibidem 10.

Court of Cassation and Justice of appeals on points of law.

The procedural provisions of civil and criminal converge about conditions that advertise union practice the way of this wonderful tool available of reach to the general prosecutor of the High Court of Cassation and Justice, leading boards of the High Court of Cassation and Justice or the courts of appeal but the Ombudsman.

In consideration of their mission to ensure consistent interpretation and application of existing laws by all courts, the doctrine treated with important decisions of High Court of Cassation and Justice pronounced in the appeals on points of law.

Given that it is not intended to create new legal rules, such decisions have formal representation of the sources of law, which does not however diminish their creative role.

If judicial institutions represented by the decisions of the Constitutional Court that the High Court of Cassation and Justice in the appeal on points of law is not news in the Romanian legal landscape, advance rulings pronounced by the High Court of Cassation and Justice and the Court of Justice of the European Union have a strong sense of novelty.

Occasioned by the novelty brought to our legislation, the doctrine also welcomed a natural needed clarification of terms then sought to identify novel sources of inspiration of the legislature.

Neither of the two approaches had encountered difficulties in research, mainly due to the existence of a rich legal literature in the field, at European level.

It was regarded as uninspired, through the associations with existing procedural terminology, the phrase prior decision. It has been expressed the view according to which the concept is easily confused with the decision can be passed with absolution, by the court judging the Fund, of certain conditions of admissibility of the main application[14].

Given that, regarding this procedural incident, the legal effects are similar in terms of competence and suspension of Decision, leaves less room for ambiguity.

The doctrine also brings up the analogy between matter of law, found in Article 519 of the Civil Procedure Code and the issue of law identified in Article 514 of the same code, the matter appeal on points of law.

Regarding the formulation there was brought criticism on the issue of official use of the term "problem", considered inadequate legal language, expressing the opinion that it is preferable notion of "matter"[15].

Going beyond aspects of form, it is distinguished the common goal of the two institutions belonging to our legislation, which is to ensure uniform interpretation and application of the law and the exclusive authority of the High Court of Cassation and Justice.

Referring to the inspiration of the referral High Court of Cassation and Justice, it is found both in the procedure currently regulated by art.267 TFEU on prejudicial references addressed to the Court of Justice of the European Union, and in the request opinion proceedings addressed to the French Court of Cassation.

Given the origin of the French law but also of Community law, it is impossible to ignore the fact that this procedure is not invented in modern times. It would be difficult, if not impossible, if we refer to the vastness of Roman law and the genius of its creators.

We are so forced to a brief foray into Roman law and will be spotted with ease, similarities with the institution rescriptum by which the sovereign shall act upon, at the request of a judge, a governor or another person on a matter of law. Binding force of rewritable rebounds on all the judges not only on the one who the matter of law is brought up[16].

However, it can be distinguished a difference between rewritable effects mentioned above, specific especially to the period we call the Distinctive, particularly to the effects of domination and limited to the Distinctive case in question which appeared, for the period Principality[17]

Returning legal institution in our legislation, it was uncertain whether, referral High Court of Cassation and Justice with a question of law, not be diverted from the purpose intended by the legal text.

In intransigent terms, it was mentioned even the malicious character of these legislative creations, invoking disruption of the due course of justice by guiding judges of lower courts to laziness, due to the possibility that they will exploit to care about solving cases at special panel of the High Court of Justice[18].

By overcoming the doctrinal criticism, somewhat valid, about other uses of the term uninspired Decision [19], it has been stated that the overall effect of the mandatory interlocutory

[14] Ioan I. Balan, "Sesizarea Inaltei Curti de Casatie si Justitie pentru pronuntarea unei hatarari prealabile/prejudicial in temeiul codului de procedura" *Dreptul* 6 (2015): 9.

[15] idem 10.

[16] Vladimir Hanga and Mircea Dan Bob C*urs de drept privat roman* (Bucuresti: Universul Juridic, 2009): 64.

[17] Constatin Stoicescu *Curs elementar de drept roman,* (Bucuresti: Universul Juridic, 2009): 58-60.

[18] Stefan Beligradeanu "Reflectii critice cu privire la caracterul vadit daunator bunului mers al justitiei al reglementarii in noul Cod de procedura civila a posibilitatii sesizarii de catre anumite instante judecatoresti a Inaltei Curti de Casatie si Justitie in vederea pronuntarii unei hatarari prealabile pentru dezlegarea unor chestiuni de drept" *Dreptul* 3 (2013): 110.

[19] Ioan I. Balan, *op. cit.* 12.

decisions has the ability to compromise judicial independence of judges.

Specifying that the force of res judicata is attached not only to the device but also to the considerations it relies on[20] requires marking the difference between interpreted and the res judicata.

Obviously, the decision prejudicing the specialized panel of High Court of Cassation and Justice conducts a work of interpretation of the norm, not hear a dispute.

Publication in the Official Gazette of the respective interlocutory decision proves the new legal situation has created a spring force of law, forcing a general nature, to respect.

Before getting to analyse jurisprudence of the European Court of Justice, from the perspective of the source of law institution, we mention the issues that concern comparative procedure interlocutory decision of our supreme court.

In a first phase, we will contrast this procedure with the appeal on points of law with which I compared concisely and above.

In a plastic manner, it is even used the phrase antechamber of appeal on points of law when treating the two legal institutions[21].

It highlights the fact that the two law institutions approach different situations in the following aspect: while decision damage is pronounced in situations that match a rule that could create future non-unitary practice, appeal on points of law aims union jurisprudence when it was divergence.

In relation to the conditions of admissibility of a referral to the French Court of Cassation, it was stated that the decision injury distances itself from the opinion institution, and in that the Supreme Court Hexagon is legally invested only when the point of law has been raised in many disputes.

In this respect, it is found an approximation of appeal on points of law by the institution under French law system.

We therefore witness a source of law created by a court having clearly determined and stated the purpose of uniting practice, however, in the absence of evidence that it was not unitary. It detaches with the preventive role of this procedure, confirmed by the absence of pre-existing casuistry.

Regarding the notification addressed to the High Court of Cassation and Justice, it is optional for the initiator of the procedure which supplementarily differentiates it by the procedure of appeal on points of law. But it is coming through the unravelling obligation on the High Court of Cassation and Justice.

The challenge legislature to prevent a looming uneven practice and the extent of publication, subsequently recording, including referral signing on the website of the Supreme Court.

Overriding interest applicability similarly to an appeal on points of law, formulated opinion written by recognized specialists in the subject matter of the complaint, aiming at overcoming the nature of any intellectual pride.

The fact that the effect of the new procedure of advance rulings in the first phase, High Court of Cassation and Justice will be charged with such cases is inherent in any beginning.

Long term, which should be considered by a legislator with vision, the effect will be to discourage initiation of processes whose purpose is easy to guess.

Also, the courts of law mission will be eased, the reasonable period no longer being a simply unattainable ideal, in the presence of a uniform practice, even if it draws in the first phase, the activity mentioned agglomeration High Court of Cassation and Justice.

It is accurate in doctrine, the reality regarding the nature of the complaint subsidies High Court of Cassation and Justice injurious to a Decision by reference to an appeal on points of law.

Complaints stated that the principle of subsidiarity, in relation to the precondition to provide a solution for a new point of law.

It is not a unitary view that it creates a dependency between this term and the requirement that the origin of this new law matters to be found in a new normative act.

It therefore accepts that, including a law without a novelty in our legal landscape has the potential to lift some considerable difficulties of interpretation or application, undetected for a long period.

And legal institution of advance rulings is what lies in bringing critical opposable erga omnes effect that attaches and considerations, mentioning the ability to compromise the independence of judges, based on the fact that such effect[22].

These critics do not pass through the filter but Distinctive aforementioned authority of res judicata and the interpreted.

Preliminary ruling procedure which shall recognize a fundamental role in the development of Community law was originally regulated in Article 177 of the EEC Treaty change is producing its first phase by the Treaty of Amsterdam, as art.234 and subsequent Treaty Lisbon on the functioning of the European Union, in the form provided by art.267.

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[20] Stefan Beligradeanu, *op. cit.* :110-111.

[21] Ion Deleanu "Proceduri prefigurate pentru asigurarea interpretarii si aplicarii unitare a legii de catre instantele judecatoresti" *Revista Romana de Dreptul Afacerilor* 1 (2010): 94.

[22] Decizia Plenului Curtii Constitutionale nr.1 din 17 ianuarie 1995, publicata in Monitorul Oficial al Romaniei, Partea I, nr.16 din 26 ianuarie 1995.

It created necessary tool connecting national courts and Court of Justice of the European Union and thus relations between the national and European legal order.

Conceived as a procedure for judicial cooperation between Member States' national courts and the Court of Justice of the European Union, it can be started by sending preliminary request to ascertain the compatibility with Community law.

Common desire of the two instances, referral and resolution of the matter prejudicial, is to ensure a uniform application and interpretation by national courts of Community law.[23]

Subsequent to such referral by a court of a Member State of the European Union, the European Court of Justice a preliminary ruling.[24]

As with Decisions prejudicial next to our current, was identified in an early stage of the procedure European risk that is subjected effective functioning of the system while extending the use of that Article and thus overcrowding activity Court of Justice of the European Union[25].

Inevitably, it cannot be given special care of each individual case, and the European construction, started with six states face in the current component with the legal systems of the 28 states with the inherent dissonance.

Coexistence of the two great systems of law, Roman-Germanic and Anglo-Saxon in EU led to different expectation from national judges.

Incontestable roles of source of law of judicial caselaw and jurisprudence in the common law judges justify the claim states that it applies to find the European Court of Justice an exhaustive approach to questions of law subject to Decision.

Via their binding on States, ECJ rulings are aimed centralized interpretation and application of Community law.

The national court is obliged not to quote passages from the European Court's Decision, much less that of taking those decisions in its own device content device.[26]

However, the national court is required to harmonize their decisions by the Court of Justice answer in the spirit of respecting the principles of the Treaty.

In the event that method of interpretation of the Community provision was not sufficient for the national court, is provided a fresh opportunity for reference.

This situation is the solution for cases in which the national court should avoid non-compliance with the acquis Community law even if it shares the view expressed in the answer to question his preliminary court.[27]

The advantage that presents European provisions compared to those of our legislation regarding advance rulings is the fact that in the first case, the European Court may alter the outcome of earlier, not only in case the legal provision making the point preliminary ruling was repealed or modified but whenever appreciates that changed circumstances or considerations of applying the legal norm or, in order to clarify certain aspects of the first decisions or due to the emergence of new factors or if it considers the existence of an interest in this.[28]

It is much more difficult to deny that such a system as designed at European level is different from the one recently adopted by Romania and just be in this regard.

In doctrine, claiming radical views were strongly and categorically indubitable need to direct express repeal of provisions relating to procedural decisions of our legislation prior[29].

Place antithetical to the ECJ decisions and castigated posing important European ones in terms stated above.

We appreciate that is overlooked as one of the greatest vulnerabilities of our legal system is the lack of predictability of Decisions.

And, the situation presented above, the Court of Justice of the European Union change its frequent practice in the absence of amendment or repeal of a legislative act initially looked not believe it reinforces the confidence of litigants novel in the judge whose decision acquires finality different the conditions shown.

3. Conclusions

Lack of flexibility and suppleness of the sources of law consisting of jurisprudence and caselaw can be criticized for, in our opinion, when confidence in the quality of justice has become impregnable.

Until we have a unitary practice but that will not arouse suspicion of morality when a court pronounces, in conditions almost identical, totally different from the previous decisions of other courts or, flexibility and suppleness occupy a secondary concern.

To be able to healthily develop, any organization needs to develop a strong immune system. And this immunity is acquired possibilities

[23] Ami Barav and Christian Philip, *Dictionnaire juridique de l'Union europeenne*, (Bruxelles: Bruylant, 1994): 475.
[24] Daniel Greenberg, *Jowitt's Dictionary Of English Law* (London: Sweet & Maxwel, 2010): 1771.
[25] Alfred E. Kellermann, *Introducere* to *Procedura trimiterii preliminare* by Sandru, Banu and Calin (Bucuresti: C.H.BECK, 2014): xvi-xxiii.
[26] Mihai Sandru, Mihai Banu and Dragos Calin, *Procedura trimiterii preliminare* (Bucuresti: C.H.BECK, 2014): 527-536.
[27] idem: 527-536.
[28] Nicoleta Diaconu, *Dreptul Uniunii Europene*, *Tratat* (Bucuresti: Lumina Lex, 2008): 264.
[29] Stefan Beligradeanu, *op. cit.*: 111-112.

of contamination conditions that are, if not excluded, limited to a maximum.

To recognize the superiority of a court, whose name is Supreme or High, must involve accountability of judges operating within it.

And if, the leading judges in their legal system predefine a route that follows it themselves but also their colleagues in the lower courts, the effect will be to strengthen legal certainty.

In the current social context in which legislative inflation is uncontrollable, a fortiori

must it be anchored in a stable environment in legal terms that we can build a unitary practice.

And the tools that seem appropriate to the erection of such building are jurisprudence and judicial caselaw transparent and based on good faith.

And additional arguments to accept them as sources of law are not required. Motivation danger brought by the legislative interference in the judiciary is not sufficient to offset the risk of perpetuating a non-unitary judicial practice.

Ignoring the damage even of the smallest incoherent legal practices is felt among both judges and litigants must be prevented.

If admission jurisprudence and caselaw as sources of law have the ability to counteract this, of course, any arguments to the contrary can be interpreted as an inability to adapt.

And the statement that inability to adapt equates to extinction has an axiomatic value.

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REFLECTIONS ON REGULATION OF PARLIAMENTARY IMMUNITY IN THE ROMANIAN CONSTITUTIONS AND IN COMPARATIVE LAW - SELECTIVE ASPECTS

Nicolae PAVEL[*]

Abstract

At the onset of the study it is necessary to mention that its topic will be circumscribed to regulations on parliamentary immunity in the Romanian Constitutions and in comparative law - selective aspects. By this approach, the proposed study opens a complex and complete vision, but not exhaustive, to the reflections on regulation of parliamentary immunity in the Romanian Constitutions and in comparative law. In comparative law analysis, we will keep a symmetrical approach to identifying regulations on parliamentary immunity in the Constitutions of other countries. Following an outline - the following parts of the study are dealt with successively: 1. Introduction. 2. Identification of constitutional rules on parliamentary immunity in the Romanian Constitutions and in comparative law. 3. Highlights on Romanian doctrine and comparative law on the parliamentary immunity. 4. Jurisprudence of the Constitutional Court of Romania on parliamentary immunity. 5. Conclusions.

Keywords: *parliamentary immunity in the Romanian Constitutions, parliamentary immunity in comparative law, romanian doctrine, comparative law doctrine, parliamentary inviolability, legal unresponsive, jurisprudence of the Constitutional Court of Romania.*

1. Introduction

The object of study of this scientific approach will be circumscribed to the scientific analysis of its three main parts, as follows: 1. Identification of constitutional rules on parliamentary immunity in the Romanian Constitutions and in comparative law. 2. Highlights on Romanian doctrine and comparative law on the parliamentary immunity. 3. Jurisprudence of the Constitutional Court of Romania on the parliamentary immunity.

What seems relevant to highlight for this research is to approach parliamentary immunity in the Romanian constitutional and legal system starting with the first document with constitutional value, i.e. The developer Statute of the Paris Convention from 7/9 August 1858 and until today, i.e. The Romanian Constitution revised in 2003, form of republished Romanian Constitution of 1991.

Considering the approach of this generous topic of study for over 145 years of constitutional evolution of parliamentary immunity in Romania, we should emphasize, since its beginnings, the need of a diachronic approach of this topic by identifying all the Romanian Constitutions which regulated the constitutional regime during all this time.

Moreover, we should point out that in the stated period, Romania experienced several forms of government, respectively, monarchy, people's Republic, socialist republic and semi-presidential republic.

In the field of comparative law, in order to maintain a symmetry of approach with the Romanian constitutional system, the regulations at the constitutional level, regarding parliamentary immunity were identified in the normative content of the selected constitutions, i.e.: 1. The Belgian Constitution as updated following the constitutional revisions of 6 January 2014, containing the latest revisions. 2. The French Constitution of 4 October 1958, in force at the date constitutional review of 23 July 2008 containing the latest revisions.

For a full, but not exhaustive, coverage of the field of study, doctrinal and jurisprudential landmarks are presented selectively regarding parliamentary immunity

On the other hand, it should be mentioned that the jurisprudence of the Constitutional Court of Romania contributed to the constitutionalization of parliamentary immunity, since its very establishment.

As results from the conducted bibliographic research, parliamentary immunity is new in its formulation, but, it is not new in its existence. Starting from this axiom, and paraphrasing K. Mbaye, we may say that: „The history of parliamentary immunity is confounded with the history of people".

This approach serves the proposed study by opening a complex and complete view, but not exhaustive, in the current sphere regarding parliamentary immunity.

In our opinion, the studied field is important for the constitutional doctrine, for the doctrine of

[*] Associate professor, PhD, Spiru Haret University, Bucharest, Romania, Faculty of Sciences Juridical, Political and Administrative and Research Associate at the Institute of Legal Research "Acad. Andrei Rădulescu" of the Romanian Academy (e-mail: **nicolaepavel0@yahoo.com**).

parliamentary law, for the doctrine of comparative law, for the general theory of law, for the legislative work of elaboration of normative acts, for legislative technique, as well as for the research in the field covered by the theme of the study.

Even if the regulation and theorizing of parliamentary immunity goes back in time to the first written constitutions in the world, the theoretical interest to resume it is determined by the fact that, not always has attention been paid in the field literature to the three aspects – normative, theoretical and jurisprudential - regarding parliamentary immunity, analyzed in this study.

2. Identification of constitutional rules on parliamentary immunity in the Romanian Constitutions and in comparative law

2.1. Identification of constitutional rules on parliamentary immunity in the Romanian Constitutions

2.1.1. The developer Statute of the Paris Convention from 7/19 August 18581

A special discussion is required for the *The Developer Statute of the Convention of 7/19 August 1858*. In our opinion, *The Statute* may be deemed a Constitution, considering the provisions of art. XVII which set forth that: all officials, with no exception, upon taking office, *are liable to swear allegiance to the Constitution and laws of the country and faith in God*.

The systematic analysis of the normative content of the Statute shows that art. VII (2) sets forth the following constitutional principle on *inviolability* of the members of the Ponderatrice Assembly and Elective Assembly, under the following phrasing: „The members of the Ponderatrice Assembly enjoy the same inviolability gauranteed for the deputees under Art. 36 of the Electoral Law enclosed hereby". (Ponderatrice Assembly members enjoy the same guaranteed *deputy's inviolability*).

We find that art. VII (2) refers to the provisions of art. 36 of the Electoral Law, which sets forth the following *inviolabilities for the members of the Elective Assembly*, with the following phrasing: „No member of the Elective Assembly shall be arrested for the term of the session, nor criminally prosecuted, except for the case of committing a flagrante delicto, but after the Assembly would have authorized the persecution.

It is worth pointing out that the Statute is the first document with the value of a Constitution, which uses the terminology: „inviolability of members of both Assemblies".

As *The Developer Statute of the Paris Convention from 7/19 August 1858*, explicitly uses the syntagm, inviolability of members of both Assemblies" inspired in our opinion, more from the French Constitution of September 3, 1791, which uses the same terminology, than the text of the Constitution of Belgium of 1866.

In the debut of the study, we intend to present some terminological explanations, from comparative law, considering that in the title and content of the study we used the syntagms: „*parliamentary immunity and parliamentary inviolability*".

(a). In English law terminology[2], the term of *parliamentary privilege* has the following content: Rights and immunities enjoyed by each House of Parliament, designed to allow members to carry out their duties unhindered. They apply collectively and individually to every Members of Parliament. Privileges include: right freedom of speech in debate; the to control proceedings; right to penalize those who commit breach of privilege; to expel members whom parliament considers unfit to serve. The absence of precedent does not prevent an act being of considered a breach of privilege.

(b). In American terminology[3] the term *congressional immunity*, has the following content: The immunity of members of the U.S, House of Representatives and Senate from Lawsuits derived from what they say on the floors of the Congress. This limited immunity is established by the *speech and debate* portion of the Constitution, Article I, Section 6, which also holds that they may not be arrested except for *treason, felony and breach of the peace*. So they are clearly subject to criminal prosecution, just as any other citizen, furthermore, what they say in newsletter and press release is also prosecutable.

In view of the foregoing, in our opinion, the syntagms *parliamentary immunity and parliamentary inviolability* regulate in their content the same parliamentary realities, and, may be used simultaneously, moreover, we consider that most of the texts of the constitutions we will refer to, do not contain a *marginal synthesizing* of the content of the constitutional text.

2.1.2. The Romanian Constitution of 1866[4]

We should point out that the Fundamental law of Belgium of 1831 was an inspiration for the constitutions of other states, among which the Romanian Constitution of 1866.

The systematic analysis of the normative content of the Constitution reveals that in Chapter I

[1]Ioan Muraru and Gheorghe Iancu, *The Romanian Constitutions*, Texts, Notes. Comparative presentation, (Bucharest: Actami, 2000), 7-28.
[2] LB Curzon, *Dictionary of Law*, Third Edition, (London: Pitman Publishing, 1991), 318.
[3] Jay M. Shafritz, *Dictionary of American Government and Politics*, (Chicago, USA, The Dorsey Press, 1998) 274.
[4] Ioan Muraru and Gheorghe Iancu, op. cit. 29-60.

of Title III, entitled *About national representation*, dedicates the following two fundamental principles regarding *parliamentary immunity*, under the following phrasing:

1. *art. 51* – None of the members of one or the other assembly may be prosecuted or persecuted for his opinions and votes during his mandate.

2. *art. 52* – None of the members of one or the other Assembly, may during the session, be prosecuted, or arrested in the matter of repression, without the authorization of the Assembly he belongs to, except when proven guilty.

Detention or prosecution of a member of one or the other Assembly shall be suspended during the whole session, if requested by the Assembly.

With reference to the immunity of the members of the other two Assemblies, the two almost similar regulations, except for the terminology, may be found in the Constitutions of other states too, including in the Constitution of Belgium of 1831 and the Constitution of France of 1791.

2.1.3. The Romanian Constitution of March 23, 1923[5]

At the onset of the study we should point out that the Fundamental Law of Romania of 1866, remained effective for 57 years, when important economic and political transformations occurred.

The systematic analysis of the normative content of the Constitution reveals that in Chapter I of Title III, entitled, *About national representation* dedicates the following two fundamental principles regarding *parliamentary immunity*, under the following phrasing:

1. *art. 54* - None of the members of one or the other assembly may be prosecuted or persecuted with regard to opinions expressed and votes cast by him in the exercise of his duties.

2. *art. 55* - None of the members of one or the other Assembly, may during the session, be prosecuted, or arrested in the matter of repression, without the authorization of the Assembly of which he is a member, except in case of flagrante delicto.

If taken under custody or prosecuted while the session is closed, such prosecution or custody shall be submitted to the approval of the Assembly of which he is a member, immediately after the opening of the session of the Legislative Bodies.

Detention of a member of either House or his prosecution before a court is suspended during the session if the Assembly so requests.

As compared to the regulation of *parliamentary immunity* in the Romanian Constitution of 1866, we may find that the Constitution of Romania of 1923 included in its content para. (2) of art. 55 which regulates the status of the custody or prosecution while the session is closed

2.1.4. The Romanian Constitution of February 28, 1938[6]

It is necessary to sepcify in the introductory part of the study that the Fundamental Law of Romania of 1923 remained effective for 15 years.

Under the historical circumstances of 1938, the new Constitution Draft was submitted to the plebiscite of 24 February 1938. The Constitution was promulgated and published in the Official Gazette Part I, no. 48, of February 27, 1938.

The systematic analysis of the normative content of the Constitution reveals that in Chapter II of Title III, entitled *About national representation*, dedicates the following two fundamental principles regarding *parliamentary immunity*, under the following phrasing:

1. *art. 56* - None of the members of one or the other assembly may be prosecuted or persecuted with regard to opinions expressed and votes cast by him in the exercise of his duties.

2. *art. 57* - None of the members of one or the other Assembly, may during the session, be prosecuted, or arrested in the matter of repression, without the authorization of the Assembly he belongs to, except in case of flagrante delicto.

Detention of a member of either House or his prosecution before a court is suspended during the session if the Assembly so requests.

As compared to the regulation of *parliamentary immunity* in the Romanian Constitution of 1923, we may find that the Constitution of Romania of 1938 removed from its content par. (2) of art. 55 which regulated the status of the custody or prosecution while the session *is closed*

2.1.5. The Constitution of April 13, 1948[7]

The systematic analysis of the normative content of the Constitution reveals that in Title IV, entitled *State supreme authority*, dedicates the following fundamental principle related to *parliamentary immunity*, in art. 59 under the following phrasing: „No deputy may be detained, arrested or prosecuted, without the authorization of the Great National Assembly of R.P.R. (People's Republic of Romania), during the sessions or the Presidium of the Great National Assembly a R.P.R., between sessions, for any criminal deeds whatsoever, except for the cases of flagrante delicto, when the approval of the Great National Assembly of R.P.R. (People's Republic of Romania) or the Presidium of the Great National Assembly of R.P.R. shall be immediately requested".

[5] *Ibidem*, op. cit. 61-92.
[6] *Ibidem*, op. cit. 93-119.
[7] *Ibidem*, op. cit. 123-139.

In our opinion, this constitutional principle serves to determine the conditions for a deputy to benefit from *parliamentary immunity*.

2.1.6. The Constitution of September 24, 1952[8]

The systematic analysis of the normative content of the Constitution reveals that in Title IV, entitled *State supreme authority of the Peoples' Republic of Romania*, dedicates the following fundamental principle related to *parliamentary immunity*, in art. 34 under the following phrasing: „No deputy of the Great National Assembly may be brought to trial or arrested without the approval of the Great National Assembly, during the sessions, and between sessions – of the Presidium of the Great National Assembly".

This constitutional principle sets the conditions for a deputy to benefit from *parliamentary immunity*.

2.1.7. The Constitution of August 21, 1965, as republished[9]

The systematic analysis of the normative content of the Constitution reveals that in Title III, entitled *State supreme authority – Great National Assembly*, dedicates the following fundamental principle related to *parliamentary immunity*, in art. 61 under the following phrasing: „No deputy may be detained, arrested or brought to criminal trial, without the authorization of the Great National Assembly of R.P.R. (People's Republic of Romania), during the session, and between sessions, by the State Council. The deputy may be detained without this approval only in case of flagrant crime".

This constitutional principle sets the conditions for a deputy to benefit from *parliamentary immunity*.

2.1.8. The Constitution of Romania of December 8, 1991[10]

From the systematic analysis of the normative content of the Constitution, the resulting that it, in its Section 2, of Chapter I of Title III, entitled the Status of Deputies and Senators, dedicates the following fundamental principle related to parliamentary immunity, in art. 69 under the following formulation:

1. *par. (1)* – No Deputy or Senator may be detained, arrested or brought to criminal trial or contravention, without the approval of the House he belongs to, after hearing. The jurisdiction in this case belongs to the Supreme Court of Justice.

2. *par. (2)* – In case of flagrant offence, the Deputy or Senator may be detained and subject to search. The Minister of Justice shall inform forthwith the President of the House on such detention and search. In the case the House finds that there are no grounds for detention, the House shall immediately order the revocation of this measure.

In our opinion, *parliamentary immunity* is common to deputies and senators alike because both categories of representatives have the sane parliamentary status.

2.1.9. The Constitution of Romania as revised in 2003, the republished form of the Constitution of Romania of 1991[11]

The systematic analysis of the normative content of the Constitution reveals that in Section I of Chapter I of Title III, entitled *The Status of Deputies and Senators*, dedicate the following fundamental principles related to *parliamentary immunity*, in art. 72 under the following formulation:

1. *par. (1)* The Deputies and senators shall not be held legally responsible for the votes or political opinions with regard to opinions expressed and votes cast by him in the exercise of his duties.

2. *par. (2)* The Deputies and senators may be prosecuted and indicted for criminal deeds that are not related to opinions expressed and votes cast by him in the exercise of his duties, but shall not be searched, detained or arrested without the approval of the House they belong to, after the hearing. The prosecution and criminal indictment may only be done by the Public Prosecutor's Office attached to the High Court of Cassation and Justice. The jurisdiction in this case belongs to the High Court of Cassation and Justice.

3. *par. (3)* In case of flagrant offences, the deputies or senators may be detained and subject to search. The minister of Justice shall inform forthwith the President of the House on the detention and search. In case the House finds that there are no grounds for detention, the House shall order immediately the revocation of this measure.

The analysis of the constitutional text shows that the text was supplemented by *tradition parliamentary immunity* in the Romanian constitutions between 1866 – 1938, the according to which *the deputies and senators may not be held legally responsible with regard to opinions expressed and votes cast by him in the exercise of his duties.*

2.2. Identification of constitutional rules on the parliamentary immunity in comparative law.

As explained in the abstract: "In comparative law analysis, we will keep a symmetrical approach to identifying regulations on parliamentary immunity in the Constitutions of other countries."

For this study we selected the following: 1. The Belgian Constitution as updated following the

[8] *Ibidem*, op. cit. 143-166.
[9] The Constitution of the Socialist Republic of Romania of August 21, 1965, was republished in Official Bulletin no. 65 of October 29, 1986.
[10] The text of the Constitution of Romania was published in Official Gazette of Romania, Part I, no. 233 from November 21, 1991.
[11] The Constitution of Romania, revised in 2003, was published in the Official Gazette of Romania, Part. I, no. 767, of October 31, 2003.

constitutional revisions of 6 January 2014, containing the latest revisions. 2. The French Constitution of 4 October 1958, in force at the date constitutional review of 23 July 2008 containing the latest revisions.

2.2.1. The Belgian Constitution as updated following the constitutional revisions of 6 January 2014, containing the latest revisions[12]

The systematic analysis of the normative content of the Constitution reveals that in Section I of Chapter I of Title III, entitled *about the federal Houses,* dedicate the following fundamental principles related to *parliamentary immunity*, in the art. 58 and in the art. 59 under the following formulation:

1. *Art. 58* - No member of either House can be prosecuted or be the subject of any investigation with regard to opinions expressed and votes cast by him in the exercise of his duties.

2. *Art. 59* – Except in the case of a flagrant offence, no member of either House may, during a session and in criminal matters, be directly referred or summoned before a court or be arrested, except with the authorization of the House of which he is a member. Except in the case of a flagrant offence, coercive measures requiring the intervention of a judge cannot, during a session and in criminal matters, be instituted against a member of either House, except by the first President of the appeal court at the request of the competent judge.

This decision is to be communicated to the President of the House concerned. All searches or seizures executed by virtue of the preceding paragraph can be performed only in the presence of the President of the House concerned or a member appointed by him.

During the session, only the officers of the public prosecutor's office and competent officers may institute criminal proceedings against a member of either House.

The member concerned of either House may at any stage of the judicial enquiry request during a session and in criminal matters that the House of which he is a member suspend proceedings.

To grant this request, the House concerned must decide by a majority of two thirds of the votes cast.

Detention of a member of either House or his prosecution before a court is suspended during the session if the House of which he is a member so requests.

In our opinion, this constitutional principle sets the conditions for a member of either House to benefit from parliamentary immunity.

2.2.2. The French Constitution of 4 October 1958, in force at the date constitutional review of 23 July 2008 containing the latest revisions.[13]

The systematic analysis of the normative content of the Constitution reveals that in Title IV, entitled the *Parliament,* and dedicates the following fundamental principles related to *parliamentary immunity*, in art. 26 under the following formulation:

No Member of Parliament shall be prosecuted, investigated, arrested, detained or tried in respect of opinions expressed or votes cast in the performance of his official duties.

No Member of Parliament shall be arrested for a serious crime or other major offence, nor shall he be subjected to any other custodial or semi-custodial measure, without the authorization of the Bureau of the House of which he is a member. Such authorization shall not be required in the case of a serious crime or other major offence committed flagrante delicto or when a conviction has become final.

The detention, subjecting to custodial or semi-custodial measures or prosecution of a Member of Parliament shall be suspended for the duration of the session if the House of which he is a member so requires.

The House concerned shall meet as of right for additional sittings in order to permit the application of the foregoing paragraph should circumstances so require.

In our opinion, this constitutional principle sets the conditions for a member of either House to benefit from parliamentary immunity.

3. Highlights Romanian doctrine and comparative law on *the parliamentary immunity*

3.1. Highlights Romanian doctrine on the *parliamentary immunity*

At the beginning of this subparagraph we shall mention the *legal definition of parliamentary immunity,*[14] which in our opinion, is indicative, but not obligatory for the doctrine.

The law mentioned in par. (1) of art. 20 set forth the following definition regarding parliamentary immunity: „*Parliamentary immunity* is the set of legal provisions which provide for the deputies and senators a derogatory legal regime from the common law in their relations with justice and for the purpose of guaranteeing their independence."

[12] Accessed, http://www.const-court.be/.../belgian_constitution.pdf

[13] Accessed, http:// www.conseil-constitutionnel.fr/...constitutionnel...

[14] **Law no. 96 of 21 April 2006, on** The status of Deputies and Senators, was republished in the Official Gazette of Romania, Part. I, no. 459, of July 12, 2013.

A first opinion[15] on *parliamentary immunity* sets the following explanations related to this concept: *Parliamentary immunity* aims at making him safe against abusive or unjustified judiciary prosecutions.

There are two categories of *parliamentary immunities*: the first are characterized by no *inexistence of liability* (irresponsabilité), which puts the parliamentary at a shelter for all the activity related to the exercise of his duties (speeches, opinions, vote); those in the second category, called *inviolabilities,* include special rules concerning the detention, arrest or *criminal arraignment*, when the deputies or senators are accused of crimes or misdemeanor. These rules protect the parliamentarians against certain abuse, certain unjustified arbitrary prosecutions, triggered by the executive or the opponents.

A second opinion[16] on *parliamentary immunity* sets forth the following explanations concerning this concept: „*The immunity of the parliamentary* is a means of protection given to the people's representatives, meant to defend them against potential pressure, abuse and heckling processes, against them in the exercise of their duties, with the purpose of guaranteeing the freedom of expression of the parliamentaries and their protection against abusive prosecutions. *Parliamentary immunity* is expressed by two legal concepts: *irresponsibility* (*legal non-liability)* and *inviolability. Parliamentary irresponsibility* is the possibility of the parliamentaries not to be held legally liable for their opinions and votes expressed in the exercise of their duties. *Inviolability* is the possibility of the parliamentaries not to be searched, detained or arrested withoutnthe approval of the House of which he is a member.

A third opinion concerning parliamentary immunity sets forth the following explanations regarding this concept: „Parliamentary immunities aim at protecting the members of the parliament against the repressive or judicial actions, which could be brought against them."[17]

Considering the above expressed opinions, the constitutional and legal regulations in the matter, we may point out that the term *parliamentary immunity* has two components: 1. *Legal irresponsibility* of the parliamentary and *parliamentary inviolability.*

3.2. Highlights comparative law doctrine on parliamentary immunity

3.2.1. For this study, we mention from the French constitutional doctrine the following opinion *on the parliamentary immunity*[18]

In the author's opinion, *parliamentary immunity* sets forth the following explanations regarding this concept concept: „Parliamentary immunities are divided into two categories: *parliamentary irresponsibility and parliamentary inviolability.*

a) *Parliamentary irresponsibility*, places the parliamentary in an immunity system against civil prosecution or against the opinions and votes civil prosecutions or votes expressed in the exercise of his duties.

b) *Parliamentary inviolability*: The objective is to protect the parliamentary against the potential initiatives of the executive and of the public ministry on which he depends, which could in order to despise him to initiate abusively prosecutions or arresting for crime or misdemeanour committed outside the exercise of his duties (those committed in this exercise are already covered by *irresponsibility*).

In our opinion, the two components of the concept *parliamentary immunity* are similar from the point of view of the content with the Romanian ones.

3.2.2. From the Belgian constitutional doctrine, we hold the following opinion *on parliamentary immunity*[19]

Regarding *parliamentary immunity*, and considering the federal organization of the state with three systems of organization of the parliamentarians, respectively at the federal, community and regional level, the author expresses the following opinions:

A special regime of *irresponsibility* is established anyway. He applies to the member of a governmental team a guarantee of the parliamentary action (according to art. 101 para. (2) of the Constitution, concerning federal ministers).

No member of the government….. *can be prosecuted or be the subject of any investigation with regard to opinions expressed and votes cast by him in the exercise of his duties"* (art. 134 of the Constitution).

The every community and regional parliamentary benefits of *immunities*

These immunities are as provided by art. 58 and by art. 59 of the Constitution i.e.

[15]Ioan Muraru and Elena Simina Tănăsescu, (*Constitutional Law and Political Institutions*) Edition 12, Volume II (Bucharest: C H Beck, 2006), 190.

[16] Ştefan Deaconu, *Political Institutions* (Bucharest, CH Beck, 2012) 218.

[17] Ion Deleanu, *Institutions and constitutional procedures - in Romanian law and in comparative law procedures* (Bucharest, CH Beck, 2006) 197.

[18] Pierre PACTET and Ferdinand MELIN-SOUCRAMAINEN, *Constitutional Law*, (Paris: Sirey, 2007) 443.

[19] Francis DELPÉRÉ, *The Constitutional Law of Belgium*, (Brussels: General Library of Law and Jurisprudence, 2000) 576-579.

irresponsibility and inviolability (art. 120 of the Constitution

If *immunity* must be raised, this should be done by the parliament and the council of which the public trustee is a member.

In our opinion, the two components of the concept of *parliamentary immunity* are similar from the point of view of the content with the Romanian ones.

4. Jurisprudence of the Constitutional Court of Romanian on the parliamentary immunity

We highlighted in the decisions of the Constitutional Court, selected for this study only the Court's reasoning having a direct connection with *parliamentary immunity*, regulated by the fundamental law.

4.1. Decision of the Constitutional Court of Romania nr. 45 from 1994 on the constitutionality of the Regulations of the Chamber of Deputies, published in the Official Gazette of Romania, Part I, nr. 50 of 25 February 1994.[20]

The Constitutional Court was notified by the President of the Chamber of Deputies that, in accordance with the provisions of art. 144 lit. (b) from the Constitution and art. 21 par. (1) of Law nr. 47/1992, to decide on the constitutionality of the Regulations of the Chamber of Deputies, approved under Decision nr. 8 of 24 February 1994, published in the Official Gazette of Romania, Part I, nr. 50 of 25 February 1994.

The Court finds that in art. 168 par. (2) of the regulations: „The definition given to parliamentary immunity is useless and, of course, unconstitutional because art. 69 and 70 of the Constitution delimits its sphere. The wording of par. 2 is unconstitutional because its ambiguity may receive interpretations beyond this sphere.

The Constitutional Court finds that the listed articles, among which the above-mentioned one from the Regulations of the Chamber of Deputies are unconstitutional.

4.2. Decision of the Constitutional Court of Romania nr. 46/ 1994 referring to the constitutionality of the Regulations of the Senate, published in the Official Gazette of Romania, Part I, nr. 131 of 27 May 1994[21]

The President of the Senate requested the Constitutional Court the exmination of the Regulations of the Senate, adopted under Decision nr. 16 of 30 June 1993, published in the Official Gazette of Romania, Part I, nr. 178 / July 27, 1993, of terms of its *constitutional legitimacy*

The Court finds that: „In art. 149 par. (2) of the regulations, the reference, with no mitigating circumstance, to the protection of the senators against juridical prosecutions *is unconstitutional* because, according to art. 69 of the Constitution, it concerns only the abusive criminal or contraventional prosecution, so that it may be raised by the House, as well as during the office, as related to the capacity of senator. The independence of opinions only, as provided by para. 3 herein, is, according to art. 70 of theConstitution, has absolute character.

4.3. Decision of the Constitutional Court of Romania nr. 67from 2003, on the admission of the exception of unconstitutionality of the provisions of art. 40 par. (2) of the Code of criminal procedure.[22]

In motivation of the exception of unconstitutionality it is stated that the provison of art. 40 para. 2 of the Code of criminal procedure is contradictory to the second thesis of of art. 69 para. (1) of the Constitution, which sets forth when the accused has the capacity of deputy the jurisdiction is of the Supreme Court of Justice, without distinguishing how the capacity of this person was acquired before or after committing the offence. It is also stated that the criticized legal provision is contrary also to the provisions of art. 16 para. (1) of the Constitution, regarding the equality of citizens in front of the law and public authority.

The Court finds that by art. 69 para. (1) of the Constitution, under the title *Parliaentary Immunity*, two of the categories of the measures of protection of the deputies and senators are regulated, during the exercise of his duties, against the potential abuse or juridical heckling, likely to affect their independence in fulfilling their mission as vested by the electorate and undermine the prestige of the Parliament.

For the above reasons, the Constitutional Court admits the exception of unconstitutionality and finds that the provisions of art. 40 para. 2 of the Code of criminal procedure are unconstitutional.

5. Conclusions

The objective of the study entitled: *Reflections on regulation of parliamentary immunity in the Romanian Constitutions and in comparative law – selective aspects*, was in our opinion attained.

He main diretions of study to attain the proposed objective were the following:

[20] Decision no. *45/1994* was published in the Official Gazette Romania, Part I, no. 131 from May 27, 1994.
[21] Decision no. *46/1994* was published in the Official Gazette Romania, Part I, no. 131 from May 27, 1994.
[22] Decision no. 67/2003 was published in the Official Gazette Romania, Part I, no. 178 from March 22, 2003.

1. *The identification of constitutional rules on the parliamentary immunity in the Romanian Constitutions*. I approached this theme because *the fundamental law of Romania – the Constitution*, sets the fundamental principles regarding *parliamentary immunity*, which will be elaborated int the legilsation or other subsequent regulations, for example, *the Regultions of the Houses.*

Moreover, I proceeded to the diachronic approach of the identification of these principles in the Romanian Constitutions, in order to turn to good account the evolution of the Romanian constitutional system for over 100 years term, starting with *The developer Statute of the Paris Convention from 7/19 August 1858*, and ending the study with ***The Constitution of Romania as revised in 2003, the republished form of the Constitution of Romania of 1991*.**

2. *The identification of constitutional rules on the parliamentary immunity in comparative law***.** Approaching the principle of symmetry, I proceeded to *The identification of constitutional rules on the parliamentary immunity in comparative law.*

I selected from comparative law the following: *The Belgian Constitution as updated following the constitutional revisions of 6 January 2014*, containing the latest revisions. 2. *The French Constitution of 4 October 1958, in force at the date constitutional review of 23 July 2008* containing the latest revisions. This selection may be motivated, consideing that these states are deemed in the doctrine among the first three states in the world which elaborated a written constitution.

3. The *highlights Romanian doctrine and comparative law on the parliamentary immunity*. In this paragraph, we highlighted the Romanian contributions in comparative law, regarding the approach of parliamentary immunity, in the Romanian, Belgian and French doctrine.

4. The jurisprudence of the Constitutional Court of Romanian on the parliamentary immunity. In this paragraph, we selected certain decisions of the Constitutional Court, which in our opinion, contributed to the constitutionalization of the subsequent regulations regarding *parliamentary immunity, in the legislation and regulations of the Houses.*

The fourt parts of the study may be considered a contribution to the extension of research in the matter of *Reflections on regulation of parliamentary immunity in the Romanian Constitutions and in comparative law*, in accordance with the current trend in the field.

On the other hand, we further point out that the above study opens a complex and complete view, but not exhaustive, in the analyzed field.

The proposed scheme-key, considering the selective approach of a *Reflections on regulation of parliamentary immunity in the Romanian Constitutions and in comparative law*, may be multiplied and extended for other studies in the matter, taking into account the vastness of the analyzed field.

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THE USE OF AVIATION ACCIDENT INVESTIGATION REPORTS AS EVIDENCE IN COURT

Sorana POP PĂUN[*]
Mihai RADU[**]

Abstract

Air transport is an essential part of the international society, constituting a liaison between people and continents and an important contributor to the world economy and globalization. Aircraft operation has grown in complexity needing for a safety level to be maintained and constantly grown. Along with the development of the aviation industry, the legal system in the aviation field has registered significant challenges, one of them being the claims related to air crashes which are contested. The investigation process of an accident or incident has become not only important for the safety of operations but also to the establishment of legal fault and blame. The article proposes to present the principles of conducting and accident and incident investigation, the value of the report and new developments in relation to the recent case law on the use of the accident investigation report in Court.

Keywords: *accident, incident, Annex 13, ICAO, report.*

Introduction

Considered to be the safest form of mass transportation, civil aviation is not free of risks and unfortunate events, such as incidents or accidents occur, shocking the civil socity, traumatizing the passangers and putting a huge pressure on the authorities dealing with investigating such events and in charge of taking the appropriate safety measures. Since the Second World War, aviation safety has significantly increased the level of safety and managed to dramatically reduce the accident rate. The international society, through the International Civil Aviation Organization[1] has also developed an investigation process, thoroughly describe by Annex 13 – Accident and Incident Investigation to the Chicago Convention[2]. According to the provisions of Annex 13, the sole objective of the investigation of an accident or an incident is the prevention of such events to occur and not to apportion blame or liability.[3] The same approach is reflected by the process of conducting an investigation and by the process of occurrence reporting, described by the EU regulations.[4]

This approach existing in the international legal framework, considering the accident or incident investigation report as a mean of improving safety generates a love/hate relationship between the authorities in charge with the administration of justice and the authorities responsible for the safety investigation. One, on the one hand, is concerned with preserving justice by identifying those responsible for the damage and bringing them on front of justice and one, on the other hand, with the sole purpose of enhancing aviation safety throught independent investigation and reporting.[5]

The investigation process,"as important as it is to the safety of the flying public, has unintentionally also become important to the establishment of legal fault and blame"[6]. The idea of separating the investigation process from the judicial one is desirable and there is a clear intention on the side of the authorities to follow such a separation. However, due to the importance of one process to the other, in practice, it has become of practical utility to use the

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[*] Sorana POP PĂUN is a junior lecturer at "Nicolae Titulescu" University, Faculty of Law. She holds a Phd in international air law and an LLM in air and space law from McGill Institute of Air and Space Law. Sorana is also an aeronautical inspector witin the Romanian Aeronautical Authority specilezed in air navigation services regulation (e-mail: **sorana.pop@gmail.com**).

[**] Mihai RADU is a third year law student at "Nicolae Titulescu" University, Faculty of Law, participant to the Leiden Sarin International Air Law Moot Court Competition (e-mail: **raducumihai@live.com**).

[1] The International Civil Aviation Organization (ICAO) is a UN specialized agency, established by States in 1944 to manage the administration and governance of the Convention on International civil Aviation. For more information please visit www.icao.int.

[2] Convention on International Civil Aviation (Chicago Convention) signed on 7 December 1944. The Convention establishes the principles governing civil aviation and sets forth the purpose of ICAO.

[3] ICAO Annex 13 – Aicraft Accident and Incident Investigation, Ninth Edition, July 2001 point 3.1.

[4] Regulation (EU) no. 996/2010 on the investigation and prevention of accidents and incidents in civil aviation and repealing Directive 94/56/EC and Regulation (EU) no. 376/2014 on the reporting, analysis and follow-up of occurrences in civil aviation, amending Regulation (EU) No 996/2010 of the European Parliament and of the Council and repealing Directive 2003/42/EC of the European Parliament and of the Council and Commission Regulations (EC) No 1321/2007 and (EC) No 1330/2007.

[5] Kevin Humpreys, "Just Culture – Can there be a Just Culture in Aviation Safety Occurence Reporting Systems", paper presented at ISASI 2014 Seminar, October 2014, Adelaide, Australia, pag. 3.

[6] Liam P. Sarsfield, William L. Stanley, Cynthia C. Lebow, Emile Ettedgui, Garth Henning, *Safety in the Skies – Personnel and Patries in NTSB Aviation Accident Investigations: Master Volume*, Institute for Civil Justice, RAND, pag. 81.

final accident report in civil litigation. This is a natural consequence of the mere fact that the final report is considered to be a ”roadmap to liability”[7].

2. Regulatory Framework

2.1. International Regulatory Framework – ICAO Annex 13

In accordance with art. 37 of the Chicago Convention, ICAO can adopt Standards and Recommended Practices (SARPs)[8] in order to achieve ”the highest practicable degree of uniformity in regulations, standards, procedures and organization in relation to aircraft, personnel, airways and auxiliary services in all matters in which such unifromity will facilitate and improve air navigation”[9]. SARPs are published by ICAO in the form of Annexes to Chicago Convention. SARPs do not have the same legal biding force as the Convention itself, as they are international treaties. However, States agreed to collaborate in securing uniformity in the implementation of SARPs and each Contracting State has the obligation under the Chicago Convention to notify the ICAO Council of the differences between SARPs and national regulation and practice.[10] ICAO regularly verifies compliance with SARPs through audits of state oversight systems and means of continuous monitoring.

Along time, civil aviation was contested by public opinion after serious incident or accidents had occured. The manufacturers and states specialists made considerable efforts to improve the saftey and performance of the air carriers, telecommunications, airports, the personnel training with the purpose to continuously increase the level of safety of air transport.

In order for a uniform process and mechanism of incident/ accident investigation to be put in place in all ICAO Member Sates, the ICAO Council addopted Annex 13 in 1951[11].

The provisions of this annex regulate all the measures, actions and processes that States must take and follow when such an unfortunate event has taken place. The provisions of Annex 13 complement Article 26[12] of the Chicago Convention providing for procedures to be applied in an investigation institued under the requierement of Article 26 and also in the event of any aircraft accident falling within the provisions of Annex 13.

Several aspects need to be considered from a legal perspective in the context of Annex 13. According to Annex 13, in the aftermath of an accident, authorities (specialized in accident investigation) are involved in the investigation of the event. The accidnet investigation authorities have the obligation to coordinate with the judicial authorities[13]. However, Annex 13 stipulates that the investigation authorities shall have full independence in the conduct of the investigation[14]. Moreover, Annex 13 strongly recommends that „any judicial or administrative proceedings to apportion blame of liability should be separated from any investigation under the provisions of this Annex.”[15] Hence, the sole purpose of the accident or incident investigation is the prevention of future accidents and incidents and not to apportion blame or liability.[16] This is the sole purpose of the accident repot as well.

Furtheremore, Annex 13 provides that certain types of record which are collected by the safety

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[7] *Idem* pag. 82.

[8] According to Assembly Resolution A36-13, Appendix A (ICAO Doc 9902) a *Standard* is defined as - any specification for physical characteristics, confuguration, material, performance, personnel or procedures, the uniform application of which is recognized as necessary for the safety or regularity of international air navigation and to which Contracting States will conform in accordance with the Convention. *Recommended Practices* is defined as - any specification for physical characteristics, configuration, material, performance, personnel or procedure, the uniform application of which is recognized as desirable in the interest of safety, regularity or efficiency of international air navigation and to which Contracting States will endeavour to conform in accordance with the Convention.

[9] Michael Milde, *International Air Law and ICAO*, Eleven International Publishing, 2008, pag. 52.

[10] Article 38 of the Chicago Convention – “Any State which finds it impracticable to comply in all respects with any such international standard or procedure, or to bring its own regulations or practices into full accord with any international standard or procedure after amendment of the latter, or which deems it necessary to adopt regulations or practices differing in any particular respect from those established by an international standard, shall give immediate notification to the International Civil Aviation Organization of the differences between its own practice and that established by the international standard. In the case of amendments to international standards, any State which does not make the appropriate amendments to its own regulations or practices shall give notice to the Council within sixty days of the adoption of the amendment to the international standard, or indicate the action which it proposes to take. In any such case, the Council shall make immediate notification to all other states of the differences which exists between one or more features of an international standard and the corresponding national practice of that State.”

[11] ICAO Annex 13 – Aircraft Accident and Incident Investigation.

[12] Article 26 of the Chicago Convention – “In the event of an accident to an aircraft of a contracting State occurring in the territory of another contracting State, and involving death or serious injury, or indicating serious technical defect in the aircraft or air navigation facilities, the State in which the accident occurs will institute an inquiry into the circumstances of the accident, in accordance, so far as its laws permit, with the procedure which may be recommended by the International Civil Aviation Organization. The State in which the aircraft is registered shall be given the opportunity to appoint observers to be present at the inquiry and the State holding the inquiry shall communicate the report and findings in the matter to that State.”

[13] Standard 5.10 of Annex 13.

[14] Standard 5.4 of Annex 13.

[15] Recommendation 5.4.1. of Annex 13.

[16] Standard 3.1. of Annex 13.

investigation authorities should not be disclosed[17] and that each State is required to establish a manadatory incident/accident reporting system to facilitate the gathering of information on safety deficiencies.[18]

An interesting feature of Annex 13 is that the State of Occurence (the State responsible for conducting the investigation), has the possibility to "delegate the whole or any part of the conducting such investigation to another state by mutual arrangement and consent"[19]. An example in this matter is the recent case of the flight MH 17 struck down by an anti-aircraft missile above the territory of Ukraine. The Ukrainien authorities delegated the accident investigation to the specialized authorities from Holland (the Dutch Safety Board) who also made the final Accident Investigation Report. This is a clear statement of State cooperation and compliance with the provisions of ICAO Annexes and the Chicago Convention.

2.2. European Regulatory Framework

Recognizing the importance of accident investigation in civil aviation, the European Union adopted in 1980 Directive 80/1266/EC on cooperation and mutual assistance between Member States in the field of accident investigation. This Directive was replaced by Directive 94/56/EC, which transposed into the EU legislation a number of principles contained in ICAO Annex 13.

After conducting a comprehensive review of the EU legislation in the field of accident investigation, the EU adopted in 2010 Regulation (EU) no. 996/2010 on the investigation and prevention of accidents and incidents in civil aviation. The Regulation applies to safety investigations into accidents and serious incidents which occur:

within the EU;

outside the EU but involve aircraft registered in an EU country or operated by an undertaking established in an EU country;

in territories where an EU country may appoint a representative or has a special interest as a result of, for example, fatalities or series injuries to its citizens.[20]

Member States must ensure that safety investigations are conducted or supervised by a permanent national civil aviation safety investigation authority. This regulation also establishes an obligation for each EU country to investigate every accident or serious incident which occurs on its territory and involving an aircraft.[21]

The sole objective of the investigation is to prevent future accidents and incidents in civil aviation and not to apportion blame or liability. The Regulation moreover provides that a national safety investigation authority from one EU country may request the assistance of other EU national safety investigation authorities.[22]

2.2. National Regulatory Framework

Romania is an EU Member State, therefore, when investigating an accident or serious incident which occurred on its territory, has the obligation to comply with the provisions of Regulation (EU) no. 996/2010.

At national level, the Civil Aerial Code of Romania establishes the general framework for accident and serious incident investigation in Chapter XIII – Technical Investigation of Incidents and Accidets in Civil Aviation. According to this chapter, is clearly established that the sole purpose of the investigation and of the investigation report, is to contribute to the improvement of safety and not to apportion blame or liability.[23] Furthemore, Article 89 of the Code provides that the technical accident investigation is completely independent from any judicial or administrative investigation. Identifying the person responsible for the accident or serious incident lays with the competent judicial authorities.

The national civil aviation safety investigation authority is the Civil Aviation Safety Investigation and Analysis Center (CIAS) established by Government Ordinance no. 26/2009 on the establishment, organization and functioning of CIAS.

3. The Accident Report

3.1. General remarks

The key to identify the causes of accidents or incidents and to increase the level of safety is the Accident Report. The report is a detailed document where all factors that led to the occurence of the accident are identified and presented.

Annex 13 provides that the civil aviation investigation authorities have the obligation to conduct an investigation and draw up an investigation report. When conducting an investigation, the authorities involved (from different states if it is the case, as well as judicial authorities) need to maitain a close cooperation,

[17] Standard 5.12 of Annex 13.
[18] Standard 8.1. of Annex 13.
[19] ICAO Annex 13.
[20] Article 3 of Regulation (EU) no. 996/2010.
[21] Article 4 of Regulation (EU) no. 996/2010.
[22] Article 1 of Regulation (EU) no. 996/2010.
[23] Article 88 Civil Aerial Code.

without affecting the investigation or the independence of the investigation authorities.

The Final Accident Report must follow a clear structure as indicated by Annex 13, namely it should present the a) Factual Information; b) Analysis of the situation; c) Conclusions and d) Safety recommendations, very important for fulfilling the objective of the investigation report, to increase the level of safety in air transport.

3.2. Legal value of the accident report

The purpose of the Accident Investigation Report is to contribute to the improvement of safety and not to apportion blame or liability, as it could be observed from the above presented provisions of Annex 13 and Regulation (EU) no. 996/2010. The Accident Investigation Report constitutes safety information, which according to Attachment E of Annex 13, should be protected from inappropriate use in order to ensure the continued availability, since the use of safety information for other than safety related purposes may inhibit the future availability of such information, leading to an adverse effect on aviation safety. The term „innappropriate use" refers to the use of safety information for purposes different from the purposes for which it was collected, namely, use of the information for disciplinary, civil, administrative and criminal proceeding against operational personnel, and/or disclosure of the information to the public. [24] However, according to point 2.1 of Attachement E of Annex 13, it is not the purpose of protecting safety information to interfere with the proper administration of justice. Furthermore, it is stipulated that national laws and regulations protecting safety information should ensure that a balance is struck between the need for the protection of safety information in order to improve aviation safety and the need for the proper administration of justice. [25]

Taking into consideration the above, the Accident Investigation Report, as it is a safety information, is not used in Court as evidence, as it constitutes a technical analysis of the causes of the accident and does not intend to apportion blame or laibility. So far in practice, the report has been brought before the Courts as a benchmark for all parties involved in the trial and had an advisory role.

4. Legal Interests

4.1. Aviation Safety vs. Administration of Justice

When it comes to the Accident Investigation Report, there is a controversy as to whether the report should be used as evidence and if it should be taken into consideration in the process of proper administration of justice. There is a clear fear on the side of the aviation personnel involved in the accident since in providing information related to the causes of the accident, a fear of being prosecuted and held accountable for the accident and damages resulted. This is the main reason for which the information gathered in the accident investigation process is protected by the civil aviation investigation authorities, so that reporting is encouraged and safety improved. The fear of criminal proceedings leads to less contribution by aviation professionals in the course of safety investigation and the increase of judicial proceedings lead to less reporting.

Even though the investigation process is crucial to the safety of flying public, over time and through practice it has "unintentionally become important to the establishment of legal fault and blame."[26]

Separating the investigation process from the litigation process is "a well-intentioned idea"[27] however, in practice it is hard to maintain such balace as the process influence and have an impact one on another. As a consequence, the final accident report of the investigation authority is considered to be a "roadmap to liability"[28], therefore, is used in court as evidence.

The most controversial part of the final report is the statement of probable cause. This statement is a cumulus of findings and analysis leading to the cause of the accident and establishing the exact factors that led to the catastrophe.

However, this analysis has a significant impact on the means for establishing legal fault and blame.

Taking into consideration the above rationale, it is important that in the process of identifying aviation safety issues, improving safety and administration of justice, to avoid setting a priority of interests. This can be achieved through a strong cooperation between the civil aviation investigation authority and the judicial authorities, helping them to better understand the consequences a judicial process and the use of safety information have on civil aviation safety.

[24] Point 1.5 (c) of Attachement E - Legal guidance for the protection of information from safety data collection and processing systems, Annex 13.

[25] Point 2.1 Attachement E - Legal guidance for the protection of information from safety data collection and processing systems, Annex 13.

[26] Liam P. Sarsfield, William L. Stanley, Cynthia C. Lebow, Emile Ettedgui, Garth Henning, *Safety in the Skies – Personnel and Patries in NTSB Aviation Accident Investigations: Master Volume*, Institute for Civil Justice, RAND, pag. 81.

[27] Idem.

[28] Idem pag. 82.

4.2. Use of the investigation report in judicial proceedings

As we have stated above, the Accident Report constitutes a „roadmap to liability", therefore, representing a starting point for lawyers of their own investigation in preparation for the lawsuit. The report suggests areas of inquiry, experts, witnesses, hence helping the lawyers to build the case. It also contains technical aspects that are of great importance to the case.

Even in the context of this situation, where the report constitutes a basis for a litigation preparation, it has been accepted as evidence as such in very few cases, and limited. This has been though changed in recent caselaw.

In the *Rogers vs. Hoyle* case, the English Court of Appeal esablished that accident reports are admissible as such as evidence in civil proceedings.

The case arouse out of a fatal accident which took place in May 2011. Mr. Rogers was a passenger in a vintage Tiger Moth bi-plane piloted by the defendent, Mr. Hoyle, which crashed into the ground. Mr. Rogers was killed and Mr. Hoyle was seriously injured but survived. The Accident Investigation report, published in June 2012, noted that „a loop manoeuvre was carried out at too low hight for the pilot to be able to recover from the subsequent spin"[29]. Furthermore, it stated that the pilot did not have sufficient knowledge or traininig on the Tiger Moth's correct spin recovery technique, and it was very much probable that he would not have been able to recover from an unintentional spin, taking into consideration the height available.

The dependents of Mr. Rogers brought a claim against Mr. Hoyle, seeking to submit the Accident Report as evidence. The defendant responded, requesting an order for the parts of the claim relying on the report to be struck out and a declaration that the report was inadmissible in the proceedings.

The Court of first instance accepted the report as evidence, decision that was contested by the defendant. In its decision delivered on 13 March 2014, the English Court of Appeal confirmed the first instance decision, that the Accident Report is admissible as evidence, both as to the facts it contains and as expert opinion evidence. Further, the Court „rejected the defendant's submissions that the Report was unsuitable as evidential material. Features of the report, including the unattributed nature of the findings, and the lack of any verbatim reporting of witness evidence, went, in the opinion of the Court, to the weight to be given to the evidence in the report rather than its character."[30] It was also stated that " the report contained statements or reported statements of fact, it was, in the view of the Court, *prima facie* admissible."[31] „Concerning the considerations to be taken by the Court when exercising its discretion to admit/exclude the report from evidence, the Court rejected the concerns raised by the defendants that admission of the report into evidence would have an adverse impact on future accident investigations. Noting the overriding objective of the Court *"of dealing with cases justly and at proportionate cost"*, the *"particular potential value"* of the report tended, in the Court's view, to favour its inclusion in evidence. The Court noted the challenge faced by many litigants to advance claims without access to the relevant information submitted to the investigators, and/or in financing independent evidence. The Court also rejected the notion that the admissibility of accident reports was so likely to prejudice the interests which the investigation authority serves that its reports should generally be excluded from evidence, noting *inter alia* that the reports are, on any view, available to litigants and can be used as the foundation for a claim or defence, and this has not had any apparent adverse effect on the authoritiy's work."[32]

5. Conclusions

The *Rogers vs. Hoyle* case could become a landmark decision. Time will tell and show the impact such a decision has in national and international litigation in relation to the use of accident investigation reports as evidence in civil litigation. A fact is obvious, that we face time of change in the approach the Courts have and a new type of balance between the administration of justice and aviation safety.

One must not forget that safety has a sovereign status and such a status needs to be kept throughtout the entire judicial proceedings in order for safety information to be available in the future as well and encourage safety reporting without the raising the level of fear of prosecution among aviation professionals.

The *Rogers vs. Hoyle* decision showed a different perspective in relation to accident investigation reports used in civil proceedings and changed theview that accident reports are not to be used in order to apportion blame or liability. The decision emphasized that the report constitutes a relevant evidence of potential value and not taking into consideration the report as evidence, would be contrary to the role and objective of the court, namely to analyze the case justly and proportionate.

[29] UK Air Accident Investigation Branch (AAIB) Report of June 2012.
[30] Rogers vs. Hoyle Case no. B3/2013/1817
[31] Idem.
[32] Giles Kavanagh&Mark Waters, „Landmark English Court of Appeal Decision Upholds Admissibillity of Accident Investigation Reports in Civil Proceedings", Aviation issue of Hollman Fenwick Willan, March 2014, pag. 2.

Furtheremore, such reports are available for the public, so it would not constitute a violation of Annex 13 or Regulation (EU) no. 996/2010 in terms of protecting safety information. "Even if reports were not admitted, they will undoubtedly be used by would-be claimants when forming their claim".[33]

Even though this decision brings a new approach in relation to evidence presented in civil litigation arising out of aviation accidents, it is not recommended that accident investigation reports be used in civil proceedings as evidence but rather as guidelines for lawyers and judges in the better understanding of the circumstances in which the accident took place and of existing operational and technical conditions at the time of the event. The accident investigation report should remain a document used strictly for the benefit of aviation safety and not to apportion blame or liablity. It is without doubt though that the administration of justice and the aviation safety aspects interconnect, however, a balance and independence should be maintained between the aviation authorities conducting the investigation and the judicial authorities. Taking a different approach, would create a high degree of circumspection in the reporting process and in the activities of the investigationg inspectors, knowing that their actions and declarations could lead to "intensive cross-examination in Court"[34]. Evetually this would cause a decrees in the level of aviation safety.

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- UK Air Accident Investigation Branch (AAIB) Report of June 2012;
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[33] Gille Belsham, David McInnes, William Turner & James Hickland, "Aviation Safety in balance?", INCE&CO International Law Firm Journal, pag. 5.

[34] Idem.

THE ROMANIAN OMBUDSMAN - PUBLIC INSTITUTION INVOLVED IN THE PROTECTION HUMAN RIGHTS AND THE OBSERVANCE OF THE SEPARATION AND BALANCE BETWEEN THE STATE POWERS

Simina POPESCU[*]

Abstract

Defender of the rights and freedoms of individuals in their relations with public authorities and guarantor of respect for the principle of separation and balance of state powers within the constitutional democracy, the Romanian Ombudsman has the legal means in order to fulfill its constitutional and legal role. The involvement of this public institution in the constitutional review, enshrined constitutionally in 2003, when the revision of the Constitution of Romania took place, is expressed by its power to notify the Constitutional Court on the unconstitutionality of laws adopted by Parliament before their promulgation by the President and to bring directly in front of the Constitutional Court the claims of unconstitutionality. Moreover, the Ombudsman shall formulate, at the request of the Constitutional Court, points of view regarding the exceptions of unconstitutionality, competence established by the law for its organization and functioning. In this context, this paper proposes a punctual analysis of how the Ombudsman exercises these powers, by highlighting the recent aspects in its activity. Bringing in front of the Constitutional Court the exceptions of unconstitutionality it is the area in which the Ombudsman was mostly and efficiently involved for the protection of fundamental rights and freedoms such as the right to defence, the right to a fair trial, right to private property, right to labour and social protection of labour or the right to decent living standard.

Keywords: *Ombudsman, Constitutional Court, fundamental rights, constitutional review, balance of powers.*

In the vast areas of public authorities within a state governed by the rule of law where the protection of human rights is a fundamental characteristic, the paper proposes a brief analysis on the relations between the Ombudsman and the Constitutional Court to highlight, through concrete examples, their role in ensuring the proper functioning of the state mechanism, configured according to the fundamental principle of separation and balance of powers. This is to emphasize the utility of such public institutions, given that and universally accepted, human rights is an ongoing goal of continuous actuality, within a democratic state governed by the rule of law.

The Romanian Constitution adopted in 1991 and revised in 2003, marked the transition of Romanian society towards a state of law, democratic and social, where human dignity, rights and freedoms, free development of human personality represent supreme values and are guaranteed. To achieve these goals, the Constitution gave a new configuration of the constitutional order, setting up new public authorities and institutions such as the Ombudsman and the Constitutional Court. The People's Advocate is the constitutional name under which it is organized and operates in Romania, the classic institution of western European ombudsman[1] with the role to defend the rights and freedoms of individuals in their relations with public authorities. Meanwhile, the Constitutional Court acts as guarantor for the supremacy of the Constitution, taking into account the social, economic and politic reality. Although it examines the laws, the Court takes into account, mainly, the person. Hence, the person, the human being and the protection of his/her rights becomes actually the common "center of gravity" for these two democratic institutions.

The particularities of relations between the Ombudsman and the Constitutional Court in the context of European requirements for the exercise an active role of ombudsman institutions in protecting human rights may, beyond any doubt, be subject to wide scientific debate.

Based on these benchmarks, some supplementary clarifications appear as necessary. Created by the Constitution of 1991, revised in 2003, as a new institution in the state legal life, the Romanian Ombudsman was actually established and started functioning after the adoption of its organic law on organization and functioning, Law no. 35/1997[2].

[*] Assistant of scientific Research, "Nicolae Titulescu" University, Faculty of Law (e-mail: **siminapopescu1@yahoo.com**).

[1] Ioan Muraru, People's Advocate-Ombudsman type institution, Publishing House All Beck, 2004, page 1.

[2] Main regulations in force regarding the Ombudsman are provided by: Romanian Constitution, art. 58-60, art. 65 alin. 2), art. 146 letter a) and d), republished in the Official Gazette of Romania, Part I, no. 767 of 31 October 2003; Law no. 35/1997 regarding the organization and functioning of the Ombudsman, republished in the Official Gazette of Romania, Part I, no. 277 of 15 April 2014; Law no. 181/2014 for the approval of the Government Emergency Ordinance no.48/2014 for changing and amending the Law no. 35/1997 regarding the organization and functioning of the Ombudsman, and for the amendment of other normative acts, published in the Official Gazette of Romania, Part I, no. 485 of 30 June 2014, The Rules on the organization and functioning of the Ombudsman, approved by the Senate Standing Bureau Decision no. 5/2002, republished in the Official Gazette of Romania, Part I, no. 922 of 11 October 2004, further amended and completed by the Chamber

Thus, the Ombudsman is an autonomous public authority and independent from any other public authority, distinct, therefore, of the three major categories of state authorities: legislative, executive or judicial; does not replace the public authorities can not be subjected to any imperative or representative mandate and its activity has a public character; Ombudsman and his deputies are not legally liable for the opinions or acts they perform, in compliance with the law, the powers envisaged by law.

To achieve its constitutional and legal role, the Ombudsman exercises receives, examines and solves the law, complaints from any natural person. For solving the issues before it, the Ombudsman has the right to request public administration concerned to take the appropriate measures to safeguard the rights and freedoms of individuals, and to notify their superiors about the lack of reaction of those summoned to take the necessary measures. Also, the Ombudsman may perform inquiries or issue recommendations.

Thus, the Ombudsman is entitled to make his own inquiries, request the administrative authorities public any information or documents necessary for the investigation, to hear and take statements from the heads of public authorities and any official who can give the necessary information to solve the petition. In exercising its legal duties, the Ombudsman issues recommendations, which can not be subject to any parliamentary or judicial review. Through its recommendations, the Ombudsman notifies the public administration authorities on the illegality of administrative acts or facts.

Where the Ombudsman found, during the conducted research, gaps in legislation or serious cases of corruption or breaches of the laws, it will present a report containing its findings, to the Presidents of both Houses of Parliament or, where appropriate, to the Prime Minister.

If the Ombudsman finds that the complaint referrers a matter for the judiciary, he is able to address, as appropriate, the Minister of Justice, the Public Ministry or the president of the court, who are obliged to communicate the taken measures. It is a legal way by which the Ombudsman can intervene in situations of bureaucracy generated by the failure in observance art. 21 para. (3) of the Constitution, art. 6 para. 1 of the Convention for the Protection of Human Rights and Fundamental Freedoms and art. 47 of Charter of Fundamental Rights of the European Union concerning the parties' right to a fair trial and the case is solved in a reasonable time.

In the same area of judicial authority, according to art. 514 of the Code of Civil Procedure and art. 471 of the Criminal Procedure Code, the Ombudsman have the duty to ask the High Court of Cassation and Justice to rule on the legal issues that were resolved differently by the courts, to ensure the consistent interpretation and application of the law by the courts[3] .

A novelty in the Romanian legal system is the appointment[4] of the Ombudsman, as the institution that fulfills the role of national mechanism to prevent torture in places of detention within the meaning of the optional Protocol, adopted in New York on 18 December 2002, of the Convention against torture and other punishments or cruel, inhuman or degrading treatment, adopted in New York on 10 December 1984, ratified by Law no. 109/2009.

Nevertheless, the Ombudsman may involve, through its own legal means in the constitutional review of laws and ordinances performed in Romania by the Constitutional Court[5], as the only authority of constitutional jurisdiction in Romania: may address the Constitutional Court on the unconstitutionality of laws adopted by Parliament before their promulgation by the President of Romania; may raise before the Constitutional Court exceptions of unconstitutionality of laws and ordinances in force; at the request of the Constitutional Court, formulates opinions on the exceptions of unconstitutionality of laws and ordinances that relate to the rights and freedoms of citizens. These tasks in the field of constitutional justice represent effective tools for the protection of human rights, which is the core of Ombudsman activity.

The constitutional and legal provisions referred before give the Ombudsman the adequate means and procedures to accomplish its role. Of course, their effectiveness depends also on persuasion, knowing that the essence of the Ombudsman's work is the absence of any means of

of Deputies and Senate Standing Bureaus Decision no. 1/2011, and republished in the Official Gazette of Romania, Part I, no. 758 of 27 October 2011; Law no 554/2004 on administrative litigations, published in the Official Gazette of Romania, Part I, no. 1154 din 7 December 2004, further amended and completed.

[3] During 2015, three appeals in the interest of law were promoted, relating to: the legality of local councils decisions to regulate the procedure of immobilization for the illegally parked vehicles, establishment and application of penalties laid down by Government Emergency Ordinance no. 195/2002 on the public roads traffic, republished, with subsequent amendments ; interpretation and application of legal provisions concerning the inclusion of the apprenticeship when calculating the labour seniority ; interpretation and application of art. 59 of Law no. 263/2010 on the unitary public pension system, respectively article . 47 para. (2) of Law no. 19/2000 on public pensions and other social insurance rights , namely to establish the meaning of the term " blind".

[4] See the Government Emergency Ordinance no. 48/2014 for amending and completing the Law no. 35/1997 regarding the organization and functioning of the Ombudsman, and for the amendment of other normative acts, published in the Official Gazette of Romania, Part I, no. 485 of 30 June 2014, approved by the Law no. 181/2014, published in the Official Gazette of Romania, Part I, no. 6 of January 2015.

[5] Art. 142 of the Romanian Constitution states: „*The Constitutional Court is the guarantor of the supremacy of the Constitution*".

coercion[6]. Hence, it results, a legal collaboration, based on the idea of constitutional loyalty between the public authorities.

We will focus below on the question of involving the Ombudsman in the constitutional review performed in Romania by the Constitutional Court, retaining for the scientific rigor of the approach that it needs to be analyzed in accordance with the provisions of the Constitution and other legal provisions. So:

I. According to art. 146 a) of the Romanian Constitution: *"The Constitutional Court shall:*

a) to adjudicate on the constitutionality of laws before promulgation, upon referral by the President of Romania, one of the presidents of the two Chambers of the Parliament, the Government, the High Court of Cassation and Justice, the Ombudsman, a number of at least 50 deputies or at least 25 senators, as well as ex officio, on initiatives to revise the Constitution ".

This means a priori constitutional review and the introduction of the Ombudsman among the subjects that can address the Constitutional Court justified the institution's ability to identify, by its permanent direct contact with the civil society, the legal provisions that infringe the constitutional provisions. In this situation both parliamentary and constitutional jurisdiction procedural rules are applicable. They are established by Law no. 47/1992 on the organization and functioning of the Constitutional Court. Under that law, the complaints must be made in writing and substantiated. In order to exercise this right, 5 days before being sent for promulgation to the President of Romania, the law shall be sent to the Ombudsman (or 2 days if laws passed in emergency procedure). In the application of constitutional provisions, law on the organization and functioning of the Ombudsman, and law regarding the functioning of the Constitutional Court contain provisions regarding the possibility of the Ombudsman to raise objections of unconstitutionality.

The involvement of the Ombudsman in this type of constitutionality review of laws since 2003 resulted in referral to the Constitutional Court with **three** objections of unconstitutionality of laws adopted by Parliament before their promulgation by the President of Romania; the first, on the Administrative Litigation Law, rejected[7] by the Constitutional Court, one, relating the Law on the free movement of Romanian citizens abroad, objection partially accepted[8] by the Constitutional Court and the third, regarding the Law on amending and supplementing Government Emergency Ordinance no. 111 / 2011 on electronic communications, admitted[9] by the Court.

In connection with the last one, some additional explanations may be mentioned. Thus, the Ombudsman noticed that the Law amending and supplementing Government Emergency Ordinance no. 111 / 2011 on electronic communications provided the registration of prepaid card users, the collection and storage of data communications services users', the conditions for achieving specific technical operations and corresponding responsibilities incumbent providers of electronic communications services, the imposition of sanctions for breach of the obligations under the law. The criticized law also imposed on legal entities that make publicly available access points to the Internet as an obligation to identify users connected to these access points, and the requirement to store for a period of 6 months the personal data obtained by data retention (e.g. identification or telephone number, by paying with credit card or other identification procedure providing direct or indirect knowledge of the user's identity). In the Ombudsman's view, these regulations violated the provisions of the Constitution contained in art. 1 para. (5) concerning the obligation to respect the Constitution, its supremacy and the laws, art. 26 on the right to intimate and private life, art. 53 para. (2) on the restriction of the exercise of some rights or freedoms and art. 147 par. (4) regarding the decisions of the Constitutional Court. In support of the unconstitutionality, the Ombudsman argued that the legal provisions were contrary to art. 147 par. (4) of the Constitution, as the legislative solution regarding the obligation to store personal data for a period of 6 months from the date of their collection is affected by a vice of unconstitutionality from the perspective of the Courts reasoning expressed in Constitutional Court Decision no. 1.258/ 2009, according to which the term of six month for storage the personal data, as an exception or derogation from the principle of protecting privacy and personal data, affect this principle, as well as the exercise of rights or fundamental freedoms, namely the right to privacy and freedom of expression in a manner that does not meet the requirements set by art. 53 of the

[6] See Monica Vlad, Romanian Ombudsman in the frame of European integration , Liber Amicorum Ioan Muraru, About the Constitution and constitutionalism, Publishing House Hamangiu, 2006 , page 71.

[7] See Decision no. 507 of 17 November 2004 on the objection of unconstitutionality of 1 par. (3), art. 7 par. (5), art. 11 par. (3), art. 13 par. (2) and art. 28 par. (2) of the Law on administrative litigations, published in the Official Gazette of Romania, Part I, no. 1154 din 7 December 2004.

[8] See Decision no. 217 of 20 April 2005 on the objections of unconstitutionality of art. 2 par. (2), art. 17 par. (1) letter b) and par. (4), art. 18 par. (3), art. 28 par. (1), art. 30 par. (1), art. 31 par. (1), art. 32 and art. 36 of the Law on the free movement of Romanian citizens abroad, published in the Official Gazette of Romania, Part I, no. 417 of 18 May 2005.

[9] See Decision no. 461 of 16 September 2014 on the objection of unconstitutionality of Law on the changing and amending The Government Emergency Ordinance no. 111/2011 regarding the electronic communications, in the Official Gazette of Romania, Part I, no. 775 of 24 October 2015.

Constitution. Accordingly, the Ombudsman considers that Parliament failed to comply with that the Constitutional Court decision.

Regarding the violation of Art. 1 para. (5) of the Constitution, the Ombudsman argued that the constitutional provisions established a general obligation imposed on all subjects of law, including legislative power, which in its legislative work must respect the Constitution and ensure the quality of legislation. It is obvious that in order to be applied in its meaning, a law must be precise, predictable and also to ensure the legal security of its recipients. Or, the Law amending and supplementing Government Emergency Ordinance no. 111/2011 on electronic communications did not cover objective criteria on the basis of which the period of storage of personal data is set up, so that it can be limited it to a minimum. Moreover, the criticized law did not provide sufficient guarantees to allow effective protection against the risk of data abuse or to any illicit access and use of personal data.

By examining this criticism in the light of the European and national legislative framework, the Court stated that the detention and retention of personal data is clearly a limitation of the right to protection of personal data and of fundamental rights on the intimate, family and private life, secrecy of correspondence and freedom of expression, constitutionally protected. Such limitations may, however, operate in accordance with art. 53 of the Constitution, providing for the possibility of restricting the exercise of certain rights or freedoms only by law and only if necessary, to protect national security, public order, health or morals, rights and freedoms of citizens, for conducting a criminal investigation, preventing the consequences of a natural calamity of a disaster, or an extremely severe catastrophe. The measure of restriction shall only be ordered if necessary in a democratic society, must be proportionate to the situation that caused it without discrimination and without prejudice to the existence of such right or freedom. Or, given that the measures taken by law, subject to constitutional review, are not clear and predictable, the State interference in exercising the aforementioned rights, although required by law, is not clear, rigorous and comprehensive to provide confidence to the citizens, the Court found that the provisions of the Law amending and supplementing Government emergency Ordinance no. 111/2011 on electronic communications violates Art. 1 para. (5), art. 26, art. 28, art. 30 and art. 53 of the Constitution. Thus, limiting the exercise of such personal rights by reason of collective rights and public interests, aimed at national security, public order and preventing criminal break the right balance that should exist between the interests and individual rights, on the one hand and the society on the other hand, the criticized law did not contain sufficient guarantees to allow effective protection against the risk of data abuse and to any illicit access and use of personal data.

In conclusion, the Court held that although neither the Constitution nor the jurisprudence of the Constitutional Court does prohibit the preventive storing of traffic and location data, without a particular occasion, the way in which they are obtained and stored violated the conditions of the principle of proportionality, did not provide guarantees to ensure the confidentiality of personal data, impairing the very essence of fundamental rights relating to privacy, family and privacy and to secrecy of correspondence and freedom of expression. Also, the Court held in this case the same considerations of its Decision no. 440 of 8 July 2014 since the criticized law regulated the same legislative solutions as those that already ceased to produce legal effects as a result of finding their unconstitutionality. As indicated previously, although that title of criticized the law is about the amending and supplementing Government Emergency Ordinance no. 111/2011 on electronic communications, the law fails to regulate on how this data are to be accessed and used. The law under review did not provide for any rule modifying the Law no. 82/2012, which constitutes the regulatory framework of procedures, in connection with the access of the retained data (type of data accessed, individuals that may request the access, the purpose for which such data may be used, control operations etc.) nor regulates distinct these procedures. Therefore, the law as a whole is incomplete, confusing and thus likely to lead to abuses in the work of implementing its provisions. Under these aspects, the legal provisions ignore the safety guarantees of data retention, did not provide adequate standards to ensure the level of security and privacy so that the Court decided that the law is irretrievably affected. Hence the Court upheld the objection of unconstitutionality and found that the Law amending and supplementing Government Emergency Ordinance no. 111/2011 on electronic communications is unconstitutional in its entirety.

II. According to art. 146 d) of the Romanian Constitution: *"The Constitutional Court shall:*

d) decide on exception of unconstitutionality of laws and ordinances, brought up before courts of law or commercial arbitration; the exception of unconstitutionality may be raised directly by the Ombudsman;"

This is a posteriori constitutional review, where the Ombudsman is entitled to address directly to the Court, without the obligation to be a party in a trial before the court of law. In the light of constitutional and legal provisions on the role of the Ombudsman, the exception, as a mean of defense, may be raised when the laws and Government ordinances in force violate the rights and freedoms

of natural persons, becoming a guarantee of their exercise. As such, the Ombudsman can not raise such an exception in the name and for public authorities or political parties. Moreover, the Ombudsman can not substitute any individuals who shall have the usual and legal means to request the constitutional review. It is to mention here, that in the Romanian legal system does not allow the direct access of individuals at the constitutional justice-*actio popularis.*

Meanwhile, on the assessment of situations in which the Ombudsman can directly raise the unconstitutionality issues before the Constitutional Court are to be outlined several aspects of the jurisprudence of the Constitutional Court. Thus, by Decision no. 336 of 24 September 2013[10], the Court held that the Law no. 429/2003 on amending the Constitution[11] introduced the Ombudsman among the subjects of law that can address the constitutional jurisdiction. In the application of the constitutional provision, the legislative solution was introduced in Law no. 35/1997 through art. I pt. 10 of Law no. 233/2004 amending and supplementing the Law no. 35/1997 on the organization and functioning of Ombudsman, published in the Official Gazette of Romania, Part I, no. 553 of 22 June 2004, and it was contained by Art. 13 letter c3) of Law no. 35/1997. Following the republishing of the Law no. 35/1997, this legislative solution is provided by art. 13 par. (1) f). The Court held that art. 13 par. (1) f) of Law no. 35/1997 resume at infra constitutional level, the provisions of art. 146 d) of the Constitution, according to which *"the exception of unconstitutionality may be brought up directly by the Ombudsman"*.

By Decision no. 1133 of 27 November 2007, published in the Official Gazette of Romania, Part I, no. 851 of 12 December 2007, the Constitutional Court stated that "art. 146 of the Constitution does not provided any condition, as stated by the Government, where the Ombudsman is empowered to refer the Constitutional Court with complaints, respectively exception of unconstitutionality". Contrary, the Government, in his opinion retained in the abovementioned decision, claimed that "systematic interpretation of legal texts governing the role and powers of the Ombudsman and of the constitutional provisions governing the sphere of legal subject that can address the Constitutional Court with the exception of unconstitutionality leads to the conclusion that the Ombudsman has the power to start the constitutional review by addressing to the Constitutional Court only the exceptions of constitutionality regarding the rights and freedoms of individuals. "

But, according to Constitutional Court jurisprudence, the Ombudsman may initiate the constitutional review on the way of the exception of unconstitutionality whatever matters covered thereby (see, to that effect, Decision no. 544 of 28 June 2006, published in Official Gazette of Romania, Part I, no. 568 of 30 June 2006, Decision no. 567 of 11 July 2006, published in the Official Gazette of Romania, Part I, no. 613 of 14 July 2006, Decision no. 392 of 17 April 2007 published in the Official Gazette of Romania, Part I, no. 325 of 15 May 2007, Decision no. 742 of 24 June 2008, published in the Official Gazette of Romania, Part I, no. 570 of 29 July 2008, Decision no. 365 17 March 2009, published in the Official Gazette of Romania, Part I, no. 237 of 9 April 2009, Decision no. 1555 of 17 November 2009, published in the Official Gazette of Romania, Part I, no. 916 of 28 December 2009 or Decision no. 1105 of 21 September 2010, published in the Official Gazette of Romania, Part I, no. 684 of 8 October 2010), but raising direct constitutional challenge is and remains at the sole appreciation of the Ombudsman, as he can not be forced or prevented by any public authority to raise such an exception.

Accordingly, the Court found that the Ombudsman has exclusivity in deciding to raise or not an exception of unconstitutionality, taking into account the institutional and functional independence that he enjoys. The Court also held that Article 146 d) the second sentence of the Constitution has been interpreted in the jurisprudence of the Constitutional Court in the sense that the Ombudsman is not limited to notifying the Constitutional Court by way of exception only to the aspects of fundamental rights and freedoms; Consequently, since the constitutional text has not been reviewed, the interpretation of the Constitutional Court can not be called into question. Regarding the procedure, we note that the exception it is not raised before of a court of law, but directly to the Constitutional Court. The exception must be made in writing and reasoned, and once before it, the Court will ask the opinion provided by its organic law (from the presidents of the two Chambers of Parliament and Government). At the plea hearing Ombudsman will be summoned.

In exercising this legal power, during the year 2015, the Ombudsman brought up directly to the Constitutional Court **seven exceptions** of unconstitutionality, which dealt with the provisions of laws and ordinances of the Government, such as the Penal Code, Criminal Procedure Code, the Emergency Government no. 8/2015 amending and supplementing certain acts, Government Emergency Ordinance no.7/2015 regarding disposition of immovable property seized, Law no. 45/2009 on the organization and functioning of the Academy of Agricultural and Forestry Sciences "Gheorghe

[10] Published in the Official Gazette of Romania, Part I, no. 684 of 7 November 2013.
[11] Published in the Official Gazette of Romania, Part I, no. 758 of 29 October 2003.

Ionescu-Şişeşti" and the system of research and development in the agricultural, forestry and food industry.

The examples that follow, as apparent from the jurisprudence of the Constitutional Court, are meant to highlight aspects of the involvement of the Ombudsman, through its legal means, to ensure the balance of powers. Issues such as the observance of the legislative delegation requirements provided for the Government under Art. 115 of the Constitution have been brought to the attention of the Constitutional Court, directly notified by the Ombudsman on the way of the exception of unconstitutionality of the provisions of Government Emergency Ordinance no. 7/2015 regarding disposition of immovable property seized. In this case, the Ombudsman alleged unconstitutionality of the enactment mentioned in relation to art. 115 par. (4) of the Constitution, arguing that the criticized emergency ordinance was not adopted on the basis of any extraordinary and urgent circumstances. The preamble of the emergency ordinance and its explanatory note do not contain any quantifiable element to demonstrate the emergency and the extraordinary situation in which the Government and that would make this public authority unable to fulfill its function of administering public and private property of the state with the principle of economy, efficiency and effectiveness in the use of public funds and property management. The mere assertion of the existence of extraordinary situation creates insurmountable difficulties in legitimizing the legislative delegation.

Facts faced by public institutions or insufficient spaces require solutions that can not be converted in circumstances of extraordinary nature, do not imply a crisis requiring urgent identification of a solution. The elements outlined in the preamble of the urgency ordinance criticized can be subsumed under the concept of opportunity, especially since the need to adopt legislative and institutional measures to enable better management of the assets seized and confiscated known to the Government over three years as one of its objectives specified in Government Decision no. 215/2012 on the approval of the National Anticorruption Strategy for 2012-2015, Inventory preventive anti-corruption measures and evaluation indicators and the National Action Plan for the implementation of the National Anticorruption Strategy 2012-2015. So the circumstances set out by the Government may not be regarded as having an extraordinary nature.

The Ombudsman also argued that the analysis of the preamble of the emergency ordinance, it is not clear why the proposed regulation can not be postponed. The mere fact that legislation is appropriate, useful or necessary does not mean that it should be approved as soon as possible and, much less, by the delegated legislature.

Moreover, the emergency regulation is not justified either by its own normative nature, it does not contain any measures to solve an extraordinary situation, but establishes the procedure for passing the buildings confiscated from private ownership of state to the public property in order to put the into the administration of institutions public. Thus, the scope is general, having as its object a special case, requiring an urgent solution. Nor the matter of high costs for the administration seized buildings is resolved, this issue being transferred to the management of public institutions that take them in administration. Also, the regulated procedure is not characterized by celerity. So, the Ombudsman concluded that the emergency is not justified in the preamble of the criticized enactment nor by the envisaged measures.

Finally, the Ombudsman noted that the delegated legislator did not motivate the urgent need to adopt the normative act, as the reasons have to be effective and to demonstrate the objective necessity of adopting the emergency legislation, not only enunciate this need. Motivation does not mean justifying the merits of the proposed measures, but their emergency, the need to motivate their adoption through an emergency ordinance. In this case, the motivation is too general, without mentioning specific information to justify the emergency of the proposed measures; it contains no mention on the financial impact on the budget, although one of the reasons for issuing the act was to reduce administrative costs and bureaucracy.

Responding to the criticism of unconstitutionality by Decision. 859 of 10 December 2015[12], Constitutional Court, by majority of votes[13], upheld the objection of unconstitutionality and found that the provisions of Government Emergency Ordinance no. 7/2015 regarding disposition of immovable property seized as unconstitutional. In essence, the Court held that under Art. 1 of the emergency ordinance, not approved by law at the time of the pronouncement of this decision, the seizure immovable property from the private property of the state, can be transmitted in the public domain and in the administration of central public administration authorities, other public institutions of national interest where appropriate, or autonomous administrations of national interest (recipient entities), at their request, by Government decision, initiated by the Finance Ministry, under the law.

The Court also noted that the confiscation of property may be disposed in principle according to art. 108 of the Criminal Code, which regulates the

[12] Published in the Official Gazette of Romania, Part I, no. 103 of 10 February 2016.

[13] Related to Decision no. 859 of 10 December 2015, See the dissenting opinion formulated by one of the judges who voted for the rejection of the objection.

confiscation and extended confiscation as special safety measures or according to art. 18 of Law no. 115/1996 on the declaration and control of assets of officials, magistrates, persons in charge with management and control tasks, of civil servants[14].

The Court also noted that in adopting the criticized emergency ordinance, the Government motivated the extraordinary situation that led to its issue by:

- lack of spaces for central public administration authorities and other public institutions of national interest, as applicable, given that some locations are unfit to conduct business in optimum conditions and some buildings were restituted, which affects the effective activity and also generate additional operating expenses, burdening the state budget;
- low level of budgetary expenditure to finance aimed investments at ensuring operational areas of central public administration authorities and other public institutions of national interest;
- the exponential growth in the volume of confiscated goods covered by the recovery apparatus of the National Agency for Fiscal Administration;
- maintaining high costs for the preservation of confiscated goods until their recovery;
- The principle of economy, efficiency and effectiveness of resource recovery activity assigned to goods entered under the law, private property of the state;
- The need to reduce administrative costs and bureaucracy;
- Failure by the Government to ensure the management function of public and private property of the state, respecting the principle of economy, efficiency and effectiveness in the use of public funds and property management.

The Court found that it is undeniable that to meet the normative point of view in the manner required by the Government, namely the regulation of the transfer of goods from the state private property in the public domain, it needs an legislative intervention, however, the legislative process has to be in compliance with requirements relating to the conditions of extrinsic constitutionality of the adopted normative act. The Government option to adopt the emergency ordinance must take into account the specific constitutional requirements imposed by art. 115 par. (4), given that the Government has no right to uncensored and absolute discretion in the categorization of a factual situation as meeting the components of the extraordinary situation. On the contrary, its right of discretion must obey the constitutional requirements, the control of this compliance belonging to the Constitutional Court. Therefore, the proclamation in the preamble of the emergency ordinance of certain facts as subsumed under the concept of extraordinary situation does not amount to an absolute presumption in this sense, but it expresses a relative presumption, for which the normative act enjoys a relative presumption of constitutionality.

Given the criticism of unconstitutionality, reported exclusively to the provisions of art. 115 par. (4) of the Constitution, the Court found that, according to its case-law (e.g., Decision no. 255 of 11 May 2005[15], Decision no. 55 of February 5, 2014[16], and Decision no. 761 of 17 December 2014[17]) Government may adopt emergency ordinances under the following conditions, cumulatively met: the existence of extraordinary circumstances; its regulation can not be postponed and emergency must be justified in the wording of the ordinance.

Extraordinary situations express a high degree of deviation from the usual or common situation and have an objective character in the sense that their existence depends on the willingness of the Government that, in such circumstances, is forced to react promptly to protect a public interest (see Decision no. 83 of 19 May 1998[18]). Also, in the sense of Decision No. 258 of 14 March 2006, published in the Official Gazette of Romania, Part I, no. 341 of 17 April 2006 "lack of regulation by failing to explain the emergency of extraordinary situations [...] is clearly a constitutional barrier in the way of adoption of the emergency ordinance by the Government [...]. To decide otherwise is to clear the content of art. 115 of the Constitution on legislative delegation and let freedom for the Government to adopt emergency regulations, anytime and in any field - taking into account the fact that the emergency ordinance can regulate subjects specific to organic laws - "(see also Decision no. 366 of 25 June 2014 published in the Official Gazette of Romania, Part I, no. 644 of 2 September 2014).

In this context, the Court held that the reasons stated in the preamble of the emergency ordinance, considered both individually and as a whole, are matters of expediency of the measure to be taken, namely the transmission of seized immovable property from the private domain of state to the public one. They do not express a high degree of deviation from the usual or common, but a situation of continuity, not of novelty. The Court therefore held that the Government demonstrates the rationale, necessity, desirability and utility of the regulation,

[14] Published in the Official Gazette of Romania, Part I, no. 263 of 28 October 1996.
[15] Published in the Official Gazette of Romania, Part I, no. 511 of 16 June 2005.
[16] Published in the Official Gazette of Romania, Part I, no. 136 of 25 February 2014.
[17] Published in the Official Gazette of Romania, Part I, no. 46 of 20 January 2015.
[18] Published in the Official Gazette of Romania, Part I, no. 211 of 8 June 1998.

but not the existence of an extraordinary situation, which it only proclaims.

On the emergency of regulation, the Court found that the regulation of operational improvement of the legislative framework can be achieved by the way of ordinary legislative procedure, the Government being without relevant arguments to the purpose of the emergency of the measure. In those circumstances, the grounds of emergency for the adoption of the emergency ordinance are a formality, lacking practical substance of the constitutional text of art. 115 par. (4).

The Court also held that under Art. 1 para. (5) c) and art. 11, letter m) of Law no. 90/2001 on the organization and functioning of the Romanian Government and ministries, published in the Official Gazette of Romania, Part I, no. 164 of 2 April 2001, the Government exercises the function of state property management, managing the public and private property of the state. In other words, serving as manager of state property does not justify a legislative activity related to it; on the contrary, the administration should be performed under the regulatory framework prescribed by the original or delegated legislature, and assessing how to achieve this function is related to the regulatory framework previously referred. If the Government wants to improve the legislative framework for state property management, may either initiate a bill or to adopt an ordinance if the Parliament authorizes the Government to do so under art. 115 par. (1) - (3) of the Constitution.

Noting that the opportunity, reason and utility of the regulation in this case do not meet the elements of an extraordinary situation whose regulation can not be postponed, the Court admitted the exception of unconstitutionality raised by the Ombudsman and declared the Government Emergency Ordinance as unconstitutional.

III. The idea of Ombudsman intervention in the constitutional review was expressed in the legislation since 2002, when the law on organization and functioning was completed by the following: *"Art. 181 - If the exception of unconstitutionality of laws and ordinances related to human rights, the Constitutional Court will request the point of view of the Ombudsman."* A similar provision was introduced by the Law no. 47/1992, republished, according to which the President of the Constitutional Court, receiving the preliminary decision of a court of law, will communicate it to Ombudsman, indicating the time by which he can share its views on the exception of unconstitutionality raised in a concrete trial. Law no. 47/1992, republished establishes also the possibility of the Ombudsman to formulate, at the request of the Constitutional Court, points of view regarding the unconstitutionality seized by the President of one of the Houses of Parliament or the Government.

These legislative additions aimed to give Ombudsman additional means to act effectively to protect the rights of individuals.

In terms of formulating opinions on constitutionality of laws or ordinances at the request of the Constitutional Court, Ombudsman's activity has increased every year. Thus, from a total of 180 views in 2002, in the year 2015, the Ombudsman formulated a number of 1132 points of views, regarding the constitutionality or unconstitutionality of the criticized laws. In the cases where the exceptions of unconstitutionality did not met the requirements set up by the art. 29 of the Law no. 47/1992, the Ombudsman considered the exception as inadmissible (e.g. the main issues concerned the amending of the law, or strictly its interpretation, or the criticized law was abrogated).

Cases in the the Constitutional Court asked the Ombudsman to formulate an opinion mainly reffered at the alleged violations of: free access to justice, including the right to a fair trial solved in a reasonable time , the principle of equal rights, right to private property, right to life, physical and mental integrity, the right to defense, the principle of non retractivity of law, except for the more favorable penal law, rules on the restriction of certain rights or freedoms.

Regarding the Constitutional Court legal obligation to ask the Ombudsman' opinion for solving every exception of unconstitutionality, a few aspects may be put into question. An example from the jurisprudence of the Constitutional Court is eloquent[19]. Thus, to resolve the exception of unconstitutionality of art. I pt. 2, pt. 7, pt. 10 and pt. 15 of the Government Emergency Ordinance no. 45/2014 amending and supplementing Law no. 370/2004 for the election of the President of Romania, the Court asked the Ombudsman to communicate its opinion. Responding to this request, the Ombudsman has sent an address that the Constitutional Court pointed out that "by virtue of institutional and functional independence the Ombudsman enjoy", "he does not express its opinion on the legal provisions criticized." In this regard, the Ombudsman stated that "the Ombudsman shall exercise his powers within the constitutional and legal framework to fulfill its role as defender of the rights and freedoms of individuals, without performing a substitute role for other public authorities that must fulfill their own duties as provided by the legislation. The Ombudsman highlighted that in this particular, the motivation of the exception of unconstitutionality envisaged the

[19] See Decision no. 460 of 16 September 2014, published in the Official Gazette of Romania, Part I, no. 738 of 9 October 2014.

relationship between the public authorities functioning in a constitutional democracy, involving analysis and approach of political nature, which would require the Ombudsman to overcome its position of neutrality and objectivity and to engage in partisan controversy." Or, "the Ombudsman must be impartial and objective, without engaging as an arbiter in disputes with political nuances between state institutions, as its fundamental role is [...] that of the defender of the rights and freedoms of individuals in their relations with public authorities.

By admitting the premises of loyal behavior that should characterize the entire activity of public authorities in a state governed by the rule of law, the cooperation between the Ombudsman and the Constitutional Court, confirmed by concrete examples of cases, validate the idea of an active partnership aimed to increase the citizens' confidence in constitutional justice and to eliminate the abuses. Confining to summarize the rules of constitutional and legal nature, as well as some aspects of the jurisprudence of the Constitutional Court and the examples of the Ombudsman recent practice in the field of constitutional review, we aimed to argue on the juridical force of these public institutions, which in the complex mechanism of the state, ensure, by exercising their competences, the separation and also the balance of powers, premise and guarantee of the rights and freedoms of citizens in the framework of constitutional democracy.

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THE JURISDICTION OF THE COURT OF JUSTICE OF THE EUROPEAN UNION TO DELIVER A CANCELLATION JUDGMENT REGARDING THE INTERNATIONAL AGREEMENTS TO WHICH THE EU IS PARTY

Roxana-Mariana POPESCU[*]

Abstract

In the case where international agreements are treated as legal acts of EU institutions, they may be subject to judicial review exercised by the Court in Luxembourg. Given the fact that we assimilate international agreements to legal acts of the European Union, we would be tempted to ask ourselves the following questions: to what extent declaring an agreement, by a judgment of the Court of Justice of the EU delivered in the action for cancellation, as being inapplicable to the EU legal order, affects the security of international relationships? If these relationships are affected, is it possible to exclude the subsequent verification conducted by the Court? In the study below, our purpose is to find answer to these questions.

Keywords: *competence; Court of Justice of the European Union; action for cancellation; international agreements.*

1. Introductory considerations

The action for cancellation lies in the possibility of Member States, European Union institutions and natural and legal persons to challenge before the Court of Justice of the European Union, a legally binding act issued by the EU institutions and to obtain, under certain conditions, its cancellation[1]. It is a means of monitoring the compliance of EU legal acts, a control of legality which seeks the abolition[2]of an unlawful act[3], not its changing.

In the case where international agreements are treated as legal acts[4] of EU institutions, they may be subject to judicial review exercised by the Court in Luxembourg. Given the fact that we assimilate international agreements to legal acts of the European Union, we would be tempted to ask ourselves the following questions: to what extent declaring an agreement, by a judgment of the Court of Justice of the EU delivered in the action for cancellation, as being inapplicable to the EU legal order, affects the security of international relationships? If these relationships are affected, is it possible to exclude the subsequent verification conducted by the Court? We believe that under no circumstances, as long as the legal control has as effect also the possibility of revising the agreements, and not only that of cancelling them. In support of this answer, we have also the opinion of the Court which considers that "it is its duty to control the deficiencies of institutions on rules of procedure and of fund, despite difficulties that may arise for third contracting States and for the security of international relations"[5]. Moreover, the Court even accepted an action brought by a Member State, although the State had the possibility to notify the Court with an application for advisory opinion under Article 218 par. (11) TFEU. In this regard, we consider the case *Portugal v. / Council* [6], where the Portuguese Republic sought the cancellation of Decision 94/578/EC of the Council of July 18, 1994 on the conclusion of the Cooperation Agreement between the European Community and the Republic of India on partnership and development**.**

2. ECJ jurisdiction to rule by a judgment in the action for cancellation which has as object, an international agreement to which the Union is party

Pursuant to art. 275 par. (1) TFEU, the Court "has no jurisdiction as regards the provisions on Common Security and Defence Policy or in respect of acts adopted thereunder." However, pursuant to

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[*] Associate professor, PhD, Faculty of Law, "Nicolae Titulescu" University of Bucharest (e-mail: **rmpopescu@yahoo.com**).

[1] For details see **Augustin Fuerea,** *Dreptul Uniunii Europene. Principii, acțiuni, libertăți,* Universul Juridic Publishing House, Bucharest, 2015, pp. 65-74.

[2] The Act will be cancelled with *ex tunc* effect (as if it did not exist) and, exceptionally, with *ex nunc* effects (for the future).

[3] For details see **Elena Emilia Ștefan**, *Reflecții privind independența justiției*, in CKS- eBook, Bucharest, 2013, pp. 671-672.

[4] See: **Augustina Dumitrașcu,** *Dreptul Uniunii Europene și specificitatea acestuia***,** second edition, Universul Juridic Publishing House, Bucharest, 2015; **Laura Spătaru-Negură**, *Some Aspects Regarding Translation Divergences Between the Authentic Texts of the European Union*, in CKS (Challenges of the Knowledge Society) 2014, Bucharest, 2014, pp. 368-387.

[5] **Emmanuelle Leray, Aymeric Potteau**, *Réflexions sur la cohérence du système de contrôle de la légalité des accords internationaux conclus par la Communauté européenne*, Revue trimestrielle de Droit Européen, Paris, no. 4/1998, pp. 535-571 (quoted by **Eleftheria Neframi** in *JurisClasseur Europe Traité, Fasc.* 192-2: *Accords internationaux – Statut des accords internationaux dans l'ordre juridique de l'Union européenne*, August 30, 2011, p. 26 - https://orbilu.uni.lu/bitstream/10993/15170/1/Fasc._192-2__ACCORDS_INTERNATIONAUX._-_Stat.PDF).

[6] ECJ ruling, *The Portuguese Republic v. / Council of the European Union*, C-268/94, ECLI:EU:C:1996:461.

para. (2) there of, "the Court has jurisdiction to monitor compliance with art. 40 TEU". What does this thing mean? The implementation of "common foreign and security policy shall not affect the procedures and scope of the powers of institutions provided for in the appropriate treaties, in order to exercise the Union's competences"[7] in other areas. In this way, the Court of Justice in Luxembourg has the competence to cancel even a legal act on an international agreement based on CFSP; nevertheless, exercising the Union's competence should be based on a different legal ground. Regarding this matter, the Court has ruled, since 2008, in the case *Commission v. / Council*[8] , where the European Commission required the Court, the cancellation of the Commission Decision 2004/833/CFSP of the Council, of December 2nd, 2004 implementing the Joint Action 2002/589/CFSP in view of the European Union's contribution to ECOWAS in the framework of the Moratorium regarding weapons and small arms and the finding of inapplicability for illegality of the joint Action 2002/589/CFSP of the Council of 12 July 2002 on the European Union's contribution to combating the destabilizing accumulation and spread of light weapons and small arms and to repealing the joint Action 1999/34/CFSP. The Case brings to the forefront of attention the interference of foreign policy and development cooperation policy, the Court cancelling[9] the decision ruled in the CFSP matter. Although the contested act was a joint action, and not an act on the closing of an international agreement, the Court competence regarding agreements in CFSP matters was founded on the possibility of penalizing the choice of the legal basis. The Court accepted jurisdiction, stating that it has "the task of ensuring that the documents about which the Council claims that fall within the scope of Title V[10] of the EU Treaty and which, by nature, can produce legal effects, do not affect the powers that the EC Treaty confers on the Community"[11]. The Court argued its position in the previous case: "The Court must ensure that the acts about which the Council claims that fall under Art. K.3 para. (2) of the Treaty on European Union do not affect the powers which the EC Treaty attributes to the Community"[12]; "It is the Court's competence to ensure that acts which in the Council's opinion fall within the scope of Title VI do not affect the powers which the EC Treaty attributes to the Community"[13]; "It is the Court's task to ensure that acts about which the Council claim to fall within the scope of Title VI do not affect the powers which the EC Treaty attributes to the Community"[14].

Turning to the Court's jurisdiction to rule in an action for cancellation against international agreements, it is clear, as we have already stated that it could reject such an action, knowing that it can only control those legal acts of EU institutions. The Court jurisprudence, however, seems to contradict us, if we consider the case *France v. / Commission*[15]. In that case, the French Republic sought the cancellation of the Agreement signed on 23 September 1991 by the Commission of the European Communities and the United States of America on the application of national competition laws. The Court accepted the request, considering that "the action of the French Republic must be understood as being directed against the act whereby the Commission sought to conclude the agreement"[16]. In this way, the Court becomes competent to carry out an indirect control on the compliance of international agreements with European Union treaties (primary law). We assimilate the doctrinarian view according to which "the assimilation of the agreement to the act of the EU institution ordering its conclusion is not dictated by a dualistic approach, but only by the need to review the legality of an act which produces legal effects in the EU legal order, in accordance with art. 216 para. (2) TFEU"[17].

In 2002, France filed an action for cancellation[18], seeking the abolition of the decision whereby the European Commission had concluded with the United States an agreement entitled "Guidelines for cooperation and transparency in the regulation area." The reason given by France was that the guidelines negotiated by the Commission with the United States in the field of cooperation and transparency, in the regulation area constituted themselves into a genuine international agreement, the conclusion of which fell under the jurisdiction of the Council. Therefore, the problem that had to be

[7] Art. 40 TFEU.

[8] ECJ ruling, *European Commission v. / Council of the EU*, C-91/05, ECLI:EU:C:2008:288.

[9] According to pt. 1 of the device: "For these reasons, the Court (Grand Chamber) hereby: 1) Annuls Commission Decision 2004/833/CFSP of 2 December 2004 implementing Joint Action 2002/589/CFSP in view of the European Union's contribution to ECOWAS in the framework of the Moratorium on small arms and light weapons".

[10] Currently, Title V has the following name: "General provisions on the Union's external action and specific provisions on Common Security and Defence Policy".

[11] Pt. 33 of the ruling.

[12] Pt. 16 of the ECJ ruling, the *Commission v. / Council*, C-170/96, ECLI:EU:C:1998:219.

[13] Pt. 39 of the ECJ ruling, the *Commission v. / Council*, C-176/03, ECLI:EU:C:2005:542.

[14] Pt. 53 of the ECJ ruling, *Commission v. / Council*, C-440/05, ECLI:EU:C:2007:625.

[15] ECJ ruling, *the French Republic v. / European Commission*, C-327/91, ECLI:EU:C:1994:305.

[16] Pt. 17 of the ruling.

[17] **Eleftheria Neframi**, *op. cit.*, p. 26.

[18] Case *the French Republic v. / European Commission*, C-233/02, ECLI:EU:C:2004:173.

solved was to know whether the guidelines developed by the Commission and its partners could be challenged by an action for cancellation. The Court ruled in favour of the Commission, considering that the Guidelines were devoid of legal force and constituted only an administrative arrangement: "The Commission (...) as institution and collegiate body has never expressed its consent to be bound by guidelines which, moreover, are only an administrative arrangement concluded at the level of services"[19]. Therefore, no act of the Commission can be the subject of an action for cancellation.

One aspect to look at is the one which is considering the *a posteriori* control exercised by the Court on a mixed agreement, as more questions arise, such as: is the Court's jurisdiction limited only to those matters falling under the Union's competence? Will the cancellation of a joint agreement affect the entire agreement? In this case, the "conclusion of the agreement would not be a common one, of the Union and the Member States, and the Member States could not continue to be bound by an agreement that does not fall entirely within their jurisdiction, unless the cancellation of provisions falling within the competence of the Union is accompanied by a special enabling of Member States which would entitle them to correct their lack of competences and give them a mandate to act on behalf of the Union. In this way, the validity of a mixed agreement could not consider the division of powers, the Court's review concerning only the unique act which constitutes a mixed agreement "[20]. The law does not seem to give an answer to the questions mentioned, if we refer to the judgment ruled in the case *Spain v. / Council* [21] in which, being notified with an action for cancellation of a Council Decision on the conclusion of the Convention on Cooperation for the Protection and Sustainable Use of the Danube, in its judgment, the Court made no reference to the mixed nature of the agreement in question.

3. The causes of illegality[22]

A. The lack of competence of the Commission

In the case France v. / Commission[23], the Court cancelled the act by which the European Commission had decided to conclude the agreement with the United States on the application of competition law, on the ground that the institution had no competence for concluding such an agreement. The Agreement had as object to "promote cooperation, coordination and to reduce the risk of disputes between the parties in the application of their competition laws or to reduce their effects"[24]. Although the Commission argued that "the agreement is in reality an administrative arrangement for the conclusion of which it has jurisdiction"[25] and that "the failure to comply with the agreement provisions would not determine the liability of the Community, but simply its termination"[26], the Court considered that the agreement, being binding to the Community and generating obligations, could not be qualified as administrative agreement.

B. Violations of treaties

Another cause of illegality is the violation of treaties. Thus in the case Germany v. / Council[27], the Court ruled in favour of Germany's request to cancel art. 1 para. (1) first indent of Decision 94/800 / EC of 22 December 1994 concerning the conclusion on behalf of the European Community concerning its fields of competence, of the agreements of multilateral negotiations of the Uruguay Round (1986-1994) to the extent that the Council approved the Framework Agreement on bananas with the Republic of Costa Rica, Republic of Colombia, Republic of Nicaragua and the Republic of Venezuela. Germany argued that "the regime established by the Framework Agreement affected the fundamental rights of operators of A and C categories, namely the right of freely exercising the profession and property rights and discriminated them against the operators of B category "[28].

The Court ruled differently in the case Portugal v. / Council[29]. In that case, Portugal requested the Court to cancel the Council Decision 96/386/EC of 26 February 1996 on the conclusion of Memoranda of Agreement between the European Community and the Islamic Republic of Pakistan, and between the European Community and the Republic of India on arrangements in the area of market access for textile products. The reasons invoked by Portugal were taking into account "on the one hand, the infringement of certain fundamental WTO rules and principles and, secondly, the breach of certain rules and fundamental principles of the Community legal

[19] Pt. 24 of the ruling.
[20] **Eleftheria Neframi**, *op. cit*., p. 27.
[21] ECJ ruling, *Royaume d'Espagne c. / Conseil de l'Union européenne*, C-36/98, ECLI:EU:C:2001:64.
[22] **Eleftheria Neframi,** *op. cit*., pp. 27-28.
[23] C-327/91 *cited above*.
[24] Pt. 5 of the ruling.
[25] Pt. 21 of the ruling.
[26] ***Idem.***
[27] ECJ ruling, *the Federal Republic of Germany v. / Council of the European Union*, C-122/95, ECLI:EU:C:1998:94.
[28] Pt. 48 of the ruling.
[29] C-149/96 *cited above*.

order"[30]. This time, the Court held that "the statement of the Portuguese Republic, according to which the contested judgment was delivered by breaching certain rules and fundamental principles of the Community legal order, is unfounded"[31] and dismissed the action in its entirety[32].

C. The wrong choice of the legal ground

As in the case of acts of secondary law, the choice of the legal ground for concluding an international agreement "must be based on objective factors which can be subject to judicial review, of which stand the purpose and content of the envisaged agreement"[33]. If the agreement has a dual purpose, the act regarding its conclusion should have as legal ground, the one required for the predominate purpose. "Only exceptionally, if goals are inextricably linked, the act concluding the agreement must have as legal ground, two legal bases"[34]. The wrong choice of the legal ground is, for the Court, a reason for cancellation of the agreement. In this respect, stands the Court judgment in the case the Parliament v. / Council[35], in which the Court cancelled the decision because of the wrong choice of the legal ground. In that case, the Parliament asked the Court to cancel Decision 93/323/EEC of the Council of 10 May 1993 on the conclusion of an agreement in the form of a Memorandum of Agreement between the European Community and the United States concerning the purchases. The reason given was that the decision had as legal grounds, only Article 133 TEC which regulated conditions for the negotiation and conclusion of agreements in the field of common commercial policy, the Parliament being, thus excluded from the procedure to conclude the agreement. In the opinion of the Parliament, in addition to this article, the decision had to have as legal basis, also other articles of the Treaty, specific to the provision of services, articles that provided a cooperation procedure. Therefore, the Parliament believed that delivering a judgement only pursuant to art. 113 TEC constituted an infringement of its prerogatives to participate in the procedure of cooperation.

Likewise, the Court ruled in the case Commission v. / Council[36], which cancelled the Council Decision on the conclusion, on behalf of the Union, of an agreement with the United States on the coordination of labeling programs for energy efficiency of office equipment. The reason for cancellation was the wrong choice of the legal grounds, given that the Council considered that the decision to conclude the agreement fell within the scope of the article concerning the common commercial policy[37], without taking into account the article on environmental policy[38].

In 2006, the Court cancelled the judgment in the case Commission v. / Council[39] on the conclusion of the Rotterdam Convention on the prior informed consent procedure applicable to certain hazardous chemicals and pesticides from the international trade. The Court considered that the decision concluding the Convention was based not only on environmental policy, but it must have a dual legal ground: the environmental policy and the commercial policy.

Another judgement cancelled by the Court is the one concerning an Agreement between the European Community and the United States of America on the processing and transfer of PNR[40] data by air carriers to Customs, and border protection by the Department of Homeland Security United States. The peculiarity of this judgment[41] is that "the Commission's decision was adopted ultravires since provisions[42] of Directive 95/46/EC have not been complied with "and in breach of (...) [provisions] concerning the exclusion of activities which fall outside the scope of the European Union law"[43]. It's hard to say whether a decision concluding the agreement is cancelled for the wrong choice of the legal ground, but it can be concluded from the Court's approach that the former art. 95 TEC[44] did not constitute the appropriate legal basis, and that the decision had to be based on the former art. 308 TCE[45]. However, it can be concluded from the Court's analysis, that the Union had no competence

[30] Pt. 24 of the ruling.
[31] Pt. 94 of the ruling.
[32] For details on the role of the legal principles, see **Elena Anghel**, *The importance of principles in the present context of law recodifying, în* Proceedings of the Challenges of the Knowledge Society Conference (CKS) no. 2/2012, p. 753.
[33] **Eleftheria Neframi**, *op. cit*., p. 27
[34] ***Idem.***
[35] ECJ ruling, *the European Parliament v. / Council of the European Union*, C-360/93, ECLI:EU:C:1996:84.
[36] ECJ ruling, *European Commission v. / Council of the European Union*, C-281/01, ECLI:EU:C:2002:761.
[37] The current art. 207 TFEU (ex.-art. 133TCE).
[38] The current art. 192 TFEU (ex.-art. 175 TCE).
[39] ECJ ruling, *Commission des Communautés européennes c. / Conseil de l'Union européenne*, C-94/03, ECLI:EU:C:2006:2.
[40] Passenger name records.
[41] ECJ ruling, *the European Parliament v. / EU Council and the European Commission*, C-317/04, ECLI:EU:C:2006:346.
[42] Pt. 51 of the ruling.
[43] ***Idem.***
[44] Currently, art. 114 TFEU.
[45] Currently, art. 352 TFEU.

whatsoever to conclude the agreement in question"[46].

4. The consequences of cancelling a decision for concluding an international agreement

Pursuant to art. 364 par. (1) TFEU, if the action is well grounded, the Court declares the act void. Therefore, the act disappears from the *ex tunc* EU legal order, from the date of the entry into force. A cancellation judgment has retroactive effect and *erga omnes* value, resulting in the total or partial nullity of the legal act of the European Union. It should be noted that the partial cancellation operates under the condition of not distorting the act. The Court can cancel a legal act, but it can also declare if some of its effects survive. It can also limit the retroactive effects. Thus, for example, it can limit its retroactivity only to the one who brought the action to court. However, the Court can cancel the act, but it can still keep it in force, until the institution adopts a new act to replace it.

Cancelling a legal act which has as object, the concluding of an international agreement leads to the impossibility of applying the agreement in the EU legal order. It should be noted that the decision to cancel the EU legal act of concluding an international agreement is not enforceable against the third State, party to the agreement. In this situation, naturally, the Union can be internationally held liable, and that while art. 27 para. (2) of the Vienna Convention of 1986 on the Law of Treaties between States and international organizations or between international organizations, provides that an international organization, party to a treaty, cannot rely on its own internal rules to justify an event of default under the Treaty[47]. Article 46 of the same Convention states: "in the situation where the consent of an international organization, to be bound by a treaty, has been expressed by breaching the organization rules regarding the competence to conclude treaties, this cannot be considered a vice of consent, unless that violation was express and aimed at an essential regulation". "The European Union law does not recognize the breach of its regulations as a manifest violation to co-contracting third countries. Consequently, the cancellation of the act concluding an international agreement will lead to international liability of the Union. However, the Union's international liability is up to the contracting parties"[48].

4. Conclusions

Echoing some previous mentions, it can be noted that the Luxembourg Court can cancel the act, but still keep it in force, until the institution adopts a new act to replace it, under art. 264 par. (2) TFEU, which states: "(...) the Court shall, if it considers it necessary, indicate the effects of the void act which must be considered definitive". Thus, in the case the *Parliament v. / Council*[49], the Council asked the Court to limit the effects of the cancellation of the ruling[50], simply because the abolition of the act concluding the agreement would undermine the rights arising therefrom[51]. For these reasons, related to legal reasons comparable to those which arise when certain regulations are annulled, the Court found it necessary to exercise the power conferred by Art. 264 par. (2) TFEU and to maintain some effects of the cancelled decision[52]. Thus, the Court upholds certain effects until the Council will replace the annulled act by one that will comply with European Union treaties.

In the case the *Parliament v. / Council*[53], the Court maintained the effects of the ruling that it had cancelled, justifying its action in the following manner: "Having regard, on the one hand, that the Community cannot invoke its right as justifying the non-execution of the Agreement which stays applicable within 90 days from its denunciation and, on the other hand, to the close link between the agreement and the decision on adequacy, it would seem justified, for reasons of legal certainty and to protect the persons concerned, to maintain the effects of the adequacy ruling during that period. In addition, it is necessary to take into account the necessary time for adopting the measures posed by the enforcement of this ruling"[54].

[46] **Flavien Mariatte**, *La sécurité intérieure des États-Unis... ne relève pas des compétences externes de la Communauté: Europe 2006, étude 8* RTDE, 2006, pp. 549-559 (quoted by **Eleftheria Neframi,** *JurisClasseur Europe Traité, Fasc*. 192-2, *op. cit*., p. 28).

[47] For details regarding forms of legal liability, see **Elena Emilia Ştefan**, *Răspunderea juridică. Privire specială asupra răspunderii în dreptul administrativ*, Prouniversitaria Publishing House, Bucharest, 2013, pp. 85-95.

[48] **Eleftheria Neframi**, *op. cit*., p. 29.

[49] C-360/93 *cited above.*

[50] Pt. 32 of the ruling.

[51] Pt. 33 of the ruling.

[52] Pt. 35 of the ruling.

[53] C-317/04, *cited above*.

[54] Pt. 73 of the ruling.

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THE INTERPRETATION OF INTERNATIONAL AGREEMENTS BY THE COURT OF JUSTICE OF THE EUROPEAN UNION

Roxana-Mariana POPESCU[*]

Abstract

According to a settled case-law, the Court held that the agreements, to which the Union is party, mixed or not, should be treated as legal acts adopted by EU institutions, in order to be introduced in the scope of art. 267 section a) TFEU1. In the study below, we shall present jurisprudential issues concerning the competence of the Court in Luxembourg on the interpretation of international agreements by the Court of Justice of the European Union.

Keywords: *international agreements, Court of Justice of the European Union, interpretation; competence.*

1. Introductory considerations

The interpretation of agreements to which the Union is a party, has constituted the subject of judgments ruled by the Court of Justice in Luxembourg since 1974[1]. This regards the judgment in the *Haegeman*[2] case. The Court declared that the Association Agreement with Greece "was concluded by the Council" according to the procedure established by the Treaty and that it constituted "henceforth, in respect of the Community, an act adopted by a Community institution (...) and that its provisions, since their entry into force, were part of the Community legal order". Therefore, pursuant to that judgment, the Court recognized its jurisdiction to interpret such agreements.

2. Issues concerning the interpretation by the ECJ, of the Association Agreements

In *Demirel*[3] Case, on the Community-Turkey Association Agreement, the Court recalled that an agreement concluded by the Council was an act adopted by a Community institution. The Court found that, depending on the nature of the association agreement; it "creates special and privileged links with a third State which must, at least partially, participate in the Community regime"[4]. Being an association agreement, "it is necessary (...) to [be] give(n) (...) the Community, the power to make commitments to third countries in all areas covered by the Treaty"[5]. In this way, the Court is limited, therefore, to assert its competence to interpret Union provisions of a mixed agreement. The Court's jurisdiction to interpret the whole agreement could be justified, according to the logic pursued by the jurisdiction of the Union in this area, by the fact that the agreement concluded is treated as an act of institutions and that its conclusion by the Council has power over the entire agreement[6]. "This statement could risk the emergence of a conflict of interpretation between the Court and national authorities[7]. Applying an allocation of powers of interpretation between national authorities and the Court would prove, however, to be delicate, given the difficulties to establish a link between the provisions of an agreement and national or community powers and could generate a risk of discrepancies in the application of the mixed agreement"[8].

3. *Some considerations regarding ECJ jurisdiction to interpret mixed agreements*

We believe that a more sensitive issue is the interpretation of mixed agreements to which the EU is a party[9], if we take into account the specificity of those agreements, namely the regulation of some areas that are distributed to both Member States and the Union.

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[*]Associate professor, PhD, Faculty of Law, "Nicolae Titulescu" University of Bucharest (e-mail: **rmpopescu@yahoo.com**).

[1] "Court of Justice of the European Union has jurisdiction to rule, by preliminary title, on: (...) b) the validity and interpretation of acts adopted by the institutions, bodies, offices or agencies of the Union".

[1] **Augustin Fuerea,** *Dreptul Uniunii Europene. Principii, acţiuni, libertăţi,* Universul Juridic Publishing House, Bucharest, 2015, p. 99.

[2] ECJ ruling, *Haegeman v. / Etat Belge*, 181/73, ECLI:EU:C:1974:41.

[3] ECJ ruling, *Demirel v. / Ville de Schwäbisch Gmünd*, 12/86, ECLI:EU:C:1987:400.

[4] Pt. 9 of the judgment.

[5] ***Idem.***

[6] **Joël Rideau**, *Droit institutionnel de l'Union et des Communautés européennes*, Edition III, L.G.D.J. 1999, p. 844.

[7] See **Elena Emilia Ştefan**, *Răspunderea juridică. Privire specială asupra răspunderii în dreptul administrativ*, Prouniversitaria Publishing House, Bucharest, 2013, pp.262-263.

[8] ***Ibid***, p. 845.

[9] See **Dumitraşcu, Augustina,** *Dreptul Uniunii Europene şi specificitatea acestuia***,** second edition, Universul Juridic Publishing House, Bucharest, 2015.

The Court has interpreted over time also mixed agreements without, however, expressly mentioning if this power extends to all provisions of the agreements or if it is limited to provisions that fall within the Union's jurisdiction. In this regard, we mention the judgment in the case *Conceria Daniele Bresciani v. / Amministrazione Italiana delle Finanze*[10]. In that case, the Court ruled only on those articles of Yaoundé Conventions[11] that regulated areas of exclusive Community competence. Joël Rideau's opinion must also be remembered: he believes that the mere "fact that the provisions interpreted in cases of this kind are considering areas that fall clearly within the competence of the Community, does not allow us to infer implicit recognition of an interpretation jurisdiction that extends to all provisions of mixed agreements"[12]. There is another opinion in the same direction, according to which "the jurisdiction of the Court of Justice to interpret a mixed agreement (...) must be analysed in relation to the definite provision of the agreement, the interpretation of which is required"[13].

Starting from the existing case-law on the subject and turning to the specialized literature[14], in order to determine if the Court has jurisdiction to interpret provisions of mixed agreements, four cases should be considered, namely[15]:

the interpretation of provisions within the exclusive competence of the Union;

the interpretation of provisions in areas where the Union has competence, but it is not exclusive and where the Union has legislated in the field of the provision subject to interpretation;

the interpretation of provisions in areas where the Union has competence, but it is not exclusive and where the Union has legislated in the field of the provision subject to interpretation;

the interpretation of provisions which lie outside the competence of the Union.

In the first case, it is obvious that the Luxembourg Court has jurisdiction to interpret those provisions related to areas where it has exclusive jurisdiction.

Regarding the interpretation of provisions which belong to areas where the EU does not exercise exclusive jurisdiction, but in which it has legislated (*the second case*), the Court declares itself competent, as it results from the judgment ruled in *Scieving-Nijstad*[16] case "involving the trademark, an area where the TRIPs Agreement is applicable and where the Community has already legislated, the Court has jurisdiction to interpret the article" which is object of the preliminary application and which can be found in the wording of the TRIPs Agreement[17]. The Court argues its opinion by resorting to its jurisprudence, as follows:

A. First of all, the *Hermès* judgment[18] is brought into question. The object of the judgment is the interpretation of a provision of the Agreement on Trade-related Aspects of Intellectual Property Rights (TRIPS) which is in an annex to the Agreement establishing the World Trade Organization. The latter is a mixed agreement. In this case, three Member States challenged the jurisdiction of the Court to rule in a preliminary ruling, arguing that the Court itself, by Opinion 1/94 "considered that the provisions of the TRIPS Agreement on" the means to enforce intellectual property "(. ..) would fall primarily within the jurisdiction of Member States and not within that of the Community on ground that when that opinion was delivered, the Community had not yet exercised its internal competence in that area"[19]. Therefore, the respective states were claiming, "whereas the Community has not adopted other measures of harmonization in the area concerned, that [the provision of] the TRIPs Agreement did not fall within the scope of Community law[20] and, therefore, the Court had no jurisdiction to interpret it"[21]. The Court considered that it was competent to rule as long as, at the time, the Community had already adopted a regulation on the matter. "The implementation of measures adopted at EU level is the responsibility of Member States, by using the national legal order and national procedural rules. When Member State authorities are enforcing measures adopted at EU level, they are required to comply with the provision of the TRIPS Agreement by which the national court notifies the Court of Justice in Luxembourg to claim for interpretation. To the extent where the provision may be relevant for the implementation of Union rules, the Court has jurisdiction to interpret it. The fact that

[10] ECJ ruling, *Conceria Daniele Bresciani v. / Amministrazione italiana delle finanze*, 87/75, ECLI:EU:C:1976:18

[11] It's about the Convention of Association between the European Community and the African States and Madagascar associated with the Community, signed in Yaoundé on 20 July 1963 concluded on behalf of the Council by its decision of 5 November 1963 and the Convention of Association signed at Yaoundé on 29 July 1969 concluded on behalf of the Council by its decision of 29 September 1970.

[12] **Joël Rideau**, *op. cit*., p. 844.

[13] **Morten Broberg, Niels Fenger**, *Le renvoi préjudiciel à la Court de Justice de l'Union européenne* by, édition Larcier, Brussels, 2013, p. 55.

[14] ***Ibid***, pp. 55-56.

[15] ***Idem.***

[16] ECJ ruling, *Scheving Nijstad vof etc. v. / Robert Groeneveld*, C-89/99, ECLI:EU:C:2001:438.

[17] Pt. 30 of the judgment.

[18] ECJ ruling, *Hermès International v. / FHT Marketing Choice BV*, C-53/96, ECLI:EU:C:1998:292.

[19] Pt. 23 of the judgment.

[20] For details about EU law - new legal typologies, see **Laura Spătaru-Negură,** *Old and New Legal Typologies*, in CKS (Challenges of the Knowledge Society) 2014, Bucharest, 2014, pp. 353-367. See **Elena Anghel**, *Values and valorization*, in LESIJ XXII, no. 2/2015, pp. 103-113.

[21] ***Idem.***

the case did not concern the implementation of Union rules does not change this situation"[22] because "only the national court notified of the dispute (...) has the competence to assess (...) the need for a preliminary ruling in order to be able to issue a judgment"[23]. In addition, "when a provision can be applied equally well in situations covered by national law, as well as in those pertaining to Community law, there is a clear Community interest concerning the fact that, in order to avoid future differences of interpretation, that provision gets a uniform interpretation, regardless of circumstances in which it must be applied"[24].

B. A second judgment invoked by the Court is the one ruled in *Dior*[25] Case. In that case, the Court wanted to know, among other things, whether the scope of the judgment ruled in *Hermès* case, on the Court's jurisdiction to interpret an article of TRIPs, was limited to statements relating to trademark law or might be extended to, why not, the whole Agreement. In its response, the Court reviews some of the reasons set out in *Hermès* case, recalling that it had jurisdiction to interpret a provision of TRIPS "in order to meet the needs of the judicial authorities of Member States when the latter are requested to apply national rules that order provisional measures for the protection of rights arising from the Community legislation falling within the scope of TRIPs"[26], and that "where a provision (...) can apply equally well to situations which fall under national law and to those falling under EU legislation, as is the case relating to trade mark, the Court has jurisdiction to interpret it, in order to avoid disputes that may arise in future interpretations"[27].

Therefore, the Court has jurisdiction to rule in matters covered by a non-exclusive competence, but in which the Union has already legislated.

The third situation that we have identified (the interpretation of provisions in areas where the EU has competence, but it is not exclusive and where the Union has not legislated in the area where the provision subject to interpretation applies) is "more complex". The situation differs from the previous one by the simple fact (does it?!) that the Union has not legislated. So, we are in the scope of powers which the EU exercises with Member States (the same situation as the previous one), but where it has not legislated (the difference from the previous case). In this case too, the jurisprudence is helping us to appreciate the Court's jurisdiction in the matter. We bring again to the forefront of discussion, the judgment in *Dior* case. In this case, as we have stated earlier, the Luxembourg Court was asked to interpret a provision of the TRIPs Agreement. The case concerned two preliminary references, which were joined, one of which was aimed at safeguarding an industrial model, but in that area the Union had not legislated yet at the time of facts of the main action"[28] (. The Court noted that as long as "a procedural provision, which applies equally to all situations falling within the scope and can apply equally well to situations which fall under national law and to those covered by Community law, this duty requires, both for practical and legal reasons, that courts of the Member States and the Community would adopt a uniform interpretation. Or, only the Court, acting in cooperation with jurisdictions of other Member States (...) is able to provide such a uniform interpretation.

Therefore, the Court's jurisdiction to interpret [a certain article] of TRIPs is not limited only to situations covered by the trade mark law"[29]. Thus, the Court has jurisdiction to interpret and declare provisions of mixed agreements which have as object, areas that are not within its exclusive competence and in which the Union has not legislated. But what is the difference between the Court's possibility to interpret provisions for which it has no exclusive competence, but in which it has legislated, and provisions for which it has exclusive competence, but in which it has not legislated? As long as the Court declares itself competent to interpret, whether the Union has legislated or not in an area that does not have exclusive competence, the difference between the two situations is that aspects related to "the direct effect of the international agreement shall be decided in accordance with the Union law "when the EU has legislated. „By contrast, (...) the Court cannot rule on how the provisions of the international agreement will be implemented in national law"[30] in cases where it has not legislated in that field.

Consequently, as long as the Court has failed so far to provide a clear answer on its jurisdiction to interpret provisions covered by a non-exclusive competence and in which the Union has not legislated, we agree with the view expressed in the doctrine, namely "if a provision of a mixed agreement applies both to the A field (for example, trademark law) and to the B field (e.g. patent law)

[22] **Morten Broberg, Niels Fenger**, *op. cit.*, p. 57.
[23] Pt. 31 of the judgment in *Hermès* case, *cited above*.
[24] Pt. 32 of the judgment in *Hermès* case, *cited above*.
[25] ECJ ruling, *Christian Dior Parfums SA v. / TUK Consultancy BV and Assco Gerüst GmbH and Rob van Dijk,* Joined Cases C-300/98 and C-392/98, ECLI:EU:C:2000:688.
[26] Pt. 34 of the judgment.
[27] Pt. 35 of the judgment.
[28] **Morten Broberg, Niels Fenger**, *op. cit.*, p. 58.
[29] Pts. 37-39 of the judgment.
[30] **Morten Broberg, Niels Fenger**, *op. cit.*, p. 58.

and if the Union has legislated only in A field, the Court of Justice would have jurisdiction in interpreting that provision if the reference from the national court concerns the A field. By contrast, if the national court reference concerns the B field, the European Union law will leave the national court to determine what effect the provision will have in the national legal order "[31]. In support of this interpretation of the doctrine, we find in the Court's jurisprudence, the judgment ruled in *Merck Genéricos* case[32]. In this case, it was requested a preliminary ruling on the interpretation of Article 33 of the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement), constituting Annex 1C to the Agreement establishing the World Trade Organization, signed in Marrakesh on 15 April 1994 and approved by Council Decision 94/800/EC on the conclusion, on behalf of the European Community, as regards matters within its competence, of the agreements reached in the Uruguay Round of multilateral trade negotiations (1986-1994). Merck & Co. is the holder of a Portuguese patent issued in 1981 on a pharmaceutical product named RENITEC. In 1996, Merck Genéricos, which had no connection with Merck & Co. placed on the market, at a much lower price, the same pharmaceutical product, under the name of ENALAPRIL MERCK. In these circumstances, Merck & Co. brought an action for infringement of its patent. The litigation focused mainly on the duration of protection afforded by the patent. The Portuguese law provided, when applying for the patent, protection for a period of 15 years from the date of issue, but the TRIPs Agreement, which is part of the WTO Agreement, provided in Article 33, a protection period of 20 years from the establishment date of the patent. The application filed by Merck & Co. was rejected at first instance. On appeal, the Court of Appeal in Lisbon ordered, however, the company Merck Genéricos to indemnify Merck & Co. for the damage done to patent, on the ground that, pursuant to Article 33 of the TRIPs Agreement, which has direct effect, the patent expired in 2001, not in 1996. Merck Genéricos appealed against that judgment, claiming that art. 33 of the TRIPs Agreement is without direct effect. The national Court held that "under the principles of Portuguese law governing the interpretation of international agreements, art. 33 of the TRIPs Agreement has direct effect"[33]. Recognizing the competence of the Court to interpret such agreements, the national Court acknowledged that the Union had adopted several legal acts in the field of patents, but at the same time recognized that the jurisdiction of the Court might be challenged, "whereas unlike the Community rules on trade provisions of Community law in the field of patents, that jurisdiction relates only to certain limited areas[34]. Presenting the situation in this manner, the national court wished, as we have previously mentioned, to know whether the Court in Luxembourg had jurisdiction to interpret a provision of TRIPs (mixed Agreement!) and, if so, whether "national courts must apply the above-mentioned article, in litigations pending, ex officio or upon request of a party?"[35] If the answer to the first question raised no problems, the previous case-law of the Court giving an affirmative answer, the answer regarding the second question was not found in earlier rulings. Thus, the Court noting that, so far, the Union had not exercised "Patent competences"[36] or that "internally, the exercise of that competence has not been (...) significant enough to consider that (...), this area is subject to Community law"[37], it concluded that "since Article 33 of the TRIPs Agreement falls within an area where, in the current stage of the Community law development, Member States remain principally competent, being allowed to recognize or not whether they can give direct effect to that provision"[38]. Therefore, as it results from the response given by the Court[39], the national court can directly apply provisions of a mixed agreement in the field of patents, as provided by national law.

The last situation (*the fourth*) taken into account to determine whether the Court has jurisdiction to interpret provisions in mixed agreements, relates to the interpretation of provisions which lie outside the competence of the Union. In other words, it is about the situation where a national court notifies the Court in Luxembourg with a preliminary question that has as object, the interpretation of a provision of an international agreement to which the Union is a party, but that provision does not fall within the competence of the Union. In this case, the Court settled, in its judgment *Commission v. / Ireland*[40], that it is "competent to assess compliance with the obligations arising from

[31] ***Ibid***., p. 59.

[32] ECJ ruling, *Merck Genéricos - Produtos Farmacêuticos Ld[a] v. / Merck & Co. Inc. and Merck Sharp & Dohme Ld[a]* , C-431/05, ECLI:EU:C:2007:496.

[33] Pt. 23 of the judgment.

[34] Pt. 27 of the judgment.

[35] Pt. 28 of the judgment.

[36] Pt. 46 of the judgment.

[37] ***Idem***.

[38] Pt. 47 of the judgment.

[39] Pt. 48 of the judgment: "in the current state of the Community Patent regulation, the Community law does not preclude art. 33 of the TRIPs Agreement to be directly applied by a national court in the conditions provided by national law".

[40] ECJ ruling, the *Commission v. / Ireland*, C-13/00, ECLI:EU:C:2002:184.

agreements when the provision in question is outside the competence of the Union, if the provisions of the mixed agreement are concerning an area that largely falls within the scope of competences of the Union and these provisions create rights and obligations in areas covered by EU law"[41]. In this case, the European Commission brought an action against Ireland, seeking a declaration under which Ireland had failed to fulfil within the prescribed period, the obligation to adhere to the Berne Convention for the Protection of Literary and Artistic Works. The obligation to adhere to this international legal instrument results from the corroboration of Article 228, paragraph (7) TEC[42] and Article 5 of Protocol 28 to the Agreement on the European Economic Area (EEA). Since this is a mixed agreement (EEA), there were states, including Ireland, which challenged the jurisdiction of the Court to rule in areas that are not subject to harmonization measures at EU level, as it was the case of intellectual property. Therefore, in their view, the Berne Convention covered classical international law, being the exclusive competence of the Member States and its application must not be subject to any control by the Court of Justice. Instead, the Court found that mixed agreements concluded by the Union and its Member States, with third countries have the same status in the legal Union order as the pure Union agreements, as regards to provisions falling within the competence of the Union. In the Court's view, the obligation to adhere to the Berne Convention, imposed by a provision contained in a mixed agreement and which relates to an area covered by a Union treaty (TCE) falls within the scope of the Union, the Court being thus competent to assess compliance with this obligation[43]. Moreover, the Court is declared competent to interpret such agreements as long as "the provisions of the mixed Agreement which it must interpret, are inseparably connected to those parts of the mixed agreement falling undeniably, in the Union's competence and insofar the Union has taken responsibility for the proper enforcement of the agreement"[44].

Therefore, the Court has jurisdiction to interpret provisions of mixed agreements that do not fall within its jurisdiction, as long as the Union's accession to these mixed agreements can be regarded as being the consequence of joining the whole agreement[45], "given the indivisibility of obligations that it states[46]".

4. The interpretation by the ECJ, of agreements concluded by Member States

It concerns those agreements which initially were concluded by Member States of the Union, but the object of which fell subsequently within the European Union's competence.

Since 1972, the Court has ruled on this situation in the *International Fruit Company III*[47]case, which had to decide on certain aspects that made references to the General Agreement on Tariffs and Trade (GATT). After that year, the Court continued to answer questions that dealt with the interpretation of certain provisions of agreements concluded by Member States and which connected the Union, to the extent that, following the entry into force of that agreement, its provisions have been part of provisions the interpretation of which depends on the preliminary competence conferred upon the Court of Justice, regardless of the purposes of this interpretation, as it is the GATT[48]case. Another situation envisaged by the Court concerns the interpretation of protocols to a GATT type agreement Its competence is also here present, as protocols were adopted by the Union's institutions in line with provisions of treaties, falling thus within the Court's jurisdiction[49].

Therefore, the Court has jurisdiction to interpret provisions of agreements concluded by the EU Member States and which, subsequently, have fallen within the Union's competence.

5. The possibility of interpretation by the Court, of acts adopted by the bodies established by certain international agreements

Not infrequently, by the agreements to which the Union is party, are established bodies that have the competence to rule in order to correctly and completely, enforce that Agreement. The analysis assumes that these rulings are part of the agreement, the Court thereby having jurisdiction to interpret such decisions. A ruling of this kind is given in *Sevince* Case[50]. In the present case, the Court was notified with three preliminary questions on the interpretation of certain provisions of the various

[41] **Morten Broberg, Niels Fenger**, *op. cit.*, p. 59.
[42] Currently, art. 218 TFEU.
[43] Pt. 20 of the judgment *Commission v. / Ireland*, *cited above*.
[44] **Morten Broberg, Niels Fenger**, *op. cit.*, p. 59.
[45] **Idem.**
[46] Pt. 20 of the judgment *Commission v. / Ireland*, *cited above.*
[47] ECJ ruling, *International Fruit CO. et al. v. / Produktschap voor Groeten en Fruit*, Joined Cases 21-24/72, ECLI:EU:C:1972:115.
[48] ECJ ruling, March 16, 1983, *cited above*.
[49] ***Idem.***
[50] ECJ ruling, *S. Z. Sevince v. / Staatssecretaris van Justice*, C-192/89, ECLI:EU:C:1990:322.

decisions of the Association Council, established by the Association Agreement between the European Community and Turkey, signed in Ankara on 12 September 1963. In fact, a Turkish citizen[51] brought an action before the competent Court in the Netherlands since the extension of his title of residence was denied to him. That aspect was regulated by the Association Agreement between the Community and Turkey. The Association Council settled by that Agreement, drafted and adopted several decisions that were incident to the situation. The problem of the sending court was mainly to know whether the Court in Luxembourg had jurisdiction to interpret such rulings. In its argument, the Court recalled that, according to its case-law, the provisions of an agreement concluded by the Council in accordance with the provisions of the Treaty formed an integral part, from the entry into force of that agreement, of the EU legal order. The Court concluded that, "given the direct link (...) to the agreement that they implement, the decisions of the Association Council, are, the same as the agreement itself, an integral part, from their entry into force, of the Community legal order"[52]. Therefore, "having the power to give a preliminary ruling on the agreement, if the act is adopted by one of the Community institutions (...) the Court also has jurisdiction to rule on the interpretation of decisions adopted by the authority established by the agreement and entrusted with its implementation[53].

Likewise, the Court ruled in *Deutsche Shell AG*[54] case. In that case, the Court was asked to interpret certain provisions of a Convention concluded between the Community and third countries; that Convention set up a body which adopted recommendations. This time, the sending court is faced with the situation of whether these recommendations could be interpreted by the Court. In its judgment, the Court held that "if those recommendations were directly related to the Convention, not just the Convention, but also recommendations become part of EU law. As long as non-binding legal acts may be subject to interpretation by the Court, the Court has jurisdiction to rule also on the interpretation of a recommendation"[55].

6. Conclusions

According to a settled case-law, the Court held that the agreements, to which the Union is party, mixed or not, should be treated as legal acts adopted by EU institutions, in order to be introduced in the scope of art. 267 section a) TFEU[56].

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[51] EU institution that protecting the rights and interests of the European citizens is Ombudsman. For details, see **Elena Emilia Ștefan**, *The role of the Ombudsman in improving the activity of the public administration*, Review of Public Law No. 3/2014, p. 127.

[52] Pt. 9 of the judgment.

[53] Pt. 10 of the judgment.

[54] ECJ ruling, *Deutsche Shell AG v. / Hauptzollamt Hamburg-Harburg*, C-188/91, ECLI:EU:C:1993:271.

[55] Pts. 17-18 of the judgment.

[56] "Court of Justice of the European Union has jurisdiction to rule, by preliminary title, on: (...) b) the validity and interpretation of acts adopted by the institutions, bodies, offices or agencies of the Union".

- ECJ ruling, the *Commission v. / Ireland*, C-13/00, ECLI:EU:C:2002:184;
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- ECJ ruling, S. *Z. Sevince v. / Staatssecretaris van Justice*, C-192/89, ECLI:EU:C:1990:322;
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TRANSITIONAL JUSTICE IN ROMANIA. REPARATIONS FOR THE VICTIMS OF THE COMMUNIST REGIME AND LEGAL ORDER

Bianca Elena RADU[*]

Abstract

This study aims to analyse, through a transitional justice approach, the reparations granted by the Romanian state to the victims of the communist regime. The paper will examine the role of reparations in transitional justice programs, the main sources of international law and legal doctrine regarding reparations, as well as the evolution of the Romanian legislation on compensations for the abuses caused by the communist dictatorship. Eventually, we will try to assess the significance of reparations for the legal order of Romania.

Keywords: *transitional justice, reparations, Romania, communist regime, legal order.*

1. Introduction

The study uses a transitional justice approach to analyse the reparations granted by the Romanian state to those individuals who suffered massive human rights violations during the communist regime. Various academic domains such as political science, sociology, history or law have dedicated scholarly research to this issue. However, our endeavor is more consistent with a legal approach at the crossroads between international and private law, being also informed by the basic terms of the general theory of law.

An analysis of the legal steps made by the Romanian state to redress human rights violations carried out by the communist regime is increasingly relevant. In February, 2016, the The High Court of Cassation and Justice of Romania issued a definitive sentence against Alexandru Vișinescu, the first Romanian person convicted after 1989 of crimes against humanity for his abusive acts as a prison commander. During the same year, eight European Ministers of Justice signed a common declaration for the establishment of an international tribunal for the investigation of crimes committed by communist regimes. In March, 2016, the Bucharest Court of Appeal issued an undefinitive sentence against Ion Ficior, convicted for crimes against humanity allegedly committed as a commander of the Periprava labor colony. Even if the aims of this paper are not related to the criminal dimension of transitional justice, one cannot minimize the impact of these decisions for the academic debate regarding the tools used by the Romanian state to manage its past social, political and legal traumas. In this context, we consider that it is highly important to underline the peculiarities surrounding the legal treatment of the communist regime's victims and not only of its' perpetrators.

The first objective of this paper is to examine how the main sources of international law and legal doctrine relate to the issue of reparations dedicated to victims of the communist regime. Secondly, we will examine the evolution of the legal documents which regulated the Romanian regime of reparations. Such an endeavor also implies an analysis of the Constitutional Court's rulings regarding the compensations allocated to victims. In the end, we will try to highlight the role and significance of such reparations in relation to Romania's post-communist legal order.

2. Theoretical considerations regarding transitional justice and reparations

Most democratic states which experienced recent historical traumas, defined by massive human rights violations, have paid attention to programs, policies and laws intended to compensate the harms endured by some members of the society. Such official efforts usually focus on two types of actions: the prosecution of human rights violators and the reparations awarded to victims. In some cases, the prosecutorial and reparative dimensions of justice are complemented by an officialised narrative of the past, usually produced by "truth committees" whose conclusions are appropriated by state officials through political means.

These types of measures are grouped by researchers under the general concept of transitional justice, a term firstly coined by Neil Kritz in 1995.[1] The concept itself is informed by the idea that transition from conflict to social peace, or from state repression to democracy as in the case of Eastern Europe, requires a peculiar approach to justice.

[*] PhD Candidate, Faculty of Law, "Nicolae Titulescu" University of Bucharest (e-mail: **biancelise@yahoo.com**).

[1] Neil Kritz, *Transitional Justice, volume I* (Washington: United States Institute of Peace, 1995).

In 1993, Claus Offe[2] conceived several options available for delivering what came to be called transitional justice. His basic idea was that the collapse of a repressive regime leaves us with the legacy of perpetrators and victims, but also makes possible "the means of civil law (regulating allocation of property rights, income and status) as well as the means of criminal law (dispensing negative sanctions, such as fines and imprisonment".[3] Starting from this distinctions, the options envisaged by Claus Offe were disqualification, retribution and restitution.

Disqualification, which is not of a strictly criminal nature, refers to acts meant to deprive natural or legal persons of possessions and status wrongfully obtained. It may take the form of lustration, income reduction, restriction of access to certain public sector positions. Retribution, however, refers to criminal sanctions dispensed against individual perpetrators for criminal acts, based on court trials and criminal legislation. Restitution implies establishing who may qualify as victim and transfer of material resources to them.

According to Pablo de Greiff[4], criminal justice, usually unsuccessful in terms of results, represents a struggle against perpetrators and not a satisfying effort on behalf of the victims. From his point of view, "for some victims, reparations are the most tangible manifestation of the state to remedy the harms they have suffered"[5].

3. Reparations in the international law and legal doctrine

Since the establishment of an international human rights regime after the Second World War, it was considered that massive violations of human rights were no longer just a matter of internal jurisdiction. This view also manifests in relation to the rights of victims to remedy and reparations. Hence, the Universal Declaration of Human Rights stipulates at article 8 that "Everyone has the right to an effective remedy by competent national tribunals for acts violating the fundamental rights granted him by the constitution or by the law".[6] Article 2, align 3 of the International Covenant on Civil and Political Rights further details the obligations of states in this matter:

"Each State Party to the present Covenant undertakes:

(a) To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity;

(b) To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy;

(c) To ensure that the competent authorities shall enforce such remedies when granted."[7]

Article 14 of the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment also stipulates significant obligations for the state to offer remedy to those who were victims of torture:

"1. Each State Party shall ensure in its legal system that the victim of an act of torture obtains redress and has an enforceable right to fair and adequate compensation, including the means for as full rehabilitation as possible. In the event of the death of the victim as a result of an act of torture, his dependants shall be entitled to compensation.

2. Nothing in this article shall affect any right of the victim or other persons to compensation which may exist under national law."[8]

Other international instruments with relevant provisions for the issue of reparations offered to victims of massive human rights violations include the International Convention on the Elimination of All Forms of Racial Discrimination, the Convention on the Rights of the Child, the Hague Convention regarding the Laws and Customs of War on Land, the Protocol Additional to the Geneva Conventions relating to the Protection of Victims of International Armed Conflicts, the Rome Statute of the International Criminal Court. The right to an effective remedy is also guaranteed by the European Convention on Human Rights, which stipulates at article 13 that:

"Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been

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[2] Claus Offe, "Disqualification, Retribution, Restitution: Dilemmas of Justice in Post-Communist Transitions", *Journal of Political Philosophy* 1 (March, 1993): 19-21.

[3] Offe, „Disqualification", 22.

[4] Pablo de Greiff, introduction to *The Handbook of Reparations*, edited by Pablo de Greiff (New York: Oxford University Press, 2006), 2.

[5] Greiff, introduction, 2.

[6] "Universal Declaration of Human Rights", United Nations General Assembly Resolution A/RES/3/21 A 10/December 1948, accessed March, 2016, http://www.un.org/en/universal-declaration-human-rights/.

[7] "International Covenant on Civil and Political Rights", United Nations General Assembly Resolution A/RES/21/2200/16 December 1966, accessed March 2016, http://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx.

[8] "Convention against Torture and other Cruel, Inhuman or Degrading Treatment", United Nations General Assembly Resolution A/RES/39/46/10 December 1984, accessed March, 2016, http://www.un.org/documents/ga/res/39/a39r046.htm

committed by persons acting in an official capacity."[9]

The Parliamentary Assemble of the Council of Europe issued in 1996 Resolution no. 1096 regarding the means to handle the heritage of former communist totalitarian regimes. With respect to reparations, the Assembly recommends that:

"[…] the prosecution of individual crimes goes hand-in-hand with the rehabilitation of people convicted of "crimes" which in a civilised society do not constitute criminal acts, and of those who were unjustly sentenced. Material compensation should also be awarded to these victims of totalitarian justice, and should not be (much) lower than the compensation accorded to those unjustly sentenced for crimes under the standard penal code in force."[10]

Even if international law was mainly concerned with states as the subjects of wrongs committed against other states, the human rights regime and the obligations of states in this field trigger legal consequences not only in relation to other states, but also in relation with individuals and groups who are under the jurisdiction of a state. The United Nations Human Rights Committee issued in 2004 a comment regarding the legal obligations imposed on states by the International Covenant on Civil and Political Rights which is illustrative for our issue. Thereby, the Committee considers that the obligation to provide effective remedies to individuals whose rights stipulated by the Covenant were violated is not discharged if reparations were not offered to those individuals.[11] Hence, we can infer that the rights of victims who suffered massive human rights violations and the obligation of states that are responsible for these violations became equally important.

Resolution 60/147/2006[12] of the United Nations General Assembly brought forward support to the centrality of victims in relation to the states' obligations in accordance to domestic and international law. According to the resolution, reparations include restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition. Restitution includes measures intended to restore the victims to the original situation before the gross violations of international human rights law occurred, such as restoration of liberty, enjoyment of human rights, restoration of employment, return of property etc. Compensation envisages economic measures provided for physical or mental harm, lost opportunities, material damages and moral damages caused by mass violations of human rights. Rehabilitation refers to medical and psychological care, legal and social services, while satisfaction moves the focus from victims to perpetrators through efforts to prosecute them and to establish the truth at political, legal, scientific and cultural levels. Finally, guarantees of non-repetition include institutional reforms and measures meant to consolidate democracy and rule of law mechanisms which could minimize the chances for other mass violations of human rights to occur again.

According to Office of the United Nations High Commissioner for Human Rights[13], the victims' right to reparation is becoming firmly established as the International Court of Justice continues to issue decisions on reparations. One example invoked refers to the advisory opinion regarding the "Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory", in which the Court found that Israel has the obligation to make reparations for the damage caused to "all natural or legal persons having suffered any form of material damage as a result of the wall's construction".

4. Reparations for victims of communist oppression in Romania

Right after the Romanian Revolution, the Provisional Council of National Union adopted Decree-law 118/1990 on Granting some Rights to Persons Politically Persecuted by the Communist Dictatorship[14]. According to article 1, the law implied that those who could qualify as victims must have been deprived of freedom based on a judicial decision, warrant of preventive arrest, administrative measures, internment in psychiatric facilities or must have been subjected to mandatory residence or resettled to another locality. Ascertainment of these

[9] "European Convention on Human Rights", Council of Europe, accessed March, 2016, http://www.echr.coe.int/Documents/Convention_ENG.pdf.

[10] "Measures to dismantle the heritage of former communist totalitarian systems", Parliamentary Assembly of the Council of Europe, Resolution 1096/1996, accessed March, 2016 http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=16507&lang=en

[11] "General Comment No. 31 (80) - The Nature of the General Legal Obligation Imposed on States Parties to the Covenant", United Nations Human Rights Committee, CCPR/C/21/Rev.1/Add. 1326 May 2004, accessed March, 2016 http://docstore.ohchr.org/SelfServices/FilesHandler.ashx?enc=6QkG1d%2FPPRiCAqhKb7yhsjYoiCfMKoIRv2FVaVzRkMjTnjRO%2Bfud3cPVrcM9YR0iW6Txaxgp3f9kUFpWoq%2FhW%2FTpKi2tPhZsbEJw%2FGeZRASjdFuuJQRnbJEaUhby31WiQPl2mLFDe6ZSwMMvmQGVHA%3D%3D.

[12] "Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law", United Nations General Assembly, Resolution A/RES/60/147/21 March 2006, accessed March, 2016, https://documents-dds-ny.un.org/doc/UNDOC/GEN/N05/496/42/ PDF/N0549642.pdf?OpenElement

[13] Office of the United Nations High Commissioner for Human Rights, *Rule-of-law tools for post-conflict state*s (New York and Geneva: United Nations, 2008), 8.

[14] "Decret-lege nr. 118 din 30 Martie 1990 privind acordarea unor drepturi persoanelor persecutate din motive politice de dictatura instaurată cu începere de la 6 martie 1945, precum și celor deportate în străinătate ori constituite în prizonieri", Consiliul Provizoriu de Uniune Națională, republished in the Official Gazette no. 631/23 September 2009.

situations fell under the responsibility of a county committee which could decide the allocation of a monthly 200 lei compensation for each year of detention, interment, mandatory residence or resettlement. Besides the pecuniary compensation, victims were also entitled to receive a residence from the state locative fund and free medical services and medication.

Individuals who were convicted for crimes against humanity or who were proven to have conducted fascist activity within an organization or movement could not enjoy the reparations granted through this law. This is an important distinction which was maintained, as we shall see, in other laws and in the judiciary practice as well.

Emergency Ordinance no. 214/1999, repeatedly amended between 2000 and 2006[15], also provided reparations to the victims of the communist regime. Based on this legal document, those persons who were convicted for crimes committed for political reasons or subjected to administrative abusive measure, as well as individuals who participated in activities of armed opposition or forced overthrow of the communist regime between 1945 and 1989 are entitled to be granted the status of "fighter in the anti-communist resistance". According to article 2 of this law, the main acts which could qualify as crimes committed for political reasons are protests against the communist dictatorship and its abuses, the support for pluralist and democratic principles, propaganda for the overthrow of the communist social order, armed opposition against the communist regime, respect for human rights and fundamental freedoms. The status of "fighter within the anti-communist resistance" is to be granted by a committee formed by representatives of the Ministry of Justice and the Ministry of Administration and Interior, as well as representatives of the Association of Former Political Prisoners in Romania. The holders of the "fighter against the anti-communist resistance" status benefit from the restitution of confiscated goods and the rights provisioned by Decree-law 118/1990. Those persons who were convicted for crimes against humanity or for carrying out fascist activities within organizations or movements cannot benefit from the provisions of this law.

In 2009, the Romanian Parliament adopted Law 221 regarding political convictions and assimilated administrative measure issued between March 6, 1945 and December 22, 1989.[16] According to article 1, political convictions were those issued by courts of law during the mentioned period for actions which aimed at opposing the totalitarian regime instated on March 6, 1945. The law also listed criminal legal provisions based on which political convictions might have been pronounced. These included certain articles of the Criminal Code, laws regarding national security, the regime of fire arms and economic offenses. According to article 4 of this law, the political nature of convictions shall be established by courts of law based on the convicted person's request, or, after its death, on the request of any interested person or of the Prosecutor's Offices attached to the Tribunals. Furthermore, the persons who suffered such political convictions or their first and second grade descendants were entitled to compensation for moral damage or for the goods confiscated based on political convictions.

As in the case of the previously discussed law, article 7 mentions that the provisions of law 221/2009 are not applicable to persons convicted for crimes against humanity or for carrying out racist, xenophobic or anti-Semitic propaganda. This specification is important as it allows us to ascertain that the political nature of a conviction is determined also by the reason of a conviction, and not only by the conviction's legal grounds. Decision no. 1709/2012 issued by the Ist Civil Section of the High Court of Cassation and Justice is relevant for such a case. It relates to a person who, having been convicted by the Bucharest Military Tribunal in 1960 for conspiring against social order based on article 209, pt. 1 of the Criminal Code, requested the application of law 221/2009. Since the military court found that he carried out legionary activities and propaganda, the High Court of Cassation and Justice, considering the fascist and anti-Semitic nature of the Legionary movement, established that the conviction of that person does not fall under the scope of Law 221/2009. As a consequence, the Court ruled that legionary activity cannot justify the right to compensation provisioned by the law and that he is not entitled to any reparations.

5. The Constitutional Court's position regarding reparations

Among the beneficiaries of law 221/2009 was Ion Diaconescu, politician and former political prisoner, who was awarded 500,000 Euros by the Bucharest Tribunal in June 2010. Following this groundbreaking decision, the Romanian Government issued Emergency Ordinance

[15] "Ordonanţa de urgenţă nr. 214/1999 privind acordarea calităţii de luptător în rezistenţa anticomunistă persoanelor condamnate pentru infracţiuni săvârşite din motive politice, precum şi persoanelor împotriva cărora au fost dispuse, din motive politice, măsuri administrative abusive", published in the Official Gazette, Part I no. 650 on 30/12/1999.

[16] "Legea nr. 221/2009 privind condamnările cu caracter politic şi măsurile administrative asimilate acestora, pronunţate în perioada 6 martie 1945 - 22 decembrie 1989", published in the Official Gazette, Part I no. 396 on 11/06/1999.

62/2010[17] to amend law 221/2009 and established a threshold of 10,000 Euros for the compensation of the convicted persons, 5000 Euros for the husband / wife and first grade descendants and 2500 Euros for second grade descendants.

One month later, the Romanian Ombudsman challenged Ordinance 62/2010 at the Constitutional Court, arguing that it violates the provisions regarding equality of rights stipulated by article 16 of the Constitution. Basically, the Ombudsman pointed out that the ordinance establishes a differential legal treatment between persons who already held a final decision based on Law 221/2009 and persons whose requests had not been settled at that moment. The Constitutional Court acceded to this perspective and ruled that the provisions of Ordinance 62/2010 which established thresholds for compensations are contrary to the Romanian fundamental law.[18] Furthermore, the Court considered that the application of the ordinance to situations in which there is an undefinitive judgement in the first instance also violates the principle of non-retroactivity, stipulated by article 15 (2) of the Constitution.

However, on 21 October 2010 The Constitutional Court settles an objection of nonconstitutionality raised by the Ministry of Public Finances to the Tribunal of Constanța in several files regarding the application of Law 221/2009.[19] The Court finds that here are two legal norms which provision the allocation of money to persons persecuted for political reasons by the communist dictatorship, namely Decree-law 118/1990 and Law 221/2009. As Decree-law 118/1990 established the conditions and the values of the monthly compensation, a second regulation with the same objective infringes on the supreme value of justice proclaimed by article 1 (3) of the Constitution. Furthermore, the parallel regulations regarding these types of compensations also infringe on article 1 (5) of the Constitution regarding the mandatory observance of laws. As a consequence, the Court declared as unconstitutional article 5 (1) (a) thesis one, according to which the state is obliged to allocate compensation for moral damages caused by political convictions.

Furthermore, the ruling of the Constitutional Court is also relevant for the nature that reparations have in Romanian legislation. According to its decision, the objective of compensations for moral damages suffered by the victims of the communist regime is not the restoration to a situation before the gross violations of human rights law occurred. The aim is rather to produce a moral satisfaction through the acknowledgement and condemnation of measures which violated human rights. Furthermore, the Court considered that the obligation to allocate compensation to persons persecuted by the communist regime has only a moral nature. This view is motivated by the Constitutional Court through several rulings of the European Court of Human Rights[20] which found that the provisions of the European Convention on Human Rights do not impose to member states specific obligations to repair injustices or damages caused by previous regimes.

6. Conclusions

Even if Hans Kelsen considers state to be a hermetic conglomerate superposed to the legal system, one cannot omit the fact that the state, constitutions or institutions have in the same time a historical, political, legal and social nature. As Nicolae Popa mentions, "The legal reality is an inalienable dimension of the social reality conditioned, by a historical context. Its existence cannot be separate by other parts of the society, bearing their influence and exerting its' own influence."[21]

One has to take into consideration that institutionalized coercion represents the tool through which legal order, grounded in a system of peculiar and depersonalized instruments that we call norms, is ensured. The process of establishing and applying these norms equates with what is understood through legal order, defined by a system of legal rules which governs society at a certain moment.[22] Furthermore, as Nicolae Popa legitimately highlights, the rules established through norms must find a minimal framework of legitimacy so that they may constitute a condition for the existence of a community. "Law is a principle of social cohesion which gives coherence and definition to society as, before being a normative reality, law is a state of mind"[23].

One can notice a certain relation of determination between the lawful order and the legal order. The lawful order, which implies the activation

[17] "Ordonanţa de urgenţă nr. 62/2010 pentru modificarea şi completarea Legii nr. 221/2009 privind condamnările cu caracter politic şi măsurile administrative asimilate acestora, pronunţate în perioada 6 martie 1945-22 decembrie 1989, şi pentru suspendarea aplicării unor dispoziţii din titlul VII al Legii nr. 247/2005 privind reforma în domeniile proprietăţii şi justiţiei, precum şi unele măsuri adiacente", published in the Official Gazette, Part I no. 446 on 01/07/2010.

[18] The Constitutional Court's Decision no.1354/2010, published in the Official Gazette, Part I, no.761 on 15/11/2010.

[19] The Constitutional Court's Decision no.1358/2010, published in the Official Gazette, Part I, no.761 on 15/11/2010.

[20] "Ernewein and Others v. Germany", ECHR decision on 12 May 2009 regarding application no. 14849/08; "Klaus and Yuri Kiladze v Georgia", ECHR decision on 2 February 2010 regarding application no. 7975/06.

[21] Nicolae Popa, *Teoria generală a dreptului* (Bucharest: C.H. Beck Publishing House, 2014), 42.

[22] Raluca Miga-Beşteliu, *Drept internaţional. Introducere în dreptul internaţional public*, (Bucharest: All Beck Publishing House, 2002), 2.

[23] Popa, *Teoria generală,* 30, 41.

of mechanisms meant to ensure order and coercion, can be obtained based on legal order. However, one should not forget that individuals are constantly guided by laws in their socialization processes and internalize legal norms as rules of conduct. This is the reason for which individuals participate in the consolidation of a lawful order, as it represents "the persons' awareness, either individually, either collectively, regarding the prescriptive content of rulings issued by the authors of legal norms." [24]

On the other hand, taking into consideration that the Kelsenian legal order does not finds it merits in the political realm, one could deduce that no matter the type of government, any state is grounded in a legal order. However, historical experience shows us that law cannot be examined without resorting to the social and political context. The autonomy of law does not mean its isolation in relation to political and social realms. Reflection on the massive human rights violations which occurred in 20th Century Europe favored criticism against legal positivism, an approach condensed by John Gardner in the following words: "In any legal system, whether a given norm is legally valid, and hence whether it forms part of the law of that system, depends on its sources, not its merits."[25] Critiques of this approach argue that totalitarian and repressive regimes operated under formal rigor and their crimes enjoyed solid legal justification.

Post-communist Romania implemented various measures to redress the abuses of the previous regime. Even it is not our goal to evaluate the merits and efficiency of these policies, we may observe that at a societal level, the legal reparations provided by the Romanian state correspond to the general aim of transitional justice.

The allocation of reparations to Romanian victims of the communist regime was influenced by several law configuration factors, from which the socio-politic framework distinguishes itself. Hence, the transition to a new governing system, post-dictatorial political evolution, the interests of the ruling elite and the influence of the international community had a major role in redressing massive violations of human rights by the communist regime.

Many scholars observed that a transitional justice approach may result in a „juridicization of the past". This idea points out that reparations, besides bringing comfort to victims, proves a break with the previous legal and lawful order. The allocation of reparations to victims of the communist regime marked the emergence of a new legal order, grounded in democratic values.

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[24] Emil Gheorghe Moroianu, „Conceptul de ordine juridică", *Studii de Drept Românesc*, 1-2 (2008), 33-42.
[25] John Gardner, "Legal Positivism: 5 ½ Myths", *American Journal of Jurisprudence*, 1 (2001): 199.

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THEORETICAL AND PRACTICAL ASPECTS CONCERNING THE ELECTION OF THE PRESIDENT OF ROMANIA

Oana SARAMET[*]

Abstract

According to art.81 of Romanian Constitution, the President of Romania shall be elected by universal, equal, direct, secret and free suffrage. The candidate who, in the first ballot, obtained a majority of votes of the electors entered on the electoral lists shall be declared elected. If no candidate has obtained such majority, a second ballot shall be held between the first two candidates highest in the order of the number of votes cast for them in the first ballot. The candidate having the greatest number of votes shall be declared elected. At present, according to Romanian legislation, the electors entered on the electoral lists can only vote at polling stations, even if some citizens are abroad. Unfortunately, Romanian regulations in electoral matters did not recognize the electronic voting or postal voting. Last year, media from around the world showed thousands of Romanian citizens from abroad who stood in long lines to vote at Romanian diplomatic offices abroad. But any participatory democracy means guaranteeing to its citizens the right to vote, not only theoretical but also practically, providing them the most effective and modern ways of voting.

Keywords: *right to vote, President of Romania, mail voting, electronic vote, democracy.*

1. Introduction

The constitutional regime in Romania following the Events in 1989 was inspired by the French one, but it did not copy it entirely. A series of constitutional arguments[1], such as the appointment of the candidate for the position of prime minister by the President of Romania (art.85) or the dissolution of the Parliament by the President of Romania only in compliance with certain conditions expressly provided by art.61 par. (1) of the Constitution, justify also in our opinion the classification of our constitutional regime as being an attenuated semi-presidential or a semi-parliamentary one.

Elections are central to the very nature of contemporary democratic rule and they provide the primary means for ensuring that governments remain responsive and accountable to their citizens[2].

The direct election of the head of state by the people is one of the characteristics of modern presidential or semi-presidential republics and represents a proof of the representation of a head of state and, through the attributions which it has, to represent the state at international level, the president has to be representative for the nation, has to be acknowledged by it[3].

2. Content

2.1. The monist executive and the dualist executive

On the other hand, the appearance of the parliamentary regime determined the birth of a second body of the executive power[4], namely the Government politically liable before the parliament, as compared to the head of state – monarch or president – who, from this point of view, is not liable. Therefore, as regards the structure, a distinction can be made between the monocratic or monist executive[5] and the dualist or two-headed [6] or bifurcated [7] executive.

The monist or dualist character of the executive, character determined by its structure, must not be mistaken with the monist or dualist character of the parliamentary regime, case in which the Government is still "in the centre of the attention", but from a different perspective.

The doctrine [8] appreciates that the executive is monocratic or monist when the executive function is held by a single state entity. Nevertheless, it is also

[*] PhD Lecturer, Faculty of Law, *Transilvania* University of Brasov (e-mail: **oana.saramet@unitbv.ro**).

[1] A. Iorgovan, *Tratat de drept administrative, "Treaty of administrative law"*, All Beck Publishing House, Bucharest, 2005, vol. I, pp. 295-298.

[2] N.C. Bormann, M. Golder, *Democratic Electoral Systems around the world, 1946-2011 in Review "*Electoral Studies" no 32/2013, p. 360.

[3] I. Muraru, S.E. Tănăsescu, coordinators, *Constituția României. Comentariu pe articol*, "*Romanian Constitution. Comment on articles"*, C.H. Beck Publishing House, Bucharest, 2008, p.764.

[4] T. Drăganu, *Drept constituțional și instituții politice. Tratat elementar*, "*Constitutional law and political institutions. Basic Treaty"*, Lumina Lex Publishing House, Bucharest, 2000, vol.II, p.308.

[5] I. Vida, *Puterea executivă și administrația publică*, "*Executive power and public administration"*, Official Gazette Publishing House, Bucharest, 1994, p. 31 and next.

[6] A. Hauroiu, *Droit constitutionnel et institutions politiques*, Montchrestien Publishing House, Paris, 1967, p. 653.

[7] T. Drăganu, *quoted works*, vol.II, p.308.

[8] I. Vida, *quoted works*, p. 31.

stated[9], that this form of the executive can be seen when the decision is focused in the hands of a single body. Therefore we can speak about a monocratic or monist executive when a single public authority of the state exercises the executive power.

Starting from this statement, we can see that an executive with such structure was specific to the absolute monarchies in which there was no separation of powers.

As in the case of absolute monarchies, in the dictatorial regimes, the merger of the powers determined that the holder of the power, implicitly of the executive power, was only one body, either unipersonal or collegial.

On the other hand, it is debatable today if the parliamentary monarchies, constitutionally established, have a monocratic executive or if it was replaced by the dualist one or has become a particular one. If in the United Kingdom the symbolic character of the monarchy is, probably, the most visible because, at least in theory, the holder of the executive power is the monarch, in practice, "Her Majesty's" ministers are those who exercise the power, led by the prime minister, who will answer before the Parliament[10], not before the monarch, the constitutional regulations of other states, such as Denmark, Netherlands, Belgium, etc. can entail a contrary opinion.

Thus, for example, section 12 of the Constitution of Denmark expressly provides that the King, with the limitations provided by the Constitution, has the supreme authority on all Kingdom's affaires and businesses and shall exercise the supreme authority through the ministers, who, according to section 14, he appoints and release, including the prime minister, and to whom he shall establish the tasks. Sections 17 and 18 of the same normative act shall regulate two bodies, namely the State Council, made of ministers – holders of some ministries, the Heir to the Throne and presided by the King, and the Council of Ministers, which is made of the ministers and presided by the prime minister. The distinction between these two bodies is made not only as regards the constituents, but also who presides them, because section 17 par. (2), corroborated with section 18 establishes a priority rule for the State Council, namely all drafts of law and all important governmental measures are to be discussed within this council and only if the King was hindered from calling the State Council they shall be subject to discussion within the Council of Ministers. Moreover, the same section 18 provides that, after the Council of Ministers reaches a decision, the prime minister has the obligation to bring it to the attention of the King, who decides whether to embrace the recommendations of this Council or addresses the respective problem to the State Council. As compared to the Danish constitutional regulations, the Dutch ones only state that the King, together with the ministers, is part of the Government [art. 42 par. (1)]. However, according to art. 45 par. (1)-(3), the ministers, together with the prime minister, form the Council of Ministers, which is chaired by the latter, prime minister who assesses and decides on the governmental policy and also ensures and promotes its coherence. However, also in the Dutch constitutional system in accordance with art. 43, the prime minister and the ministers are appointed and released from their positions by the King, through a royal decree.

In relation to the two constitutional examples, we shall be able to point out that the Danish executive, by the fact that it provided the monarch with a considerable right of decision which is not found in the provisions of the Constitution of the Netherlands, is much closer to the real monocratic executive. On the contrary, the Dutch executive can be classified as such only at a formal level, being more closer to a dualist executive, which, in our opinion, is the case of most of the executives within contemporary monarchies.

The evolution from the absolute monarchy to the parliamentary monarchies or contemporary republics, as well as the influence of the principle of separation and balance of powers in the state, shall determine most of the times the abandonment of the monocratic executive in favour of the dualist one.

Nevertheless, the monocratic executive model was taken also by states with a presidential regime, where the holder of the executive power is the president of the republic. The most eloquent example for this purpose is the President of the United States of America, to whom the executive power is granted by art. 2 par. (1) point 1) of the Constitution.

The American presidential regime crossed the borders of the state where it was born through the 1787 Constitution, but each of the states, such as Argentina or the Russian Federation, which used it as model brought an "institutional innovation"[11], namely the Government, which, together with the President – head of state, forms the executive power. This "alteration" of the presidential regime did not affect the nature of the regime, aspect pointed out both by the doctrine[12], as well as by the

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[9] D.C. Dănișor, *Drept constitutional și instituții politice*. *Exercițiul puterii în stat,* "*Constitutional law and political institutions. Exercise of state power"*, Europa Publishing House, Craiova, 1996, vol. II, p. 99.

[10] S.E. Tănăsescu, N. Pavel, *Sistemul constituțional al Marii Britanii in Actele constituționale ale Regatul Unit al Marii Britanii și al Irlandei de Nord in Constituțiile statelor lumii*, "*Constitutional system of Great Britain. In: Constitutional acts of United Kindom of Great Britain and North Ireland. In: Constitution of the world's states„*, Colection, All Beck Publishing House, Bucharest, 2003, p. 5 and next.

[11] I. Vida, *quoted works*, p. 34.

[12] Ibidem, *quoted works*, p. 34.

constitutional provisions related especially to the functions and attributions of the President.

Therefore, currently, the identification of an executive as being monocratic, monist or dualist can be difficult, having constitutional systems in which it is difficult to estimate that an executive has one of these two forms, the predominance more or less formal of the head of state – monarch or president – in exercising the executive power and, implicitly, its relations with the collegial body – the other component of the Government, influencing this identification.

As regards the relations within the dualist executive, we can notice that within the modern parliamentary regimes, the role of the head of state – president or monarch - tends to be closer to the symbolic role of the monarch, the Government having the task of exercising the executive power.

However, a particular situation can be seen in the semi-presidential or parliamentary republics, as they are characterized by a part of the doctrine. Especially the relations between the president and the prime minister shall be strongly influenced by the evolutions on the political scene, especially the relations between them and the parliamentary majority, but also by the personality of those who temporarily hold these dignities. Therefore, we can state that not even in a semi-presidential regime, the president does not have the effective power to govern, exclusively, as it does not substitute the Government, not even the prime minister, its role being focused on the capacity of arbitrator[13], statement which is all the more correct in case of attenuated semi-presidential regimes or semi-parliamentary regimes, as our current Romanian constitutional regime was characterized[14].

2.2. Evolution of the executive structure in Romania

The regulations from the Developing Statute of the Convention of August 7th/19th1958, especially those of art. I read in conjunction with those of art. II, III and V, according to which public powers were assigned to the Ruler, and he exercises only the legislative one along with the two Legislative Assemblies establishes a single executive or monist.

Later, through the adoption of the Constitution of 1866 was introduced the parliamentary regime[15], the monarchy being regulated as form of government, the executive being monist as it is reflected from the provisions of art. 35, the executive power being entrusted to the King who will exercise it in the manner regulated by himself. So, we can talk about a single executive or monist, the unipersonal body to whom is entrusted the exercise of this power, initially bearing the title also of "Ruler", as, after the proclamation in 1881 of the Kingdom of Romania, this to be changed in "King".

The Constitution of 1923 will maintain, among other previous constitutional provisions, the provisions of art. 35 of the Constitution of 1866 which will be reflected in art. 39. In contrast, this fundamental law will outline the institution of the Government by specifying in art. 92, the fact that it exercises the executive power in the name of the King as established by Constitution. This attention of the constituent legislator to the institution of the Government or the Council of Ministers has not changed the Romanian executive of that period from a single one in a dualistic one.

The Constitution of 1938 will maintain a single executive, the executive power being entrusted also to the King, so also to a unipersonal body, which, according to art. 32 will exercise it by their own Government.

The adoption of the acts with constitutional character of September 1940, the new regulations abolishing the dictatorship of King Carol II, will not affect the Romanian executive structure, this remaining still a single one, be it about the person of the new King or that of Marshal Ion Antonescu. Thus, the prerogatives of the new King – Mihai I will be reduced gradually until he will be vested only with the honorific ones, such as: head of the army, conferring decorations[16], the assignment of the exercise of the other powers in the state being assumed to the President of the Council of Ministers, "vested with full powers for the administration of the State"[17] and who, thus, becomes "the pivot of the whole Romanian public life".

The period of 1944-1948, marked by numerous social and political convulsions and constitutional transformations, will put its mark on the executive structure, being difficult to appreciate the monist or dualistic character of it even in the circumstances where under the Decree no. 1626 of 31st August 1944, will replace, partially, in force, the provisions of the Constitution of 1923. We base this view on that, although the monarchy is maintained, the Council of Ministers becomes "a supreme body of state, which concentrated in its hands the whole state power"[18]. Subsequently, by Law no. 363 of 30th

[13] M. Duverger, *Les constitutions de la France*, PUF Publishing House, Bucharest, 1944/1987, pp. 106-107.

[14] O. Şaramet, *The Structure of Executive Power. The Structures Evolution of the Executive Power in Romania* in AGORA International Journal of Juridical Sciences, no.4/2014, pp.163-171.

[15] C. Ionescu, *Tratat de drept constituțional comparat*, "*Treaty of contemporary constitutional law"*, All Beck Publishing House, Bucharest, 2003, p. 491.

[16] P. Negulescu, G. Alexianu, *Tratat de drept public*, „*Treaty of public law"*, tome I, School House Publishing House, Bucharest, 1942, p. 232.

[17] Ibidem, *quoted works, p. 232.*

[18] I. Muraru, S.E. Tănăsescu, *Drept constituțional și instituții politice*, "*Constitutional law and political institutions"*, All Beck Publishing House, Bucharest, 2001, p.110.

December 1947 for the constitution of the Romanian state in People's Republic[19], the task of exercising the executive power will return to a collegial body - the Presidium of the Romanian People's Republic - that will subordinate its Government, the executive being qualified as a monist one.

Romanian Constitutions that followed, namely the one in 1948 and the one in 1952 establishes a monist executive, represented by a collegial body, respectively the Grand National Assembly Presidium, the Government or the Council of Ministers being limited to just meet an administrative role.

The constitutional development of Romania after the Events of the period 16th to 22nd December 1989 can be characterized by three stages[20]: revolutionary power stage, revolutionary power stage organised under the form of government assembly and the stage of the Revolution legalization. By the Communication to the country of the National Salvation Front, published in the Official Gazette no. 1 of December 22nd 1989, the only central state bodies kept were the ministries. The state power concentration in the hands of a collegial body emanated from the lines of the National Salvation Front Council was equivalent to "a government of fact performed by a group of people who have taken themselves this responsibility and acted according to the needs of the moment"[21]. It is a reason for which it is almost impossible to distinguish, for this period, between organs or state authorities in the sense of the theory of separation and balance of powers in state, especially to determine the dualistic or monist character of the executive.

Defined as a "revolutionary mini-constitution"[22], the Decree-law no. 2 of 1989 on the establishment, organisation and functioning of the National Salvation Front and territorial councils of the National Salvation Front formed a new body - the National Salvation Front Council, whose President was vested with specific powers of a head of state. The same newly created Council will have as attribution, according to art.2 par. (1) letter b), the appointment and revocation of the Prime Minister as well as the approval of the Government component, at the Prime Minister's proposal. The consecration of these attributions of the National Salvation Front Council, which by all the powers conferred, resembles a legislative assembly, will allow the characterization of the new regime as being one of "assembly" within which the "executive power is an emanation of the legislative body at any time revocable by it"[23]. In terms of structure, the executive is a dualistic one, being represented by the President of the People's Republic, respectively by the Government[24], but the subordination of the Government to it, as well as limiting the attributions of the former to the ones specific to the representation function and implicitly the impossibility of the President to dissolve the legislative, deprives the executive of the possibility to preserve its "profile of true power in the state"[25].

By the Decree-law no. 92/1990 for the election of the Parliament and the President of Romania, a new legal-political institution has been created – President of Romania, the executive power being exercised along with the Government, headed by a prime minister, thus, being confirmed the dualistic structure of the executive.

The structure dualism of the executive will be maintained by the constituent legislator of 1991, as well as later to the revision of 2003 of the Constitution, being represented by an unipersonal body - the head of state and a collegial body - the Government, with the proviso that in achieving its constitutional role, in terms of its administrative dimension, the Government will benefit from the contribution of the public administration of which general administration exercises.

Within this dualistic executive, according to the nature of the political regime established in our Constitution and that bears influences of the parliamentary one, the attributions are shared therefore between a head of state represented by a president of the republic elected by direct universal suffrage, and a government appointed by this after the vote of confidence granted by the parliament, to whom is also responsible[26].

2.3. The appointment of the head of state in Romania

The appointment of the Romanian head of state experienced different modalities starting with the Developing Statute of the Paris Convention of 1858. Thus, if Cuza's Developing Statute will maintain the principle of elective or "lifelong" monarchy, as P. Negulescu said, principle introduced by the Paris Convention with the Ruler's choice by the Elective

[19] Was published in the Official Gazette, Part I, no.300 bis of 30th December 1947.

[20] T. Drăganu, *Drept constituțional și instituții politice. Tratat elementar*, "*Constitutional law and political institutions. Basic Treaty"*, Lumina Lex Publishing House, Bucharest, 2000, vol.I, p.390 and next.

[21] T. Drăganu, *quoted works*, vol.I, p.392.

[22] Ibidem, *quoted works*, vol.I, p.392. This Decree-law was published in the Official Gazette no.4 of 27th December 1989.

[23] T. Drăganu, *quoted works*, vol.I, pp.274-276, and p.393.

[24] By the Decree-law no.10/1989 on the establishment, organisation and functioning of the Romanian Government will be established, as the highest body of the state administration, the Government of Romania.

[25] T. Drăganu, *quoted works*, vol.I, p.276.

[26] O. Șaramet, *The Structure of Executive Power. The Structures Evolution of the Executive Power in Romania* in AGORA International Journal of Juridical Sciences, no.4/2014, pp.163-171.

Assembly, both the Constitution of 1866, according to art. 82 and the one of 1923, according to art. 77, respectively the one of 1938 by art.35, will abandon this principle in favour of the hereditary monarchy. It is necessary also to state that the transmission of the monarchy was established "in downward line, direct and legitimate of His Highness Prince Carol I of Hohenzollern Sigmaringen", but only in the male line, with primacy of primogeniture and exclusion of women and their successors forever. Socio-political and historical context of the time imposed waiving to reigns and thus replacing them by a ruler who came from one of the ruling families of Europe.

Changing the form of government of Romania by Law no. 363/1947, by transition from monarchy to republic, will result also the transfer of the prerogatives of the head of state from a unipersonal body to a collegial one, represented either by the Presidium of the Romanian People's Republic or the Grand National Assembly Presidium or the Council of State. Appointing members of these collegial bodies will not be made hereditarily, but either by appointment or by election by the legislative body of the time, respectively the Grand National Assembly. The amendment of the Constitution of 1965 will determine, through the creation of the presidential institution, only the transformation from collegial body in unipersonal body of the one that exercises the function of head of state, the manner of designation being kept because, according to art. 72, the President of the Socialist Republic of Romania was to be elected by the Grand National Assembly.

The election of the President of the National Salvation Front Council – body of provisional character which can be assimilated, by the nature of its attributions to a head of state, was made in the same conditions, so this election were made by a legislative assembly, respectively.

By the Decree-Law no. 92/1990 it will be adopted as a method to designate the Romanian head of state, the one specific to a presidential republic (for example Section 94 of the Argentinean Constitution provides that the President and the Vice-President of the Nation will be elected directly by the people, following the second tour of elections, according to the provisions of the Constitution), but which was also adopted by other states such as France, Austria, Portugal, the dualist executive of which "has permitted the conservation of certain aspects of the parliamentary system"[27], solution which has been maintained by the constituent legislator of 1991, neither being modified with the occasion of the review of the Constitution in 2003[28]. Thus the Romanian head of state – The President is elected, according to art. 81 par. (1) of the Constitution, by universal vote, equally, directly, secretly and freely expressed. The election is done according to par. (2) and (3) of the same article, by uninominal majority elections in two rounds so that in the case that neither of the candidates subscribed for the election race meets in the first round the absolute majority of the votes from the voters recorded on the election lists, in the second round they will be elected President of Romania they who, out of the first two candidates established in the order of the number of the votes acquired in the first round, have gathered the greatest number of votes, just a relative majority respectively. Similar procedures of election of the head of state – president are regulated also by other constitutions, such as: that of Austria (art. 60); that of France (art. 7); that of Portugal (art. 121). The election of the head of state by universal and direct vote by the citizens, following a uninominal majority voting, in two rounds, is preferred in parliamentary republics. In this sense, there are for example, the provisions of the Constitution of Bulgaria, namely those of art. 93.

The orientation of the Romanian constituent legislator towards adopting this method of electing the head of state was not a random one and did not have as purpose just the desire of implementing certain new constitutional procedures of designating the Romanian public authorities as opposed to those prior to the Constitution of 1991. The embracing of a semi-presidential regime in an attenuated form or semi-parliamentary, to the detriment of the parliamentary one devoted to the previous constitutional norms and implicitly, the accentuation of the mediating position of the head of the state have imposed, at least for the moment, the renunciation of their election by the parliament, which would have allowed this to be the result of the political confrontations of the parties represented at the legislative level. Moreover, knowing that the head of state exerts this office mediating not just between the powers of the state but also between the state and society, their neutrality, their lack of any influence from the political parties could ensure the objectivity, the impartiality as much by actions of mediation, as well as its result. Also in order to consolidate the neutrality of the President, confirming their independence, art. 84 par. (1) of the Constitution has registered as specific incompatibilities of the Romanian President, those that relate to: the capacity of member of a political party and the impossibility of fulfilling any other public or private position.

However it should not be understood that by implementing these methods of their designation, the head of state becomes a superior authority in relation

[27] I. Muraru, S.E. Tănăsescu, *quoted works*, 2001, p.557.

[28] The constitutional provisions concerning the election of the Romanian President have been supplemented and developed by those of Law no. 69/1992 for the election of the Romanian President, with subsequent amendments and completions, published in the Official Gazette, Part I, no. 164 from July 16th 1992.

to the Parliament, more so as both authorities benefit, following the universal vote of "an originally democratic legitimation"[29]. In fact this statement is valid in relation to any other authority or political formation.

With respect to the conditions which have to be met by a person in order to run for the office of President of Romania neither the Constitution not the present regulatory act which regulates the organisation and development method of the elections for the President of Romania – Law. No 370/2004[30] for the election of the President of Romania, do not comprise a unitary regulation of them, their deduction being made by a systematic and logical interpretation of the provisions of these regulatory acts. Art. 10 of Law no. 370/2004 expressly specifies, however, exactly who can't run for this office, identifying two possible situations: the failure to fulfil by the candidate to the presidential office of the conditions provided by art. 37 of the Romanian Constitution, republished, and also that according to which they were previously elected, twice, as President of Romania. The absence of express dispositions regarding these conditions and prior to the entry into effect of the new law in the field, but even prior to the review of 2003 of the Constitution, has determined the Constitutional Court[31] to decide which are in accordance with the constitutional provisions, the cumulating conditions which the person running for the office of President of Romania has to meet namely: to have a right to vote according to art. 34 par. (2); to have only Romanian citizenship and the residence in the country, according to art. 16 par.(3); to not fall in the category of people who cannot be part of a political party art. 37 par.(3); to have reached by the day of the elections inclusively, the age of at least 35 years – art. 35 par. (3); to not have fulfilled previously two mandates in the office of President of Romania art. 81 par. (4).

In the procedure of designating the President of Romania, along with the election offices which have according to Law no 370/2004, specific attributions with respect to the organisation and running of the presidential elections, an effective role is also played by the political legal institutions, such as the Constitutional Court, the Parliament or the Government[32].

2.4. Duration of the head of state mandate in Romania

The revision from 2003 of the Romanian Constitution implied also the reconsideration of the head of state mandate, being chosen a duration of 5 years compared to 4 years, as it was initially provided by the Constitution from 1991. Justified by the necessity of an additional guarantee for the political stability of the country by maintaining the continuity of the presidential institution in the period of parliamentary electoral campaigns[33], this new duration of the presidential mandate is according to the constitutional provisions in force of most states, mostly of those from the European continent[34]. Although the justification of modifying the head of state mandate is grounded, we think that for the moment, as well as for the following 10-20 years, neither the political class from Romania nor the citizens do not and will not have the political maturity necessary to fully understand the motivation of adopting this measure. In supporting those declared, we mention that, for example, following the local and parliamentary elections from

[29] I. Deleanu, *Instituții și proceduri constituționale în dreptul comparat și în dreptul român*, "*Constitutional institutions and procedures in comparative law and Romanian law"*, C. H. Beck Publishing House, Bucharest, 2006, p.627; H. Portelli, *Droit constitutionnel*, Dalloy Publishing House, Paris, 1999, p.176; C. Călinoiu, V. Duculescu, *Drept constituțional și instituții politice*, "*Constitutional law and political institutions",* Lumina Lex Publishing House, Bucharest, 2005, pp.191-192.

[30] It was published in the Official Gazette, no. 887 from November 29th 2004, previous law – Law no. 69/1992 for the election of the Romanian President, with subsequent amendments and completions, being implicitly abrogated.

[31] The Constitutional Court Order no 10/1992 related to the challenge no. 233 of September 7th 1992 of mister Ioan Adrian Mihalcea related to the recording of the candidacy to the office of President of Romania of mister Ion Iliescu, published in the Official Journal 1st Part no. 238 of September 25th 1992. Although following the review of the Constitution in the year 2003, some of these art. have changed their numbering becoming – art. 34 – art. 36, art. 35 – art. 37, and art. 37- art. 40, their content has stayed the same, exception making the dispositions of par. (3) of art. 16 by which it is has been considered unjustified to prohibit the access to the public offices and titles of the Romanian citizens who have also another citizenship aside from the Romanian one, (M. Constantinescu, I. Deleanu, A. Iorgovan, I. Muraru, F. Vasilescu, I. Vida, *Constituția României revizuită – comentarii și explicații*, "*The revised Constitution of Romania – comments and explanations"*, All Beck Publishing House, Bucharest, 2004, p. 22), the access to the public civil service offices and titles has no longer been conditioned by the owning of *only* the Romanian citizenship, we consider the specifications of the Constitutional Court as current. On the other side, in order to avoid any future controversies and potential challenges to the Constitutional Court with regard to any candidacy to the office of President of Romania, it would have been beneficial to record these mentions in the Law no.370/2004, reason for which we propose that a future modification of this regulatory act include this aspect as well. Even in these conditions we should not omit the fact that according to art. 147 par. (4) of the Constitution, the court orders of the Constitutional Court are generally obligatory and have power only for the future, constitutional disposition which, along with the review of the Constitution, has consolidated the obligatory nature of the decisions of this authority, provided also prior to the year 2003.

[32] O. Șaramet, *Head of State in Romania. Designation. Duration of Mandate* in Bulletin of the Transilvania University of Brasov, no.7 (56)/2014, pp. 277-284.

[33] M. Constantinescu, I. Deleanu, A. Iorgovan, I. Muraru, F. Vasilescu, I.Vida, *quoted works*, p. 143.

[34] Constitutions of states such as: Albania [art. 88 par. (1)]; Bulgaria [art. 93 par. (1)]; Czech Republic (art. 55); Cyprus [art. 43 par. (1)]; Croatia [art. 95 par. (1)]; Estonia [art. 80 par. (1)]; Lithuania [art. 78 par. (2)]; Macedonia [art. 80 par. (1)]; Poland [art. 127 par. (2)]; Portugal [art. 128 par. (1)]; Slovakia [art. 101 par. (2)]; Slovenia [art. 103 par. (3)]; France [art. 6 par. (1)] Germany [art. 54 par. (2)] provide a duration of President mandate of 5 years, being relatively a few which establish a mandate duration bigger or smaller than 5 years.

June, namely November 2008, the political parties from Romania and not only, have been in electoral campaign, masked or not, its conclusion taking place only at the end of 2009, after the second tour of presidential elections. For the same purpose, we can also mention the intention, even declared, of some opposition parties or coalitions of parties that along with the election as President of Romania of that supported by them, to obtain also the power in the Parliament, following the initiation and adoption of the censure motion. Such situation was also encountered after the presidential elections from 2014, when the elected president came from one of the opposition political formations. The arguments brought in order to justify the introduction of these censure motions (the one from May 5, 2015, and the other from September 21, 2015, both rejected) aimed certainly also economic, social, political dissatisfactions but it was claimed, sometimes expressly, other times euphemistically, the necessity of changing the relation of forces for corresponding at parliamentary level to the will expressed by the electorate at the election of the president. Or, on one hand, the intention of the constituent legislator expressed through the revision from 2003 was not for this purpose and on the other hand, the democratic legitimation of the Romanian President, through the vote expressed by the electorate, does not automatically imply that such legitimation was given indirectly to the parliamentary political formations from which comes the person who obtained the presidential mandate. Only the electorate, within a new electoral exit poll, organised in constitutional and legal conditions in force, can offer or not such legitimation.

The Romanian President shall exercise the five years of mandate, according to art. 83 par. (1) and (2) of the Constitution, from the date of making the oath provided by art. 82 par. (1) from the same normative act, before the Chambers of the Parliament reunited in joint session and until the date of making the oath by the new elected President. In these conditions, the value of the oath is not only symbolical, formal but also legal, having also legal consequences, offering the mandate effectiveness[35].

The President mandate can be also concluded before the expiration of its 5-year duration and the circumstances in which the presidential mandate can be concluded before full term, provided by art. 96 par. (1) from the Constitution, are: resignation; dismissal from position; impossibility to finally exercise the attributions; death.

Art. 81 par. (4)[36] of the Constitution stated, *expresis verbis*, in order to be avoided the transformation of the presidential institution in a personal one, the fact that no person can fulfil the position of Romanian President for more than two mandates, which can be successive. It is thus written in our Constitution a rule which was initially a constitutional common law born in the United States of America, where no President, except Franklin Roosevelt, who had 4 consecutive mandates between 1933 and 1945, had more than two mandates and along with the ratification of the 22nd Amendment in 1951, no President will do this anymore[37].

The above-mentioned interdiction concerns only those mandates which were, are and will be exercised under the Romanian Constitution in force in the present, the Constitutional Court [38] acknowledging the fact that "any judgement concerning the logic, significance and implications of texts of Constitution, including those that concern the institution of the Romanian President, is analyzed and interpreted starting with the situations that occur after its entry into force", therefore the provisions of art. 81par. (4) can be only applied in the future[39].

2.5. Constitutional Court in the context of the procedure for Romanian president election

The Romanian constituent legislator considered highly necessary to grant the Constitutional Court attributions not only concerning the constitutionality control on legal acts mentioned by the Constitution but also concerning the constitutionality of measures or actions undertaken by some authorities, legal acts with constitutional nature. Most of these attributions have as common and central element the Romanian head of state.

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[35] I. Deleanu, *quoted works*, p.629.

[36] The Romanian constitutional provisions are according to most of those from other states. In the same sense, for example, are the provisions of Finnish Constitution – art. 54 par. (1), those of Bulgarian Constitution – art. 95 par. (1) or those of Irish Constitution – art.12 point 3.2. Other fundamental laws such as that of Austria [art.60 par. (5)] or that of Argentina (section 90), nuance this interdiction specifying the fact that the re-election for the immediately following mandate is admissible once. But because Argentina has not only the position of President but also that of Vice-president, it is mentioned in addition that this interdiction operates also if both the President and Vice-president ran the second time for the position held previously by the other.

[37] J. Q. Wilson, *American Government. Institutions and Policies*, Lexington, Massachusetts. Toronto: Heath and Company, 1986, pp.351-351; I. Muraru, S.E. Tănăsescu, *quoted works*, 2001, p.559.

[38] To see for this purpose the Decision of the Constitutional Court no. 18 from September 7th 1992 on the appeal of the Party of the Romanian House of Democratic Europe concerning the candidacy of Mr. Ion Iliescu for the position of Romanian President, published in the Official Gazette, Part I, no. 238 from September 25th 1992, as well as the Decision of the Constitutional Court no. 1 from September 8th 1996 related to the settlement of appeals concerning the registration of the candidacy of Mr. Ion Iliescu for the position of Romanian President at the elections from November 3rd 1996, published in the Official Gazette, Part I, no. 213 from September 9th 1996.

[39] O. Şaramet, *Head of State in Romania. Designation. Duration of Mandate* in Bulletin of the Transilvania University of Brasov, no.7 (56)/2014, pp. 277-284.

Thus, art.146 letter f) compels the Constitutional Court to supervise the compliance with the procedure for the election of the Romanian President but to also confirm the results of the suffrage only following the validation of these results through a decision will the newly elected Romanian President take over its mandate, after making the oath provided by art. 82 par. (2) from the Constitution. For this purpose, the Constitutional Court will be the one which will publish the result of elections in the media and in the Official Gazette of Romania, for each exit poll tour and validating the results of elections, will submit, according to art.25 par. (1) from Law no. 370/2004 for the election of the Romanian President, one copy of the validation document to the Romanian Parliament for making the oath by the President.

During the electoral process, incidents can appear, such as the submission of appeals concerning the registration or non-registration candidacy for the position of Romanian President or concerning the prevention of a party or political formation or candidate from performing its electoral campaign according to the law. On the other hand, the Constitutional Court has the obligation to supervise the procedure for President Election, therefore not only all technical and material operations, legal material acts, the incidents following to be also solved by the Constitutional Court, according to art. 38 from Law no. 47/1992, republished.

In order to fulfil this attribution by the Constitutional Court[40], one copy of the candidacy proposal will be submitted by the Central Electoral Office and up to 20 days before the date of elections, the candidate, political parties, political alliances and citizens can appeal the candidacy registration or non-registration. In this situation, the appeal is sent to the Constitutional Court by means of the Central Electoral Office which will also submit in 24 hours the file of the candidacy. In 48 hours from the registration, the Constitutional Court will settle the appeal, the decision being final, for which there are no other means of appeal before neither the constitutional nor the ordinary court, following to be published in the Official Gazette of Romania.

By virtue of the role and attributions established by Law no. 370/2004, the Central Electoral Office is also the one which, for each exit poll tour, will submit the Constitutional Court the protocol with the files of the circumscription electoral offices within 24 hours from the registration of the last file, in order for the constitutional authority to be able to validate or cancel, depending on the case, the presidential elections. Law no. 370/2004, through art. 24, establishes expressly and restrictedly both in the cases in which the Constitutional Court can cancel the elections, namely when the voting process and determination of results took place by fraud in order to modify the mandate attribution or, depending on the case, the order of the candidates who can participate to the second exit poll tour and also the fact that a request for cancellation of elections must be submitted for this purpose either by the parties or candidates, the Court not being able to refer the matter to itself. The Court will decide until the date established by law for publicly informing the results of elections.

3. Conclusions

Popular election provides democratic legitimacy and, especially in combination with more than minimal powers specified in the constitution, can tempt presidents to become active political participants – potentially transforming the parliamentary system into semi-presidential one[41].

Starting from this statement, in case of a revision of the Constitution, we do not advocate the modification of the modality in which the President of Romania is elected, or the duration of its mandate. Therefore, we advocate that the current semi-presidential regime is maintained, eventually, with some adjustments, the President of Romania is to be elected further by the citizens with a right to vote and not by the Parliament, case in which we could speak also about a chance of the political regime into a parliamentary one. As regards the revision of the Constitution of Romania, we appreciate that it is necessary only if we consider that the last revision took place in 2003, including in order to integrate Romania in the Euro-Atlantic structures, situation which was modified, finally, in 2007, once with the accession of Romania to the European Union, but not established as such by the constitutional provisions in force.

The mandate duration of the President of Romania should remain the same, not being optimum, in our opinion, to come back to the 4 years mandate and the organisation, at the same time, of the elections for Parliament and President, precisely for the latter to have the possibility to express its constitutional role focused on neutrality and to be able to ensure the political stability during the parliamentary elections.

[40] The attributions of the Constitutional Court concerning the procedure for electing the Romanian President are developed through Law no. 370/2004 for the election of the Romanian President, published in the Official Gazette, Part I, no. 887 from September 29th 2004.

[41] A. Lijphart, *Constitutional design for divided societies* in *Journal of Democracy*, Volume 15, Number 2, April 2004, p. 104.

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EUROPEAN UNION'S COMMITMENT TO FIGHT AGAINST THE HUMAN BEINGS TRAFFICKING, THE MODERN FORM OF SLAVERY

Laura-Cristiana SPĂTARU-NEGURĂ*

Abstract

One of the most serious threats to the European Union is the organised crime. The EU is continuously adapting its response in order to best respond to the situation. Among different types of organised crime, human beings trafficking is one of the most seriously crimes worldwide, representing also a gross violation of human rights. Very often behind the human beings trafficking is the organised crime because is one of the most profitable criminal activities in the world. The numbers are very scary because it is estimated that the trafficked people to or within the EU are reaching several hundred thousands a year.

The present study is intending to discover how the European Union intends to fight against the human beings trafficking, since there is a need to have a coherent action at the European level because of the criminals can easily operate across border.

Keywords: *commitment, human beings, European Union, slavery, trafficking.*

1. Introduction

1.1. About human beings trafficking

One of the most serious threats to the European citizens, businesses, state institutions and economy is organised crime.

A coherent action at the European level is mandatory because the criminals easily operate across border. Thus, the European Union is continuously adapting its response in relation to the amplification of this phenomenon. This adaptation can be noticed even in the continuous development of the specialised EU agencies (e.g. Europol, Eurojust, CEPOL).

The expression *human beings trafficking* can be misleading, because it places emphasis on the transaction aspects of a crime that is more accurately described as *enslavement*. It envisages the exploitation of people, day after day, for years on end.

But what are the root causes of trafficking in human beings? We can argue that one of the causes is *vulnerability* due to different criteria (poverty, marginalisation, economic exclusion, armed conflicts, social and gender inequality, discrimination[1] against ethnic minorities and infringements of children's rights). Another cause is related to *inadequate laws and policies* in many countries and that the risk of getting caught is quite small. Another cause is the *demand in richer countries/urban areas especially for prostitution and cheap labour*. But why are people trafficked? Several purposes can be distinguished, among which the most important are: sexual or labour exploitation, organs' removal.

Who are mainly the targeted persons? Women and children are particularly affected, mostly because of their lack of defending power (women and girls represent 56% of victims of forced economic exploitation and 98% of victims of forced commercial sexual exploitation, while children are also trafficked to be exploited for begging or illegal activities, such as petty theft).

This is why the EU has made a top EU priority preventing and fighting them. In this respect, the European Commission has proposed better new rules for more concrete action against criminals responsible for child sexual abuse and trafficking. The Commission has also thought measures for victims' better assistance.

When analysing this problem, it is obvious that the EU's political commitment to stop the phenomenon of human beings trafficking is reflected in a large number of measures, funding programs and initiatives.

We underline that the EU's actions regards both trafficking into Europe and intra-regional trafficking in third countries, especially for labour and sexual exploitation.

1.2. Differences between trafficking in human beings and people smuggling (migrants)

But what is the difference between trafficking and irregular migration (or even the smuggling of irregular migrants)?

Very often, human beings trafficking and people smuggling are confounded. We could argue four main differences between them.

* Assistant lecturer, PhD, Faculty of Law, "Nicolae Titulescu" University of Bucharest (e-mail: **negura_laura@yahoo.com**).

[1] For information on non-discrimination in Romania, one of the EU's member states, please see *Elena-Emilia Stefan*, Opinions on the Right to Non-Discrimination (in Proceedings of the Challenges of the Knowledge Society Conference, ISSN 2359-9227, 2015) accessed March 28th, 2016 http://cks.univnt.ro/cks_2015_archive.html

First of all, we have to analyse the *consent to enter a country illegally*. Even though some trafficked persons might start their journey by agreeing to be smuggled into a country illegally, many do not and never have any intention of doing so. In cases of trafficking from third countries, the victims may enter a country legally (e.g. on a tourist or student visa), then be exploited by traffickers and held in the country beyond the expiration date, possibly against their will. Although undertaken in dangerous and humiliating conditions, the smuggling migrants give their consent for the journey.

Secondly, the *exploitation* is different. In a trafficking case, after crossing the border, the victim is further exploited in coercive or inhuman conditions, while smuggling of migrants ends with the migrants' arrival at their destination.

Thirdly, we have to discuss about *transnationality*.While trafficking in human beings can take place (i) within the borders of their own countries (internal trafficking) or (ii) across international borders (international trafficking), the smuggling of migrants is always transnational.

Fourtly, the *source of profits* is different. While in trafficking cases, the profits are derived from the exploitation itself, in smuggling cases, the profits are derived from the transportation or facilitation of the illegal entry or stay of a person into another county.

2. Content

2.1. Eurostat Statistics

Eurostat, the statistical office of the EU, provides with statistics at European level that enable comparisons between countries and regions. Its mission is to be the leading provider of high quality statistics on Europe.

International statistics are an important, objective and down-to-earth way of measuring how we all live.

Statistics aim to answer many questions in human trafficking, as in general. Is society heading in the direction promised by the EU? Is human trafficking up or down? Are there more human beings trafficking cases compared to five years ago? How is your country's results compared to other EU Member States?

In 2013 Eurostat published its first working paper on Trafficking in Human Beings in Europe, which constituted the second working paper at the EU level on statistics on human beings trafficking. The paper contains data for the years 2010, 2011 and 2012.

The second working paper refers to the same period of time (2010-2012) and includes statistical data from all 28 EU Member States and the following EU Candidates and EFTA/EEA (Iceland, Norway) countries (Montenegro, Norway, Serbia, Switzerland and Turkey). The figures used in the paper were given by the EU Member States.

It worths mentioning that a revised edition of the working paper published in 2014 was issued in February 2015[2], taking into account additional data and information received from Italy.

Unfortunatelly, these statistics are the sole official statistics at the EU level, but we consider that the figures and percentages are relevant to construe an image on this subject. In this regard, please have in mind that the information of this sub-section is part of the 2015 version of the Eurostat working paper.

Information on victims comes from a range of sources (Member States' police, NGOs, immigration authorities, border guards and other sources).

In 2012 Member States reported a total number of 10,998 registered identified and presumed victims, while over the three years 2010-2012, 30,146 victims were registered in the 28 Member States.

From the data over the three years disaggregated by (i) *gender*, it results that 80% of registered victims were female, while by (ii) *gender and age*, women account for 67%, men for 17%, girls for 13% and boys for 3% of the total number of registered victims of human beings trafficking.

Moreover, it appears that 45% of registered victims were aged 25 or older, 36% were registered as aged 18-24, 17% were registered aged 12-17, and 2% were aged 0-11.

Data showed that the majority of registered victims (i.e. 69 %) were trafficked for the purpose of sexual exploitation, 19% for labour exploitation and 12% for other forms of exploitation (e.g. removal of organs, criminal activities, or selling of children).

We underline that 85% of all the female victims registered were trafficked for the purpose of sexual exploitation, while 64% of all registered male victims, were trafficked for labour exploitation. Therefore, registered victims of sexual exploitation are predominantly female (95%) whereas the majority of registered victims of labour exploitation are male (71%). For other forms of exploitation (e.g. forced begging, selling of children), females represent 52% and males 38% of registered victims, with 10% of unknown gender.

As for the citizenship of victims, it appears that 65% of registered victims come from EU Member States.

Over the three year period covered by the data, Romania appears in the top five countries of citizenship within the EU, in terms of absolute

[2] *EUROSTAT*, Trafficking in human beings (2015 edition, February 2015) accessed March 28th, 2016 https://ec.europa.eu/anti-trafficking/publications/trafficking-human-beings-eurostat-2015-edition_en

numbers of registered victims, together with Bulgaria, the Netherlands, Hungary and Poland.

As for non-EU citizens, the top five countries were Nigeria, Brazil, China, Viet Nam and Russia.

Eurostat underlines that no conclusions could be drawn about the breakdown of citizenship by age.

As for the assistance and protection of victims, it results that in 2012, the number of victims who received assistance in the 24 Member States which could provide the data was 5,452. The number of registered victims given a reflection period under Directive 2004/81/EC on residence permits for victims of trafficking in human beings was 1,110 (19 Member States), while the number of registered victims granted a residence permit based on Directive 2004/81 was 1,100 (20 Member States).

As for the suspected traffickers, over the three years, unsurprisingly, more than 70% of suspected traffickers were male and 69% of all suspected traffickers were EU citizens. Romania is again in the top 5 EU countries of citizenship besides Bulgaria, Belgium, Germany, and Spain. As for the non-EU citizenship, the five countries most frequently reported in the three reference years were Nigeria, Turkey, Albania, Brazil and Morocco.

Member States reported that 8,805 people were prosecuted for trafficking in human beings between 2010-2012, while 3,855 convictions were reported (over 70% of prosecutions were of males, and more than 70% of convicted traffickers were male).

Across the three years, there is no EU-wide trend in the number of convictions. However, Romania has reported a more than doubling in the number of convictions from 2010 to 2012.

2.2. EU Strategy to Eradicate the Human Beings Trafficking 2012-2016[3]

EU's present strategy to eradicate the trafficking was established for the period 2012-2016 and is currently applicable. It will be interesting to analyse the new strategy to be adopted at the end/at the beginning of the year.

This strategy sets-up five top priorities to focus on and establishes certain actions to be implemented by the European Commision together with other key actors (i.e. Member States, EU institutions, international organisations, third countries).

The above mentioned priorities could be resumed as following:

a) identifying, protecting and assisting the trafficking victims;

b) stepping up the prevention of the human beings trafficking;

c) increased prosecution of traffickers;

d) policy coherence and enhanced coordination and cooperation among key actors;

e) effective response to emerging concerns related to human beings trafficking.

These priorities cannot be followed outside of a legal EU framework even though this is a dynamic legal framework.

On April 5th, 2011 a directive[4] on this matter has been published in the Official Journal of the European Union (Directive *2011/36/EU*[5] of the European Parliament and of the Council of 5 April 2011 on preventing and combating trafficking in human beings and protecting its victims, and replacing Council Framework Decision 2002/629/JHA). The adoption followed a Commission[6] Directive proposal, with binding legislation to prevent trafficking, to effectively prosecute criminals, and to better protect the victims, in line with the highest European standards. Moreover, this is the first EU measure of criminal law nature adopted under the Lisbon Treaty.

As stated in Article 1, the Directive establishes minimum rules concerning the definition of criminal offences and sanctions in the area of trafficking in human beings.

Article 2 of the Directive provides the following definition:

"The recruitment, transportation, transfer, harbouring or reception of persons, including the exchange or transfer of control over those persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation."

Moreover, in the same article it is explained that:

"*A position of vulnerability means a situation in which the person concerned has no real or acceptable alternative but to submit to the abuse involved*."

But what does exploitation means under the Directive? In the same Article 2, it is defined that:

"*Exploitation shall include, as a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, including begging, slavery or practices*

[3] Available at https://ec.europa.eu/anti-trafficking/sites/antitrafficking/files/eu_strategy_towards_the_eradication_of_trafficking_in_human_beings_2012-2016_1.pdf.

[4] For information on the specifities of EU directives, please see *Augustin Fuerea*, Manualul Uniunii Europene, 5th edition revised and enlarged, after the Lisbon Treaty (*Bucharest: Universul Juridic Publishing House, 2011*), 157 and *Roxana-Mariana Popescu*, Introducere în dreptul Uniunii Europene, (*Bucharest: Universul Juridic Publishing House, 2011*), 68 and following.

[5] Available at http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2011:101:0001:0011:EN:PDF

[6] For details on the division of powers, please see *Augustina Dumitraşcu and Roxana-Mariana Popescu*, Dreptul Uniunii Europene. Sinteze şi aplicaţii, second edition, revised and enlarged (*Bucharest: Universul Juridic Publishing House, 2015*), 183-190.

similar to slavery, servitude, or the exploitation of criminal activities, or the removal of organs."

We have to underline that those definitions are almost identical to the definition of the United Nations Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children.[7]

The Directive contains provisions for the protection, assistance and support to victims, as well as provisions to prevent the crime and provisions to better monitor and evaluate efforts. It ensures that people who are victims of trafficking are given an opportunity to recover and to re-integrate into society.

The key points of the directive could be resumed as follows:

a) criminal law and prosecution:

a definition of the crime applicable in all EU Member States;

non-prosecution or non-aplication of penalties to the victims of the human beings trafficking that are dirrectly linked to them being trafficked (i.e. using false documents);

extraterritorial jurisdiction, meaning that there is stated the possibility to prosecute EU nationals for crimes commited in third countries.

b) prevention measures in order to:

discourage the demand for human beings trafficking (e.g. clients buying sexual services from the victims);

promote training for victims, but also for the officials to come in contact with them (e.g. border police, social workers).

c) victim protection and support measures in order to:

establish national mechanisms for identifying and assisting victims from early stages;

provide victims with support (e.g. shelter, medical assistance, interpreting services);

ensure proper treatment for victims;

give assistance before, during and after criminal proceedings.

The Directive also contains reflections on the mandate of the EU anti-trafficking coordinator (established by the Stockholm Programme – December 2009). Among his tasks, we underline that it provides overall strategic policy orientation in the human beings trafficking, it improves co-ordination and coherence of the EU's external policy, and it contributes to the elaboration of existing or new EU policies for fighting against the human beings trafficking.

Additionally, there are other EU pieces of legislation relevant on this matter:

Charter of Fundamental Rights of the EU (2012) which specifically prohibits the human beings trafficking (Article 5);

Directive 2004/81/EC on the residence permit issued to third-country nationals who are victims of trafficking in human beings or who have been the subject of an action to facilitate illegal immigration, who cooperate with the competent authorities. According to this directive, a reflection period is given to these victims who are in the EU ilegally, in order to recover and to establish an independent existence, free from the traffickers influence. If the victims cooperate with the authorities, a temporary residence permit can be issued.

The Brussels Declaration on human trafficking and May 2003 Council conclusions on the declaration effectively introduced a new policy framework and led to setting up of a Commission expert group on human beings trafficking.

Interesting to keep in mind is the 2005 EU plan on combating and preventing human trafficking, containing procedures, standards and best practices. One of the most important aspects is the scope for collective EU action and action of individual EU governments.

In order to raise awareness on trafficking in human beings and increase the exchange of information, knowledge and best practices amongst the different actors working in this field, the European Commission decided that each October 18th we will celebrate the EU Anti-Trafficking Day, at the national level or at the EU level. Certain outcomes from the EU level events include the 2007 Recommendations on the identification and referral to services of victims of trafficking in human beings and the 2011 Joint Statement of the Heads of EU Justice and Home Affairs Agencies.

Mention should be made regarding the informal EU Network of National Rapporteurs or equivalent mechanisms which was set up by the Council Conclusions adopted on June 4th, 2009 and meets every year, with the help of the European Commission. The National Rapporteurs are monitoring the implementation of anti-trafficking policy at the national level and play a key role in data collection both at national and EU Level.

There are several EU funding programmes which help to the developing and implementing EU policies against trafficking in human beings (in the EU, in the Member States and even in the candidate countries). We mention here: Daphne III (2007-2013), Prevention of and Fight against Crime (ISEC) (2007-2013), Thematic Programme Migration and Asylum.

3. Conclusions

As underlined in the legal doctrine, "there cannot exist a common legislation for all societies".[8]

[7] Available at https://ec.europa.eu/anti-trafficking/legislation-and-case-law-international-legislation-united-nations/united-nations-protocol-prevent_en

[8] *Anghel Elena*, Constant Aspects of Law (in Proceedings of the Challenges of the Knowledge Society Conference, ISSN 2359-9227, 2011) accessed March 28th, 2016 http://cks.univnt.ro/cks_2011_archive.html, 595.

In the last decade, the EU has made important steps towards building a truly comprehensive migration policy, based on common political principles and solidarity. Since 2005, the Global Approach to Migration and Mobility is the overarching framework of the EU external migration and asylum policy. The Global Approach to Migration and Mobility defines how the EU conducts its policy dialogues and cooperation with non-EU countries, based on clearly defined priorities and embedded in the EU's overall external action, including, of course, development cooperation.

This line was also followed în the 2009 Action Oriented Paper on strengthening the EU external dimension against trafficking in human beings.

As we can notice very easily, human being trafficking is also addressed in numerous external relations instruments (*e.g.* the annual progress reports on candidate and potential candidate countries, the roadmaps and action plans regarding visa liberalisation dialogues with third countries, the Country Strategy Papers and National and Regional Indicative Programmes and programmes in the framework of the European Neighbourhood Policy). Additionally, it is also addressed in bilateral Action Plans and ongoing political dialogue with third countries.

We hope that the new ambitious rules adopted by the EU institutions will keep the EU at the forefront of the international fight against human beings trafficking by protecting the victims and punishing the criminals behind this modern type of slavery.

We are looking forward to the launch of the future EU's strategy to eradicate the human trafficking starting from 2017.

Due to the fact that these crimes are affecting the entire world (at the global level, the UN Office on Drugs and Crime frames a figure of 2.45 million[9], out of which 1.2 million[10] children according to UNICEF), effective legislation and measures have to be taken on an international, regional and national level.

In this respect, we have to bear in mind that "[t]he law always starts from the social actions, but it also means legal consciousness, ideals and social values".[11]

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[9]Available at http://www.unodc.org/documents/human-trafficking/Global_Report_on_TIP.pdf

[10]Available at http://www.unicef.org/protection/

[11]Anghel Elena, *Values and Valorization* (in Proceedings of the Challenges of the Knowledge Society Conference, ISSN 2359-9227, 2015) accessed March 28th, 2016 http://cks.univnt.ro/cks_2015_archive.html, 357.

UNITY IN DIVERSITY. THE EUROPEAN UNION'S MULTILINGUALISM

Laura-Cristiana SPĂTARU-NEGURĂ*

Abstract

It is undeniable that the European Union represents the most ambitious legal and linguistic project, integrating 28 Member States and 24 official languages.

What we undertook with this study was to explore the importance of multilingualism in the European Union and the problems that unity in diversity involves. This study tried to touch upon both theoretical aspects (i.e., what the multilingualism of EU law implies) and practical issues (i.e., the interaction between legal languages at national and at EU level, problems emerging from multilingualism, illustrated by the relevant case law of the European Court of Justice).

In many ECJ cases, it was underlined that multilingualism is essential to the EU legal order. The meaning of EU law cannot be derived from one version of the official languages and the ECJ regularly heads for a uniform interpretation of the contradictory versions.

The present study is part of a more complex research on this theme and it is meant to approach certain important points of my PhD thesis. A first part of this research on multilingualism has already been published.

Keywords: *European Union, diversity, unity, multilingualism, languages.*

1. Introduction

1.1. About law and language

Language is the core of national or minority group identity.

The linguistic diversity is a *specific value* of the EU which should be protected. Contrary to the provisions of 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[1] 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 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.[2] As from the 1st of July 2013, the European Union has 28 Member States, the last Member State entering the European family being Croatia. Almost every Member State has its own official language, *in the EU being recognized 24 languages* per total.[3] Moreover, "depending on how languages are defined and what inclusion criteria are used, more than 100 regional and minority languages are spoken in Europe".[4] 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".[5]

Like in the past years, we still wonder why EU does not agree on a common language.

Linguistic diversity is part of cultural diversity, which is one of the fundamental values of the EU.

The relation between law and language is very clear. As one author points out very precisely "[l]aw is a highly institutionalized communicative order regulating and giving a special meaning to social

* Assistant Lecturer, PhD, Law Faculty, "Nicolae Titulescu" University of Bucharest, Romania (e-mail: **negura_laura@yahoo.com**). *Laura-Cristiana Spătaru-Negură*, Reconciliation of Language Versions with Diverging Meanings in the European Union (in Proceedings of the Challenges of the Knowledge Society Conference, ISSN 2359-9227, 2015) accessed March 28th, 2016 http://cks.univnt.ro/cks_2015_archive.html, 502.

[1] 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.

[2] 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.

[3] 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.

[4] *Anne Lise Kjaer and Silvia Adamo*, "Linguistic Diversity and European Democracy: Introduction and Overview" in Linguistic Diversity and European Democracy: Introduction and Overview, *Anne Lise Kjaer and Silvia Adamo (eds.)* (Ashgate, 2011), 4 (footnote omitted).

[5] *Magali Gravier and Lita Lundquist*, "Getting Ready for a New Tower of Babel" in Linguistic Diversity and European Democracy: Introduction and Overview, *Anne Lise Kjaer and Silvia Adamo (eds.)* (Ashgate, 2011), 75.

action by means of norms expressed in natural language, sometimes using technical terms, as opposed to artificial language with formalized and logical syntax and technical terms and symbols".[6]

Languages are bridges between people. Their diversity means richness and difference. *Law cannot exist without language*, since legal concepts cannot be embodied in any way other than by using linguistic signs; therefore, a legal norm and its linguistic expression are inseparable.

Moreover, "people live together, not just coexist",[7] as it is emphasized in the legal doctrine.

Nowadays, we are discussing about an interdisciplinary field on law and language, called *legal linguistics*. This domain covers "a number of different areas including the development, characteristics, and usage of legal language, comprehensibility of legal texts, language for specific purposes (law), legal translation and interpreting, legal terminology and lexicography, analysis of legal discourse, legal style, semiotics of law, language in the courtroom, forensic linguistics as evidence, and various issues related to language policy and planning, and linguistic human rights".[8]

2. Content

2.1. The EU Multilingualism

From the beginning, we want to emphasize that Europe is different from other continents including by the language factor in the configuration of state boundaries. As one author points out: "[a] quick glance at the political map of the continent makes this quite clear. With very few exceptions, European states' official denominations offer us a direct reference to a state's official language, be it Greek in Greece, Polish in Poland, Danish in Denmark or French in France. This is not the case in the Americas, for instance, where languages such as «Canadian», «Mexican», «Bolivian» or «Brazilian» simply do not exist. […] The idea of the national language is a European idea".[9]

Since the 1950s when the founders of the European Communities (France, Germany, Italy and the Benelux countries) started the project of unification, an important role in the official discourse was given to diversity. It was underlined that the establishment of a common market should not be the sole goal of the unification, but also the cultural diversity. Regarding this concern, it is remarkable what Jacques Delors stated in the 1990s: "you don't fall in love with a common market: you need something else". Moreover, in the documents following the Maastricht Treaty, diversity was mentioned. "The highlighting of diversity may well be considered as the genuinely new element of the European Union's incipient «constitutional» discourse, an element that set the EU apart from the historical precedents of nation-state construction".[10] Delors' "something else" could have been the Treaty establishing a Constitution for Europe.

Afterwards, as stated by the Treaty on the Functioning of the European Union, the multilingualism of the EU reflects its commitment to respecting and promoting its cultural and linguistic diversity. Even in the Treaty of Lisbon, diversity is acknowledged:

> *It [the Union] shall promote economic, social and territorial cohesion, and solidarity among Member States.*
>
> *The Union shall respect its rich cultural and linguistic diversity, and shall ensure that Europe's cultural heritage is safeguarded and enhanced.*[11]

The multilingualism is one key characteristic of EU law – "if not *the* key manifestation – of cultural diversity in Europe today".[12] It is an "indispensable component of the effective operation of the rule of law in the Community legal order".[13]

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 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".[14]

Multilingualism can be *strong* (all official language versions are equally authentic) or *weak* (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

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[6] *Joxerramon Bengoetxea*, "Multilingual and Multicultural Legal Reasoning: The European Court of Justice" in in Linguistic Diversity and European Democracy: Introduction and Overview, *Anne Lise Kjaer and Silvia Adamo (eds.)* (Ashgate, 2011), 98.

[7] *Anghel Elena*, Values and Valorization (in Proceedings of the Challenges of the Knowledge Society Conference, ISSN 2359-9227, 2015) accessed March 28th, 2016 http://cks.univnt.ro/cks_2015_archive.html, 357-358.

[8] *Lelija Socanac; Christopher Goddard; Ludger Kremer (eds.)*, "Curriculum, Multilingualism and the Law", Nakladnizavod Globus, (Zagreb, 2009), 9.

[9] *Peter Kraus*, "Neither United nor Diverse? The Language Issue and Political Legitimation in the European Union" in Linguistic Diversity and European Democracy: Introduction and Overview, *Anne Lise Kjaer and Silvia Adamo (eds.)* (Ashgate, 2011), 19.

[10] *Idem*, 23.

[11] *Kraus*, "Neither United nor Diverse?", 26.

[12] *Idem*, p. 27.

[13] *Bengoetxea*, "Multilingual and Multicultural Legal Reasoning", 100.

[14] *Kraus*, "Neither United nor Diverse", 23 (footnote ommited).

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.

As stated in our last year's study[15], from the doctrine and from the ECJ case law, we notice 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".[16] 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,[17] because by translating the implied assumptions made in the original version may be identified.

Strong multilingualism has the advantage to offer the same rights from a Member State to another Member State, because all European citizens have the right to discover the EU law in their own language.

At an analysis of the EU's language regime, we notice that there is an *external and internal side* of the regime. On one hand, the *external side* concerns the communications between the EU to the Member States and their citizens (*output – e.g.* publication of legal texts in the Official Journal in order to be read by the citizens) or the relation between the Member States and their citizens to the EU (*input – e.g.* the language rules for Court proceedings involving citizens and EU institutions). It concerns the accessibility of the EU legal acts. The external side is governed by the equality of Member State languages, reason for why the majority of EU texts are being published in the 24 EU official languages.[18] On the other hand, the *internal side* concerns the internal procedures (*e.g.* judicial, administrative, governmental and parliamentary proceedings). As one author pointed out, "[w]hile the external side concerns at least in part questions of the rule of law – which requires *e.g.* access to the courts and the publication of a law to guarantee its accessibility — the internal side deals mainly with questions of the internal procedures of a government, or a court, and therefore mainly with questions of good governance".[19]

We must emphasize that the internal side of the EU language regime is "less visible" than the external side. It is interesting to see that "the more an internal procedure of an institution, or an inter-institutional procedure, involves elected or appointed politicians as opposed to civil servants or experts, the more the respective language regime tends to respect the criterion of the equality of Member State languages".[20] We agree with the author's opinion because the national politicians working at the Council or at the European Parliament "are not selected according to their linguistic abilities"[21], while the EU public functionaries have to know two official languages in addition to their mother tongue. There is, however, an exception – for the ECJ judges, Member States are encouraged to select and appoint judges with advanced French skills. This selection may discriminate the most prepared candidates for the job.

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".[22]

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[15] *Laura-Cristiana Spătaru-Negură*, Reconciliation of Language Versions with Diverging Meanings in the European Union (in Proceedings of the Challenges of the Knowledge Society Conference, ISSN 2359-9227, 2015) accessed March 28th, 2016 http://cks.univnt.ro/cks_2015_archive.html, 502.

[16] *Theodor Schilling*, "Multilingualism and Multijuralism: Assets of EU Legislation and Adjudication?", German Law Journal (vol. 12, no. 07, 2011), 1463.

[17] *Gerard Caussignac*, "EmpirischeAspekte der zweiprachigenRedaktionvomRechtserlassen" in RechtsspracheEuropas. Reflexion der Praxis von Sprache und MehrsprachigkeitimSupranationalenRecht, *Friedrich Muller and Isolde Burr (eds.)* (2004).

[18] Of course, new official languages may be, and usually are, added with each enlargement of the EU.

[19] *Schilling*, "Multilingualism and Multijuralism", 1469 (footnote omitted).

[20] *Schilling*, "Multilingualism and Multijuralism", 1470.

[21] *Ibidem*.

[22] *Fabrizio Vismara*, "The Role of the Court of Justice of the European Communitities in the Interpretation of Multilingual Texts" in Multilingualism and the Harmonisation of European Law, *Barbara Pozzo and Valentina Jacometti*, (Kluwer Law International, 2006), 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.

In the doctrine it is underlined that even if EU law is not a case law "the interpretation and application of EU law in accordance with the Treaties are possible only through the jurisprudence of the European Court of Justice".[23] As stated by the Court in the *EMU Tabac* case[24],"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 said that:

> *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.*[25]

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.*[26]

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".[27]

We have to keep in mind that "[l]aw must itself contain the equilibrium between the letter and spirit of rules".[28]

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".[29]

But to what extent must language be regarded as *a barrier* to the development of a uniform European law?

3. Conclusions

What we undertook with this study was to explore the importance of multilingualism in the European Union and the problems that *unity in diversity* involves.

It appears 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"[30].

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This study tried to touch upon both theoretical aspects (*i.e.*, what the multilingualism of EU law implies) and practical issues (*i.e.*, the interaction between legal languages at 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 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"[32].

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[23] *Roxana-Mariana Popescu*, Features of the Unwritten Sources of European Union Law (in Proceedings of the Challenges of the Knowledge Society Conference, ISSN 2359-9227, 2013) accessed March 28th, 2016 http://cks.univnt.ro/cks_2013_archive.html, 640.

[24] 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.

[25] Judgment of the Court in Case C-361/01 P *Christina Kik v. Office for Harmonisation in the Internal Market* [2003] ECR I-8283.

[26] Judgment of the Court in Case C-283/81, *Srl CILFIT and Lanifacio di GavardoSpA v. Ministry of Health* [1982] ECR 3415, par. 18.

[27] *Kjaer and Adamo*, "Linguistic Diversity and European Democracy", 7.

[28] *Anghel Elena*, The Importance of Principles in the Present Context of Law Recodifying (in Proceedings of the Challenges of the Knowledge Society Conference, ISSN 2359-9227, 2012) accessed March 28th, 2016 http://cks.univnt.ro/cks_2012_archive.html, 756.

[29] *Kjaer and Adamo*, "Linguistic Diversity and European Democracy", 7.

[30] *Kjaer and Adamo*, "Linguistic Diversity and European Democracy", 7.

[31] *Ibidem.*

[32] *Kjaer and Adamo*, "Linguistic Diversity and European Democracy", 7.

As stated by the European Commission, "[t]he responsibility of the European legislator for adequate linguistic and terminological choices is the more underlined by the fact that, with regard to undefined or unclear concepts or diverging linguistic versions of an act, it is ultimately the European Court of Justice to decide on the EU meaning of the concept or to conciliate between diverging language versions. The jurisprudence of the Court is quite clear on this point and its approach prefers a systematic and teleological interpretation over a textual one".[33]

Of course that multilingual judicial reasoning means "more than mere comparison of language versions although it cannot possibly neglect or elude such comparison. It would involve deploying all linguistic techniques or skills and interpretation methods[34] to all language versions and being aware, when drafting the terms of its reasoning, of how such terms would be translated into the other official languages so that the message is clearly understood and, as the case might be, any possible ambiguity is properly preserved".[35]

However, the ECJ[36] "regularly heads for a uniform interpretation of the contradictory versions"[37], therefore the wording contained in the majority of the language versions should be accepted. But, if one of the language versions is due to a discernible typing error, the other versions are decisive.[38] We have to underline that "[t]his interpretation is not necessarily according to the (contradictory) wording of the provision in question but rather according to its meaning and purpose[39]".[40]

Upon our research, there are also *challenges* raised by multilingualism. One of them is the *use of foreign origin words*, due to the origin of the original drafting language. It appears that the "EU translators often seem to be more purist than draftspersons or writers within the national administration".[41] Consistency should be the key, because using two different equivalents can lead to inconsistencies where the context of their use is not defined (e.g. the Dutch national equivalent of the term *conformity – overeenstemming* - disappeared in the course of time in favour of the term *conformiteit* which took its place in legal texts.).

Another challenge is the *impact of the original language* as a source language on the official languages in the translation phase.[42] However, nowadays, we notice that English is the preponderant drafting language at the Commission who influences the former drafting language, French. Of course that French influenced also English in the past, because English became official in 1973, therefore the vocabulary was established mainly on French texts. It is relevant what Simone Glanert underlines about using English as a working language "[i]n practice, the recourse to English as a working language compels most of the participants in the various task forces to operate in a foreign tongue and thus to relinquish their native language. In effect, each lawyer is expected to explain her national law to all the other members of her working group. Given the multiplicity of languages around the table, this account, in the name of efficient communication, can only take place in a common working language, that is, in English. Concretely, the Italian lawyer, for example, in order to elucidate the present state of Italian law with respect to a particular legal problem, must therefore translate the Italian legal rules and principles into the common working language. In the same way, her German colleague, who wants to describe the German point of view with regard to a specific question, is constrained to express the German legal ideas in the English language. Once the different national legal solutions have been translated into the working language, further discussions will generally take place in English".[43]

Another difficulty appears from this challenge when English uses two terms with *similar meanings* and other languages do not have two equivalents but

[33] EUROPEAN COMMISSION, Directorate-General for Translation, *Studies on translation and multilingualism.Lawmaking in the EU multilingual environment*, 1/2010, 153.

[34] For more information on the ECJ's interpretation methods, please see and *Augustin Fuerea*, Manualul Uniunii Europene, 5th edition revised and enlarged, after the Lisbon Treaty (*Bucharest: Universul Juridic Publishing House, 2011*), 175.

[35] *Bengoetxea*, "Multilingual and Multicultural Legal Reasoning", 115.

[36] For more information on the ECJ's case law as a source of EU law, please see *Roxana-Mariana Popescu*, Introducere în dreptul Uniunii Europene, (*Bucharest: Universul Juridic Publishing House, 2011*), 96.

[37] *Schilling*, "Multilingualism and Multijuralism", 1487 (footnote omitted).

[38] Case C-64/95 *KonservenfabrikLubella v. Hauptzollamt Cottbus* [1996] ECR I-5105, para. 18.

[39] *E.g.* Case 100/84 *Commission of the European Communities v. United Kingdom of Great Britain and Northern Ireland* [1985] ECR 1169, para. 17.

[40] *Schilling*, "Multilingualism and Multijuralism", 1488.

[41] For example, within the Austrian and German administration, the terms *Monitoring, Governance, Follow-up* and *Implementierung*are more frequently used than the terms *Überwachung, Staatsführung, Folgemassnahmen*and *Umsetzung*subsequently used by German translators at EU institutions for the same concepts. EUROPEAN COMMISSION, Directorate-General for Translation, *Studies on translation and multilingualism.Lawmaking in the EU multilingual environment*, 1/2010, p. 84.

[42] New disciplines are used in their 'internationalised' English form (*victimology*) and when they are translated, it is often a transliterated form (in Spanish *victimología,* in French and Romanian *victimologie,* in German *Viktimologie*) and seldom with an indigenous term (*iospairteolaíocht*in Irish). Additionally, some English terms linked to modern technologies, are still often used in their original form (*on-line, website, newsletter,* and *voucher).*

[43] *Simone Glanert*, Europe, "Aporetically: A Common Law Without A Common Discourse", Erasmus Law Review, vol. 5, no. 3/2012, accessed March 28th, 2016 http://connection.ebscohost.com/c/articles/85331719/europe-aporetically-common-law-without-common-discourse.

only one for both terms and they create an artificial new term to be able to distinguish between them.[44] Another difficulty that appears is the *syntactic and stylistic impact* (e.g. different punctuation rules in English that overrule the orthography rules of national languages, abusive use of passive voice, excessive use of some words – *shall, will, should*). Moreover, some languages have problems adapting to the wide usage of figurative phrases and metaphors, which are not common to the national official texts which are more neutral (e.g. the Latvian legal system – the translators literally translated the EU legal texts, fact which created many problems because of the concepts like: *sunset clause, carbon footprint, open sky, predatory pricing behaviour*).

Another difficulty is the lack of clarity in the source language version, which can drive to opposite results: inconsistencies in the translations or better quality of the translations.

We consider that in order to solve these conflicts resulted from translations of the European acts, the national judges should read other language versions of the EU acts than their own, not just when the national version is very absurd.

Is the linguistic question in the European Union *the new legal Pandora's box*? After all, how deliberative democracy should function in polities that are made up of many linguistic groups and seem to forget the impact that linguistic diversity may have on political communication and mutual understanding across languages.[45]

Consideration must be given concerning the goal of bringing Europeans from a range of countries together, because this may affect the European citizens' right to speak their own language.

In the end, languages "are exclusive, and they exclude. Even if the possibility for speakers of a minority language to speak their own language should be protected, representing a fundamental constitutional right in democratic societies, supported at both national and European level, minorities would be culturally, socially and politically isolated if they were unable to speak the language of the majority. Therefore, one might conclude that language rights should be concerned not only with the protection of linguistic diversity and the right to speak one's own language, but also with the right to learn the language that enables one to be among those who exercise power, or, less ambitiously, to understand the linguistic code of those in power".[46]

Could we talk about the hypocrisy of the Member States concerning the language diversity? As some authors point out "[m]ost EU Member States seem to endorse the view that diversity is valuable only if they are in charge of that diversity, defining its meaning and limits. Thus, minority language rights are protected and diversity celebrated only with respect to languages with a long historical presence in Europe. The increasing and widespread presence of non-European immigrant languages is not protected by language laws".[47] Nowadays, English is the *de facto* language of the European Union, becoming "the dominant supranational language".[48]

But following and respecting the European motto is not just a question of good intentions, but it requires institutional ambition and consistency. "Needless to say, many nuances will have been lost throughout the different translation processes, but the question remains whether and when these nuances will be noticed and acted upon and whether the nuances are so grave as to lead to inconsistencies".[49] 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".[50]

However, we consider that lawyers should research more in languages and legal interpretation. Interdisciplinary efforts could solve the multilingualism problems of the EU.

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[44] For example, the Slovak language when translating *effective* (delivering the desired outcome) and *efficient* (using resources to best effect) using different terms. Despite the efforts made to translate them differently, the terms are used as synonyms.

[45] *Kjaer and Adamo*, "Linguistic Diversity and European Democracy", 1.

[46] *Idem*, p. 9 (footnotes omitted).

[47] *Kjaer and Adamo*, "Linguistic Diversity and European Democracy", 10.

[48] *R. Phillipson*, "The EU and Languages: Diversity in What Unity?" in Linguistic Diversity and European Democracy: Introduction and Overview, *Anne Lise Kjaer and Silvia Adamo (eds.)* (Ashgate, 2011), 69.

[49] *Bengoetxea*, "Multilingual and Multicultural Legal Reasoning" in Linguistic Diversity and European Democracy: Introduction and Overview, *Anne Lise Kjaer and Silvia Adamo (eds.)* (Ashgate, 2011), 101.

[50] *M. Bobek*, "The Multilingualism of the European Union Law in the National Courts: Beyond the Textbooks" in Linguistic Diversity and European Democracy: Introduction and Overview, *Anne Lise Kjaer and Silvia Adamo (eds.)* (Ashgate, 2011), 141.

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THE EVOLUTION OF ROMANIAN JUDICIAL SYSTEM SEEN THROUGH THE LAST MONITORING REPORT

Florin STOICA*

Abstract

Even though great strides have been made in this direction, Judicial reform and fighting corruption continue to represent major points in the evolution of Romanian society, in the context of compliance with European standards. Mechanism for cooperation and verification will be continue to be an incentive for Romania in the maintenance and evolution of results counted by the European Commission.

Keywords: *European Commission, Corruption, judicial reform, MCV, Monitoring report.*

1. Introduction

Introduced in 2007, the Cooperation and Verification Mechanism (CVM) was set up at Romania's accession to the European Union[1]. Although it was introduced and created for Romania and Bulgaria[2], the mechanism is also a good example for other countries that have similar shortcomings. At the accession's time, it was considered the need for additional efforts in the key areas, to address the remaining deficienciesin the judicial reform and fight against corruption. Throughout time, the CVM reports assessed the progress made by Romania in these hotspots and the efforts' targeting was searched by issuing specific recommendations. Being a functional lever, established by the European Commission, this mechanism has exceeded even the internal expectations on how to influence major decisions in the fight against corruption in Romania.

Further, hotspots for a company in full transition, such as the one from Romania, judicial reform and fighting against corruption are those that maintain the European Commission's attention, exactly for no register a setback. Why a regress? Exactly because that this led to public demonstrations, with broad participation.

The Commission completely supports that CVM continues to be essential for Romania, being a key factor for the reform and an incentive in order to conserve the positive results on the long term, and also their augmentation.

The Commission's analysis and the methodology used in the CVM were joined by a strong support from the Council[3] , as well as the cooperation and contributions of many Member States.

The actions and efforts of the Romanian State, through the judicial and integrity institutions in order to combat high-level corruption and increasing the professionalism of the judiciary system, were considered, by the Commission, as sustained and sustainable progress. Thus, CVM Report highlighted the need to strengthen the achieved progress and substantiate them on more solid bases. In the monitoring process are found also many outstanding legislative issues and a doubtful political consensus that supports the reform.

The Council noted that it is also necessary an ongoing global political commitment for sustained reforms. The necessity to respect the independence of the judiciary system is essential to ensure the progress sustainability towards achieving CMV[4] objectives.

Reform is analyzed in this Report in terms of both trends, exactly to study in depth the bases and the elements of this reform. Analysis is performed through an intense process based on the cooperation between the Commission, the Romanian authorities, the civil society and the other stakeholders. The progress sustainability will be reviewed also through a series of tests that will take place during 2016. Thus, following these tests, the utility of maintaining a CVM type monitoring mechanism will be proved. In conclusion, will try to show in this article the utility and also try to underline the progress made and the recommendations.

The Commission paid a particular attention to the issues mentioned in the monitoring activity from this year and will continue to support Romania in order to achieve CVM objectives. In many areas, Romania already benefits from the support provided

* PhD Candidate, General theory of law, Faculty of Law "Nicolae Titulescu" University of Bucharest (e-mail:**florin.stoik@gmail.com**).

[1] Ministers Council conclusions of 17 October 2006 (13339/06); Commission Decision establishing a mechanism for cooperation and verification of progress in Romania to address specific benchmarks in certain areas of judicial reform and the fight against corruption 13 December 2006 [C (2006) 6569 final].

[2] Radu Carp, *Dreptul public, perspectiva comparata si analiza politica*, Editura Adenium, Iasi, 2015.

[3] http://ec.europa.eu/cvm/key_documents_ro.html

[4] http://data.consilium.europa.eu/doc/document/ST-7281-2015-INIT/ro/pdf

through the European Structural and Investment Funds. In addition, in 2015, the Commission introduced a new instrument as a support service for structural reforms (Structural Reform Support Service - SRSS), whose aim is to provide technical assistance to the reform efforts of EU Member States into a wide range of areas. The Commission encourages Romania to fully use the possibilities offered.

2. Content.

The stage of justice reform

2.1. Independence of the judiciary.

The monitoring report 2015, as last CVM reports, had in the center of attention, the evolution and the actions of the key institutions of the magistracy - High Court of Cassation, the Public Ministry and the National Anticorruption Directorate and the Superior Council of Magistracy. But not only, it was taken into account the solid actions and results obtained by the mentioned institutions but also their management. This is why, through this report, for the appointments in management positions of these institutions, transparent selection and merit based procedures[5], are recommended, because with these procedures a stable leadership without political interference can provide. Also, as known, the lack of political interference ensures the independence of the judiciary, namely the judicial system.

Appointments to those positions are considered by the Commission as important tests for Romanian authorities. For example, the appointment of a new chief prosecutor of the Directorate for Investigating Organized Crime and Terrorism[6], for which the procedure has been completed, characterized by greater transparency and predictability (publication of the vacancy, the public definition of criteria, publication of the names of candidates) through collaboration and cooperation between relevant actors, Ministry of Justice and the Superior Council of Magistracy. The procedure was launched during 2015, as the former Chief Prosecutor has been investigated and taken into custody for corruption charges. The applied method in this case is the clear proof of how clear and rigorous procedures, with the full involvement of the key authorities, may be the most important factor in an appointing credible process. The procedures are recommended to be also used in the other key functions, namely the posts of President of the Supreme Court of Cassation and Justice, General Attorney and chief prosecutor of the National Anticorruption Directorate[7]. Why is this recommended? Since, at legislative level, there are no criteria to ensure the highest level of professional competence and integrity, and the current appointment procedure involves a strong political component, given the role it has within it the minister.[8]

However, when it comes to judicial independence, we also refer to the justice and the judicial process respect. Thus, CVM report for 2015 takes note the corruption's high level cases solved by condemning a large number of well-known Romanian politicians. This is a strong argument regarding the independence of the judiciary and ensures that the constitutional principle according to which any person who commits an offense is not situated above the law.

But the report scores negatively the record of an increase number of requests for the defense of the judicial independence, following some media attacks and from politicians, but also, the lack of respect for the compliance of the judicial decisions[9]. Criticisms from the media and politicians have targeted, personally, both the head of DNA and also of the head of the High Court of Cassation and Justice (HCCJ)[10]. The requests were solved by the Superior Council of Magistracy (CSM) and the Judicial Inspection, who continued to defend the judicial independence and the professional reputation, the independence and the impartiality of the judiciary.

Another point highlighted by the Commission is the important role in the rule of law and in strengthening the independency of justice, which the Constitutional Court (CCR) plays. In 2015, the court's jurisprudence included 24 decisions on the new Criminal Code and Criminal Procedure Code provisions, as well as some important decisions related to the powers balance and the respect for the fundamental rights. Most of CCR decisions regarding the Criminal Code were aimed at strengthening the right to a fair trial and the rights of the parties in accordance with the jurisprudence of

[5] COM(2015) 35 final, COM(2014) 37 final; COM(2013) 47 final, COM(2012) 410 final.

[6] Former chief prosecutor of the Directorate (DIICOT) is in custody on corruption charges, which highlights the need to bring out any issue of integrity.

[7] Procedure for appointing the Chief Prosecutor of DIOCT applies also to all senior prosecutors, their deputies and heads of departments including the Public Ministry and DNA. In total, there are 15 prosecutor positions for which the Minister of Justice must make appointments this year.

[8] The Venice Commission was specifically concerned about the work of finding a balance report in this regard (see Technical Report, Section 2.1, p. 6-8).

[9] Technical Report, Section 2.1, p. 5.

[10] For example, in a public letter addressed to the President of Romania, President of the Senate, referring to a person paid in the first instance, but remand for 6 months, requested revocation ICCJ President and the Chief Prosecutor of DNA. Technical Report, Section 2.1, p. 5.

the European Court of Human Rights (ECHR). Such decisions enhance legal security and individuals rights, and the decisions regarding the legislation interpretation also play an essential role in the in the control system and the institutional balance[11].

2.2. Judiciary Reform

Following the entry into force, on 1 February 2014, of the New Criminal Code and the new Code of Criminal Procedure, it appears that the recommendation contained in CVM report published during the 2015 regarding the legislative environment stability for their application, has not been reached. The problem lies on the parliamentary procedures codes inconsistency. Even if the Government has proposed changes designed to remedy the problems identified since the spring of 2014, they have not yet been adopted by the Parliament. The judicial authorities, the civil society and the Member States have criticized the controversial amendments made on their own by the Parliament, arguing that it would harm the fight against corruption and reduce the ability of law enforcement authorities and courts to conduct prosecutions and apply sanctions. Commission's recommendations in this regard provide the development of amendments by Parliament in strict accordance with the will and wishes of the judicial authorities.

Although there are discussions on the legal framework, the codes implementation in the form in which they were adopted continued, and practitioners have issued favorable opinions regarding the new legal framework and judicial institutions through the judges and prosecutors, as well as throught clerks involved which have continued to implement the reform.

Continued reform and efforts filed by: the High Court of Cassation and Justice, the General prosecutor, the Superior Council of Magistracy, the National Institute of Magistracy and the Ministry of Justice.

At Ministry of Justice level, measures have been taken in order to increase the number of posts, especially clerks and judicial inspectors, but also by training institutions in this field.

CVM report notes that as regards the implementation of the Civil Code and the Code of Civil Procedure, the transition period necessary to resolve the new codes previous cases in parallel with the new cases is largely completed, an increased effectiveness of the act justice[12]been registered.

In terms of justice consistency, the High Court of Cassation and Justice (HCCJ) holds the main responsibility andalso has the role of interpreting uniformly the legislation and the practices.. This court has two legal mechanisms to develop the jurisprudence consistency and to provide a uniform interpretation: prior decisions and law[13] interest appeal. Although these measures and some signals in the direction of consistency are implemented, there are still frequently reported inconsistent decisions. While some issues related to the new codes should be resolved with the passing of time, some structural issues require more attention from the courts managers and each magistrate, as well as continuing training, with lawyers' participation also.

Judiciary system development strategy 2015-2020, is being finalized and for its implementation, several consultations with all the stakeholders took place. This action plan will be commonly assumed, effectively, with all the stakeholders. The action plan will have to clarify to what extent the new Superior Council of Magistracy sees this as a model for its own actions. And the elections for the new council will be a new opportunity for continuing the reform.

2.3. Integrity

Another key point on the Commission agenda was also the activity of the National Integrity Agency and the National Integrity Council. Although there were problems related to the the two institutions management, they still handled a large number of inquiries during the reporting period.

In 2015, the execution of final ANI decisions and their confirmation through final decisions has remained a problem. For example, two cases inform the Parliament have registered significant delays before the final decisions regarding the incompatibility to be executed, conducting to the cessation of a parliamentary mandate. ANI had to resort to fines application or criminal prosecution notification.

In order to achieve legislative consistency and clarity in integrity field, CVM 2015 report takes note that the encoding tests were postponed because of some fears related to the fact that the existing rules could be diluted[14]. Thus, this year's elections according to the Commission will be an important test for Romanian authorities and for the functioning of these institutions.

[11] For example, decisions to determine whether doctors in public hospitals are public servants or not. Technical Report, Section 2.1, p. 4.

[12] Technical Report, Section 2.2, p. 12.

[13] In criminal matters in 2015 were submitted 35 questions and 33 were solved, compared to 2014, when the questions were submitted and 31 were solved 28. There is a significant increase in the number of questions in civil and administrative : 2015 were submitted 51 questions and 47 were solved, compared to 2014 when 17 questions were submitted and 25 were solved 13. in 2015, 18 were introduced civil remedies and were 19 resolved; in criminal matters were introduced six appeals have been settled and 7. This mechanism can be used also for procedural questions, which is not the case in prior decisions.

[14] CSM elections scheduled for autumn 2016, the new Board will come into office in January 2017. It is unclear whether the elections will be made to renew all or only those members who have completed their six-year mandate.

2.4. Fighting Corruption

The main reason for which was established the CVM report, was the fight against corruption, is still the central point of the analysis. Thus, the reporting took into account the activity balance of the institutions involved in fighting corruption. The activity of these institutions is a strong point of the monitoring, thus there were taken to end a large number of cases involving politicians and senior civil servants[15]. 2015, reporting year for Monitoring National Anticorruption Directorate, reported an increase in complaints from the population[16], but also an activity comprising a total of 1,250 defendants prosecuted. Among the cases investigated by DNA are: the Prime Minister, former ministers, parliamentarians, mayors, county council presidents, judges, prosecutors and a wide range of senior officials.

We most underline an important issue: , the fortunes unavailable during 2015 by the National Anticorruption Directorate worth 452 million euros. The activity of this institution concentrated also on the local authorities' corruption.

In the procedural stage, the competent courts solved with the same rhythm as the criminal investigation competent bodies. Most of these cases were prosecuted by the HCCJ, whether as a court of first instance or as a court of last instance. In terms of solving period, the report underlines the relatively short period in which the judiciary solved the cases, thus, the cases solved in 2015, were recorded in 2014 and 2015 and the oldest one dates from 2011.

In fighting corruption, the Parliament played and plays a key role, refusing a third of DNA's requests of lifting the parliamentarians' immunity, in order to allow the normal course of judicial investigations. The criteria for which these requests have been refused or accepted cannot be identified, reason why there is a lack of practice consistency at this level. Although, most reports so far notified this fact and slow steps are made for accomplished change.

Corruption has affected and affects the judiciary system and the relevant bodies actions were directed also in this area, the number of cases has increased in the recent years, and the proofs are the magistrates' convictions. At the same time, we can take note about the system's ability to impose its integrity standards.

Romanian authorities' efforts were focused, as the Commission takes note, also in terms of fighting corruption at all levels.

The 2015 CVM report highlights also the effects that corruption has on long term and the impact on society. Thus, the areas of risk include: education, health, public procurement.

Regarding the National Anticorruption Strategy, CVM report indicates the importance that the preventive measures taken by the government have, both national and local level. Prevention projects implemented over the years, both at central and local public administration's level have demonstrated their effectiveness and will continue to bring their contribution in the hard fight against corruption[17]. However, there are situations where these preventive measures are applied fragmented due to the institutions incapacity to understand and apply these provisions/recommendations. The incapacity is caused, firstly, because of political interference in the management of these institutions. The strategy should be extended for the next two years, and this should remedy the deficiencies noted in the review. The removal of these shortcomings will be done by control bodies.

To the corruption fight will also contribute the administrative reform proposed by the Government, but also sustained efforts of the General Prosecutor and the General Anticorruption Department from the Ministry of Interior.

Corruption strategy proposes the setting up of an agency that could handle the administration of the seized goods originating from criminal activities and to recover the damages, this aspect representing a big problem of the judiciary system. In this regard, a law draft has been submitted in the Parliament, and was approved in December of 2016 by the Parliament. In this manner, the Commission's recommendation regarding the enforcement of assets confiscation will be implemented.

Also, the anticorruption strategy refers also to the links between the alignment with the public procurement system are made.

3. The Commission recommendations for 2016

As each CVM report, so far contained recommendations, even if progress had been registered, the 2015CVM report contained the Commission's recommendations for 2016. The Commission's recommendations to the Romanian authorities include necessary measures related to the reported key areas.

In terms of judicial system independency, the Commission recommends that the nominations in the system's important leadership posts to be made by using clear and robust procedures and based on merit, in this manner there are offered equal opportunities for all the actors in the field. Transparency represents the center of these procedures. But the recommendations do not just

[15] Technical Report, Section 3.1, p. 22-23. ANI overall results obtained were stable compared to 2014.

[16] DNA reports that 85-90% of cases based on complaints from citizens, 5-10% based on referrals from office or complaints from other institutions and less than 5% of cases are based on notifications from the intelligence services.

[17] http://sna.just.ro/

stop to the senior posts' appointments but also refer to the need to strictly observe the independence of the judiciary by parliamentarians[18].

The second Commission's recommendations agenda point consists of judicial system reform. It will have to go on the same upward trend and, thus, to strengthen the magistrates professionalism. By developing a favorable legal framework to the reform development, the preservation and the stability of the achieved results will ensure so far. Also, the controversial amendments that target the new codes, already entered into force, will be made by the professionals and practitioners' contest, not by MPs, without a preliminary investigation of the impact that they may have. The impact will study both at system and citizens level, as the ultimate beneficiary of legislative measures.

Integrity is another area where the Commission has made recommendations, because it is necessary to implement the rules in terms of incompatibility and conflict of interest. Regarding the integrity, the recommendations addressed to the Parliament are to respect the court suspension from office decisions , related to its members.

Regarding the fight against corruption, the recommendations contained in the CVM report refer primarily to the consistent application at all levels of the legislation regarding corruption. Although there are notable progresses in this area, the results should be consolidated, exactly to not record a setback. By using structural funds, the Romanian authorities have the possibility to initiate programs to prevent corruption. Commission's attention for the next reporting period will be focused on the functioning of the Agency seized assets management and on the strategy and action plan regarding the corruption prevention in terms of public procurement. According to the Court of Auditors report, in 2014, the damages caused are around 1, 8 billion.[19]

4. Conclusions

Even if the Cooperation and Monitoring Mechanism was one of the conditions of Romania's accession to the EU, it is questionable whether the institutional and functional evolution reached has been achieved without the external pressure instruments. CVM reports have been criticized over the years by those for whom work is a tool, such as practitioners, researchers and representatives of nongovernmental organizations. However, these reports were not criticized for their utility or their results, but for the evaluation methods applied by the European Commission, which are not objective and clear criteria, that can allow a longitudinal verification.

Long time, it were compared with progress reports, established before 1 January 2007, and then CVM reports, have gradually become European control pressure instruments in the internal decisions. Although they not attract major penalties as the safeguard clauses, they are reflected more on the company's image, both internally and externally, a corrupt state is a state with low credibility in the face of external partners. Indirectly, we can consider this mechanism as a tool of formal pressure on the internal decision makers but not the Commission interference in the national decisions, such as the pressure from the citizens, the opinion makers, political leaders from the opposition setting up the context of a clean society development.[20]

In the last two years, the CVM reports quantified a number of areas where the reform was strengthened by achieving positive results which have been preserved. As an overview, the judiciary system grown into a system that proves professionalism, independence and transparency, characteristics considered to be controversial before implementing this mechanism. The last report, analyzed also by us, provides that the essential objectives of the Cooperation and Verification Mechanism lies on a progressive trend in terms of their achievement, but underlines also the preservation of the almost same recommendations, over several reporting periods, can be identified some gaps in efforts to preserve necessary sustainable progress. Although without term, the mechanism will be kept until European Commission's experts will consider that the objectives set up will be achieved and will submit to vote to the European Parliament the removal of this safety net, moment when it will be considered that the fight against corruption will no longer be a danger to Romania's national security and shall not affect in any way the integrity of the European Union.

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[18] Sergiu Gherghina, Mihail Chiru, *Perspective românești asupra politicilor europene*, Editura Adenium, Iasi, 2014, 57-95.
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[20] Sebastian I. Burduja, *Intre speranta si deziluzie*, Editura Humanitas, Bucuresti, 2015.

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DRONE OPERATORS – LEGAL RESPONSIBILITY

Andrei-Alexandru STOICA*

Abstract

Drones or unmanned or remote vehicles represent a new generation of devices that were designed to help mankind achieve better results in areas that were proven to hazardous. By developing drones, new areas of economic activities have been unlocked for better exploitation, but at the same time, the lack of a proper legal system to back-up the new technology allowed a new wave of gray-lined uses of drones that must be tackled. As the Director of the 21st Century Defense Initiative at the Brookings Institute[1] explains in an interview in 2012 that "a revolutionary technology is a game-changing technology on a historic level. It is technology like gunpowder, or the steam engine, or the atomic bomb". With this in mind, drones mark the revolution to carry out strikes from thousands of kilometers away, while also ensuring a permanent eye in the sky for both military and also law enforcement operations. The aforementioned facts are just small percentages of what a drone is truly capable of and its full potential will only be unlocked once artificial intelligence will become an integral part of robotics.

Keywords: *drones, operators, International Criminal Court, strike, man-in-the-loop.*

1. Introduction

Until the development of autonomous or intelligent weapons reaches a new milestone, the concept of *man-in-the-loop*[1], that is a human being doing the decision-making authority and not the robot. A typical drone, or for a better illustration a Reaper drone used by the United States of America's Military, requires at least one pilot and a team comprised of flight-coordinators, intelligence gathering teams on the ground, military and civilian analysts and commanders, each, being in most cases, located in different bases around the world and trying to process information in real time. The U.S. Air Force admitted in 2011 that for just one Predator drone to be operational for 24 hours, they required 168 people in different key areas in the continental United States[2]. This may have changed since then do to more technological advancements, but the fact remains, current drone operations require a large amount of manpower and current trends show that this type of work environment is very demanding on the human psyche so drone operators are leaving in scores[3]. Drone operators, such as Brandon Bryant[4], spoke to the media about the difficulties of being a military drone pilot and the psychological impact it had on him when he was doing targeted killings from thousands of kilometers away.

This type of public outcry caused the policy makers to shift from the *man-in-the-loop* to a new policy, the *man-on-the-loop*[5], a situation where the drone uses an algorithm to function independently up to the point of acquiring a target and take a preliminary decision on how to act. The human pilot and the team behind him still have the final decision regarding the action that the drone must take and also, with this type of system, the human team can monitor more than one drone.

The paper will focus on defining and acknowledging that drone operators are viable military targets and can be prosecuted for their actions under international law, while also showcasing how drone operators are more frecvent from private companies rather than be under a governmental agency. The importantance of the paper is marked by the fact it will entertain an explanation on how recent trends in the area of unmanned vehicles have evolved, while also trying to speculate on whether the push for more control over drone missions can be achieved or if still lacks legal guidelines. In doing so, the study will be undergone by analyzing real cases and understanding the milestones that drone technology achieved in the last ten years. Unfortunately, since the area of military drone operations is only recently being made public, the level of information that can be made public or used without backlash for using sensitive information is still restricted to reports by different organizations or public figures

* PhD Candidate, Faculty of Law, University "Nicolae Titulescu" (e-mail: **stoica.andrei.alexandru@gmail.com**).

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[4] Helen Pow, Did we just kill a kid?, Dailymail.co.uk, 17 December 2012.

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2. Drone operators as subjects of the Rome Statute

2.1. Drone operators and the international crime of genocide

*T*he classic theory of criminal responsibility that the Rome Statute and the International Criminal Court Elements of Crimes, as adopted by the General Assembly of the Member States to the Rome Statute[6], enshrines the necessity to have both an international liability but also a criminal law oriented one. But, while having a clear legal framework for the traditional organized military and armed groups, applying the Rome Statute and other international criminal law tools in the context of drone warfare could prove to be more difficult as technology evolves.

The crime of genocide is defined by the Convention on the Prevention and Punishment of the Crime of Genocide[7] as "In the present Convention, genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such : a) Killing members of the group; (*b*) Causing serious bodily or mental harm to members of the group; (*c*) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; (*d*) Imposing measures intended to prevent births within the group; (e) Forcibly transferring children of the group to another group.". While this definition is a general statement that the alleged offender could be any person, the question that arises is whether or not a drone operator could be convicted of such a crime or if drones could even prevent genocide.

In the first case, a drone operator acts as a military personnel and as such he is entitled to both the possibility to be liable or to have his commander liable for the decision he imposed in the military chain of command. But in the second thesis, regarding the prevention of genocide by using drones, the situation is more of a hypothetical issue, since no genocide has been conducted in very recent history and drones only started to become relevant in military and police operations only just now.

Ever since 2008, when General Atomics started shifting production from Predator drones to Reaper drones and as such a global fast reaction force to stop genocide could be considered as consisted.

In an interview[8] with a former journalist and genocide investigator for U.N.I.C.E.F., Keith Harmon Snow, information that a global reaction force from the United States of America, Israel and its allies started adopting drones as a means and methods of preventing and intervening in situations that could become genocide or war crime, yet he reporter stated that such a possibility was only to protect assets from AFRICOM, while also contributing to the crime itself. Such a thesis has been promoted more recently in the ongoing conflict between Yemen and Saudi Arabia[9], where anti-war activists said that Saudi Arabia is using its own drones and also U.S. drones to target and kill civilians and military members of the dissident faction, while also doing it in a systematical and with the intent to destroy the group.

Interesting enough, this type of intervention from the United States of America is based on a doctrine that the Pentagon developed in 2012 and it is entitled as the Mass Atrocity Response Operations[10], a doctrine regarding peace operations that require a massive fleet of surveillance gear and information gathering-interception devices, but also gear that could intervene faster than a human group[11]. This doctrine could help protect key elements of the civilian population, while also forming a strong deterrent or imposing psychological pressure on possible perpetrators.

This doctrine did however cause moral damages, as Professor Francis Boyle[12]points out, since the doctrine focuses more on certain religious or ethnical groups, like the Muslim group, and as such the Central Intelligence Agency would be a key violator of human rights and humanitarian law, since it causes more civilian casualties in an operation than it wants to admit. The Professor goes on and notes that in a speech to the Rotary Club in 2013, the U.S. Senator Lindsey Graham outlined no less than 4 700 killed in the drone program, most being comprised of civilians and from this group, a lot of minors.

These statements, while interesting, seem to be countered by the fact that the United Nations mission in the Democratic Republic of Congo used a part of the Satellite Sentinel Project[13] that allowed the U.N. mission to monitor both the rebels and the civilians using drones and to provide early warning and early assessment. This project also had the possibility to gather and develop algorithms in preventing mass

[6] Adopted on 17th of July 1998 and entered into force on 1st of July 2002. As of 2016, 124 states are party to the Rome Statute – according to the untreatycollection website (treaties.un.org).

[7] United Nations, 9th December 1948.

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[13] Daniel Sullivan, 5 successes in genocide prevention in 2013, Endgenocide.org, 30th December 2013.

atrocities. The Sentinel Project allows a three pronged initiative to predict, prevent and mitigate[14] *atrocities, by using a small drone for patrolling areas that had been designated as a risk of mass atrocities. Drones can also create communication networks and help implement and document legal tools in combating and preventing genocide similarly to how satellites helped document the human rights violations in Sudan, Syria and Burma.*

As such, drone operators can be both the cause of genocide and also a preventive tool to it. Voices such as that of the journalist Daniel Greenfield[15] issues an outcry on the lack of action against extemist armed groups that cause massive atrocities, such as Daesh, and also that on September 10, 2001, Bill Clinton said that he could have had Bin Laden taken out if not for the collateral damage in Kandahar. As a result of his inaction, 3,000 people in the United States and countless civilians in Afghanistan died.

2.2. Drone operators in crimes against humanity and war crimes

Seeing as how UAVs are more useful in combating genocide than causing it, could the usage of drones be considered a crime against humanity or war crime? The truth is that shady politics and legal frameworks of the United States and its allies could create this impression that it does not follow international law. The American lawyer and Nazi investigator for the Nuremberg Trials, Benjamin B. Ferenzc[16], stated that "*the illegal use of armed force knowing that it will inevitably kill large numbers of civilians is a crime against humanity, and those responsible should be held accountable by national and international courts*," and as such the act to use a weapon that will unavoidably kill a disproportionate number of civilians is considered inhumane and should be held liable. The Rome Statute outlines crimes against humanity as any of the acts enshrined in article 7, when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack. Sadly, the report of the Office of the Prosecutor from 2013 entitled *Report on Preliminary Examination Activities*[17] does not address the usage of drones by coalition forces, however it does address targeted killings as an activity used by Taliban forces and Governmental forces in their search for collaborators. Based on this report, the British Reprieve organization tried to call to justice a series of armed drone using states in almost 156 cases, but most national courts dismissed the cases while the last judiciary line stands with the International Criminal Court[18].

This idea is further strengthened by the report of U.N. special rapporteur[19] from the 21st of June 2012 in Geneva, where it had been brought to the attention of the United Nations that the tactics employed by the United States of America were considered serious crimes under international law since they targeted civilians and first response medical teams. The report was further backed by the Pakistani r and Swiss ambassador, but unfortunately the United States of America dismissed the issue since they already publicly stated that the war on terror is governed by the law of armed conflict and as such these tactics are legitimate[20].

As such, while Central Intelligence Agency and Pentagon agents could technically be trialed for war crimes and crimes against humanity, the fact that the United States of America is not a member state of the Rome Statute and as such would be difficult to seize the Court as per article 13[21] of the Rome Statue since the United States of America is still a permanent member of the Security Council of the United Nations and could block deferrals and other seizures for 12 months, but also shows how the Court lacks a police system to arrest persons outside state cooperation.

Lately, a national judge in the United States of American, Judge Andrew Napolitano, stated that the latest drone operations could be labeled as war crimes if they target American citizens abroad[22], but such statements seem to be unfounded and lack clear guidelines in American legal system, as the case of Anwar al-Awlaki and others proved[23]. The case involved a dual citizenship individual who was killed by a drone strike in the Arabian Peninsula for alleged recruitment and training individuals for specific acts of violence linked with terrorism. The

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[20] Jack Serle, UN expert labels CIA tactic exposed by Bureau "a war crime,„ thebureauofinvestigativejournalism.com, 21th of June 2012.

[21] The Court may exercise its jurisdiction with respect to a crime referred to in article 5 in accordance with the provisions of this Statute if: (a) A situation in which one or more of such crimes appears to have been committed is referred to the Prosecutor by a State Party in accordance with article 14; (b) A situation in which one or more of such crimes appears to have been committed is referred to the Prosecutor by the Security Council acting under Chapter VII of the Charter of the United Nations; or (c) The Prosecutor has initiated an investigation in respect of such a crime in accordance with article 15.

[22] Tina Nguyen, Fox's Judge Napolitano: War Crime for Obama Drone Strikes to have killed Americans, mediaite.com, 24th April 2015.

[23] Robert Chesney, Who May Be Killed? Anwar al-Awlaki as a Case Study in the International Legal Regulation of Lethal Force, Yearbook of International and Humanitarian Law Vol. 13, 2010, University of Texas Schoof of Law, published in 2011.

case tried to pull-in the legal responsibility for the U.S. for violations of the U.N. Charter and other human rights conventions. The idea was that the drone strike contradicted article 2 paragraph 4 and article 51 of the U.N. Charter, but the fact that both Yemen and Pakistan consented on the usage of force by a foreign state on their sole removed the liability[24] of the U.S. since 2010 reports showed that C.I.A. convinced the Yemeni President to agree to such strikes, while also proving that Pakistan had tacit consented to strikes even thou strong public protests.

While the *International Review of the Red Cross*[25] issues a warning that not all situations fall under the material field of application of international humanitarian law, the Anwar case proves that the threshold needed to carry out lethal strikes against targets has indeed been lowered. What the case also tried to do is to create a precedent in criminal liability for those that command and operate drones but sadly, the national judges deferred this case to unsolvable as drone operators are protected by the secrecy of state matters[26]. Other cases have yet to be brought up in the United States, Great Britain or Israel, even though such crimes could be prosecuted in any state due to the universality principle enshrined in customary law. Recently, Professor David Glazier[27] stated that CIA operatives are not actual combatants but rather are civilians taking part in armed conflict and as such do not benefit of privileges, under this view CIA drone pilots are liable to prosecution under the law of any jurisdiction where attacks occur for any injuries, deaths or property damage they cause.

2.3. Drone operators and the crime of aggression

The International Criminal Court defined aggression as the "use of armed force by one State against another State without the justification of self-defense or authorization by the Security Council"[28], a definition that was already largely accepted from the text of the United Nations General Assembly Resolution 3314[29]. This concept has yet to be implemented since it lacks an operative mechanism to use it, while also the resolution provides that the court will have jurisdiction over aggression subject to a decision to be taken after 1 January 2017. This means that while we now have a definition of the crime of aggression, jurisdiction over the crime it is put off for future decision, which means we have a crime without any means of punishment before the ICC. Empowered by the UN Charter, the Security Council determines the existence of any act of aggression[30].

This however can be a troublesome approach as drone operations have been up until now subject of a defensive doctrine based on self-defense as per article 51 of the Charter rather than an active and classic approach to armed conflict. Resolution 3314's drafting history, however, further undermines the suggestion that American drone strikes against al Qaeda fighters in Pakistan constitute acts of aggression. Resolution 3314 identifies acts of aggression depending, inter alia, on their "consequences" and "gravity," along with "other relevant circumstances"[31].

Until 1st of January 2017 one can only speculate if the crime of aggression could be attributed to drone strikes that have been used in Yemen, Pakistan, Somalia, Syria or Libya since drone operations have been used as an excuse to bypass article 2 para. 4 of the Charter, while also being done with the consent of the state that has terrorist cells operating on its territory[32].

Discouraging as it may be, drone strikes and by extent, drone operators have yet to be held criminally liable for their actions since they have a *license to kill*[33] without the fear of going to court due to the secrecy shrouding the program, thus allowing them to be able to target and kill anybody that is a suspect of terrorism and any type of activities that can be linked to terror.

3. Drone operators as military objectives

3.1. Defining a military objective

A military objective is limited to those objects which by their nature, location, purpose or use make an effective contribution to military action and whose partial or total destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage[34]. This definition of military objectives is set forth in Article 52(2) of Additional Protocol I, to which no reservations have been made. The definition has been used consistently in subsequent treaties,

[24] William Banks, Counterinsurgency law: New Directions in Asymetric Warfare, Oxford University Press, 2013, p. 169-174.
[25] Sylvian Vite, International Review of the Red Cross, Geneva, Switzerland, 2009, p. 70.
[26] Mark Mazzetti, How a US Citizen came to be in Americas cross hairs, nytimes.com, 9th March 2013.
[27] Nathan Hodge, Drone pilots could be tried for war crimes, law prof says, Wired.com, 28th April 2010.
[28] International Criminal Court [ICC], Assembly of States Parties, The Crime of Aggression, Annex I, art. 8, ICC Doc. RC/Res.6 (advance version June 28, 2010).
[29] G.A. Res. 3314 (XXIX), Supp. No. 31, U.N. Doc A/9631 (Dec. 14, 1974).
[30] Michael J. Glennon, The Blank-Prose Crime of Aggression, 35 Yale Journal of International law Vol. 71, 2010, p. 108– 109.
[31] Andrew C. Orr, Unmanned, Unprecedented, and Unresolved: The Status of American Drone Strikes in Pakistan under International Law, Cornell International Law Journal Vol. 729, 2011, p. 741-744.
[32] Coalition for the International Criminal Court, Delivering on the promise of a fair, effective and independent Court > The Crime of Aggression.
[33] Amnesty International, Will I be next? US drone strikes in Pakistan, 22st October 2013, p. 43-50.
[34] Rule 8 of the ICRC Customary Law Study Vol. I, Jean-Marie Henckaerts and Louise Doswald-Beck, Cambridge, 2009, p. 29-32.

namely in Protocol II, Amended Protocol II and Protocol III to the Convention on Certain Conventional Weapons, as well as in the Second Protocol to the Hague Convention for the Protection of Cultural Property.

As per article 52 paragraph 2 of the aforementioned Protocol, attacks shall be limited strictly to military objectives. In so far as objects are concerned, military objectives are limited to those objects which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage.

These situations arising from the interpretation of article 52 and rule 8 enshrine the idea that a key factor is whether the object contributes to the enemy's war fighting or war sustainability capability, and so a military benefit or advantage should derive from the neutralization or capture of the objective[35].

By definition of international humanitarian law, a member of an armed forces is considered a combatant under rule 3 of the ICRC Customary Study and this status only exists in international armed conflicts. A drone operator must comply with the rules that are provided for governmental armed forces, meaning that they could be taken out any time, even if they are thousands of kilometers away from the battlefield. For example, a drone operator sitting in a base in Nevada may control a drone buzzing over Afghanistan. Though the operation may be conducted within a military compound, far removed from civilian populations, the problem arises when a drone operator completes a shift and goes home.

As combatants, drone operators are targetable at any time. On the battlefield, a combatant does not acquire immunity when he or she is eating, sleeping, or picking up children from school. And that is the key, because on traditional battlefields, there are no children, and there are no schools. International law does not allow combatants to kill in the morning and then enjoy immunity later in the evening. It is not a light switch. War has never worked that way[36]. Although the operators of remote-controlled weapons systems such as drones may be far from the battlefield, they still run the weapon system, identify the target and fire the missiles. They generally operate under responsible command; therefore, under international humanitarian law, drone operators and their chain of command are accountable for what happens. Drone operators are thus no different than the pilots of manned aircraft such as helicopters or other combat aircraft as far as their obligation to comply with international humanitarian law is concerned, and they are no different as far as being targetable under the rules of international humanitarian law[37].

3.2. Drone operators as military objectives stationed in another state or in their origin state

In an article published by Professor Ryan Goodman[38], it had been stated that that a violation of the maxim does not necessarily entail criminal liability and the maxim could be formulated to include (or exclude) a proportionality analysis. This sparked the possibility of regular army operations or Special Forces operations to either kill or capture a target, based on the instructions or rules given to them by laws of armed conflict and state manuals. The legal right to use armed force is limited to the objective of rendering individuals hors de combat (taken out of battle) or, in the collective sense, to defeating enemy forces. Parties have a right to kill enemy combatants during hostilities, but that right is constrained when killing is manifestly unnecessary to achieve those ends. The author also supports the idea of restraint use of force for any type of combatant, thus for drone operators as well, but this study lacks relevant state practice to uphold the rule.

While current U.S.A. drone bases are known to be only on American soil, the strike on Anwar al-Alwaki was done from a different military installation on Saudi Arabia territory[39] close to the Yemen border. Other bases have been confirmed in Djibouti[40], Ethiopia[41] and other key locations such as the Seychelles or Qatar. Recently, the base in Saudi Arabia has been closed in partial thanks to the recent conflict between the House of Saud and the Yemeni Shiite Rebels[42], a situation that shows how important drone operations and how valuable drone pilots are to the program.

Targeting drone operators in foreign establishments is similar to that of targeting a member of the armed forces of a foreign government inside another state, similarly to how Europe and the United States of America have military bases established in Iraq, Afghanistan or Mali. Consistent with the principle of distinction, attacks may only be conducted against military objectives, including members of the armed forces and other organized armed groups participating in the conflict. By the "use" criterion, civilian objects may become military

[35] University Centre for International Humanitarian Law Geneva, report expert meeting "Targeting military objectives", 12th May 2005, p. 3-5.
[36] Aroop Mukharji, Drone operators: Soldiers or civilians?, TheAtlantic.com, 28th March 2013.
[37] Interview with the President of the ICRC, Peter Maurer, in 2013, 10th May.
[38] The Power to Kill or Capture Enemy Combatants, The European Journal of International Law Vol. 24 no. 3, 2013, p. 821.
[39] Noah Shachtman, Is this the secret U.S. drone base in Saudi Arabia?, Wired.com, 2nd July 2013.
[40] Telesur, Secret U.S. drone base rapidly expanding in Djibouti, Globalresearch.ca, 21th October 2015.
[41] Nick Turse, America's Secret Empire of Drone Bases, TheWorldCantWait.com, 16th October 2011.
[42] AssociatedPress, U.S. Evacuates key drone base as storm brews in Yemen, 22th March 2015.

objectives when the enemy employs them for military ends. Analogously, civilians may be targeted should they "directly participate in hostilities."[43].

This further is outlined in situations such as the peacekeeping operations, where personnel from United Nations peace-keeping forces are not armed forces raised by the Security Council by virtue of Articles 43 and 47 of the United Nations Charter, nor are they organized by the States Members on the basis of an invitation (as in Korea in 1950) or of an authorization by the Security Council (as in the Gulf in 1990, and Somalia in 1992). Both these categories are empowered to use coercive measures to restore international peace and security (or adequate security conditions) in the region concerned[44]. Such a mission would be the MONUSCO[45] mission established through the United Nations Security Council Resolutions 1279 and 1291, which requires a force of over 20 000 to achieve a persistent control over the civil war torn state. The forces stationed there have started, from 2013, to use drones to supervise troop movements, but in 2014 and again in 2015[46], MONUSCO had drones crashes into remote areas or farmlands due to technical issues and never repairing the damages these crashes caused, neither did drone operators or commanders admitted to being at fault for damages caused to civilians in the usage of military drones.

Even the National Guidelines for the Coordination between Humanitarian Actors and MONUSCO adopted in 2006 and revised in 2013 fail to address how drones should be handled in both military and humanitarian areas of activity, while also covering the aspect of surveillance operations with clauses of secrecy to humanitarian actors that work alongside the MONUSCO forces.

Drone operators and commanders that are assigned to such instances, like the one in the Democratic Republic of Congo, will face targeted attacks from the dissident armed forces in a state that has similar issues to the Democratic Republic of Congo. Issues similar to targeted attacks or asymmetric warfare against peacekeeping forces or foreign forces present in a civil war torn state could be resolved by applying the *Kigali Principles*[47], which called for an early assessment of "potential threats to civilians" and the proactive undertaking of steps to mitigate such threats. By applying the Kigali Principles, drone operations could be deployed in advance to counter possible attacks from rebel armed forces against civilian targets or foreign peacekeepers. This of course could count as a law enforcement operation and as such, drone operators would not face the heavy conditions established by international humanitarian law in such an operation. Rule 33 of the ICRC Customary Study also enforces the idea that members of the Peacekeeping Mission are protected by international law and as such attacking them would constitute a war crime[48].

On the other hand, drone operators stationed at home have a similar statute, meaning that they are still protected as members of the armed forces when active and that civilian drone operators (hobbyists and policemen) are protected by municipal laws. For example, in the U.S.A. a woman had a 1 year prison sentence given to her for attacking and beating a civilian drone operator[49] for using it in a public space. Such a situation tied with the fact that even uniformed drone operators can be targeted by attacks[50]and be the most efficient way to take out the mechanism, rather than just targeting the drone, which could be captured and re-used. A drone operator in the U.S.A. requires at least 12 months of training along the traditional Air Force Pilot training[51] and gets a very advantageous work benefit package, but as the legal jurisdiction issue is raised, even if they were civilian operators, they could still be punishable for their role by both domestic and international law by their own state or by a third party state, if the attack could constitute an element of crime provided by international criminal law legal documents. In the *Interpretative Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law*[52], for a civilian to be considered a direct participation in hostilities, 3 requirements must be fulfilled: 1) the action must be likely to adversely affect military operations or to cause damage to objects protected against direct attack (threshold of harm); 2) there must exist a link between the act to cause harm and the result (one casual step); 3) the act must cause a direct support to

[43] Michael N. Schmitt, Targeting and International Humanitarian Law in Afghanistan, International Law Studies – Vol. 85, US Naval War College, Newport, Rhode Island, p. 311-315.

[44] Umesh Palwankar, Applicability of international humanitarian law to United Nations peace-keeping forces, Review of the ICRC, 30th June 1993.

[45] United Nations Organization Stabilization Mission in the Democratic Republic of the Congo, established in 1999.

[46] Siobhan O'Grady, How a U.N. drone was promptly forgotten, ForeignPolicy.com, 9th October 2015; AFP, UN surveillance drone crashes in eastern DR Congo, 20th October 2014.

[47] An emerging principle that was conceived in a High-level International Conference on the Protection of Civilians in Kigali, from 28th-29th May 2015, based on the margins of the 69th UN General Assembly in New York.

[48] Article 8(2)(b)(iii) of the Rome Statute, 2003.

[49] Gregory S. McNeal, Woman Faces A Year In Jail For Beating Drone Operator, Assault Caught On Video, Forbes.com, 10th June 2014.

[50] David Cortright, Drones and the Future of Armed Conflict: Ethical, Legal and Strategic Implications, the University of Chicago Press, 2015, p. 58-60.

[51] Pratap Chatterjee, Why are drone pilots quitting in huge numbers? , Inthesetimes.com, 10th March 2015.

[52] Nils Melzer, ICRC, 31th December 2008, p. 995-996.

a party to the conflict and be in the detriment of another. As such, the CIA or the UK programs use private contractors to operate drones, and thus civilians who take part in direct hostilities.

3.3. Civilian-military partnerships as a risk towards legal strikes

While drones have been traditionally been considered a platform that only the government could deploy and use such platforms, but lately, drones have been outsourced to private civilian contractors or civilian controlled agencies. This is the case of the Central Intelligence Agency who is a civilian controlled governmental agency that coordinates drone strikes with the Pentagon. These types of cooperation, while also attributing different contracts to other private entities, has been more and more evident ever since Iraq or Afghanistan[53]. As of January 12, 2011, the Air Force has used UAS to deliver 906 Hellfire missiles and 201 GBU-12 precision guided 500 lbs. bombs against enemy targets[54], given the heavy manpower requirement, mission number growth, and demand for UAVs delivered armament, the Air Force, has greatly depended on contractors to maintain these medium and large category UAVs, and to perform intelligence data and video analysis.

A new report (*US Special Operations Command Contracting: Data-Mining the Public Record*), that analyses a US procurement database to shed light on the activities of US military special operations contracting has found that private corporations are integrated into some of the most sensitive counter-terrorism activities[55]. This report outlined that nearly 13 billion us dollars, in a 5 year period, got spent on projects from companies such as Lockheed Marti, L-3 Communications, Raytheon or Shee Atika, who had to either provide components or provide intelligence, surveillance and reconnaissance services or on-spot translation services.

Such situations show the growing extent of how private military and security and other intelligence, surveillance and reconnaissance companies have become vital in U.S.A. foreign policy decisions. It even went to the extent of hundreds of private sector intelligence analysts are being paid to review surveillance footage from U.S. military drones in Central Asia and the Middle East, according to a new report from the Bureau of Investigative Journalism[56]. By using contractors, the government can rotate military personnel from active duty to leave permissions, but this also means that private companies gets access to private and sensitive information, that may or may not be protected by privacy laws. The latest outsourcing will be done by the USA to India's Genpact LTD[57] and by this outsourcing, the company will get training for targeting and intercepting enemies and to do intelligence gathering operations, all while being under supervision of the US Department of Defense.

If the entire drone program will be outsourced to private companies then the ability to prosecute crimes will be forever diminished, similar to how the US handled private contractors in Iraq with the famous *Order 17*[58] which gave them immunity from Iraqi law, however, ever since 2007, Uniform Code of Military Justice was amended to allow for prosecution of military contractors who are deployed in a "declared war or a contingency operation". Other incidents that went unprosecuted were Abu Ghraib, the 2005 Trophy Video incident[59] and lately, STTEP International involvement in Nigeria[60]. Most of these incidents would fall under international law, which places legal obligations on states in areas under their jurisdiction or control to provide effective legal remedies for persons who have suffered violations of their fundamental rights. This includes state responsibility to investigate and prosecute serious human rights violations and violations of the laws of war by private persons and entities as well as by government officials and military personnel. Unfortunately, the US is the largest supplier of private defense companies in the world and it is also a state that is not a party to the Rome Statute, meaning that only national legislation could prosecute these contractors. While indeed the US Senate has laws pending to give the Federal Bureau of Investigation powers to investigate contractors that are activating abroad, the current legal framework prohibits the prosecution of civilians by military courts[61].

[53] Steven L. Schooner, Daniel S. Greenspahn, Too Dependent on Contractors? Minimum Standards for Responsible Governance, Journal of Contract Management 9, Summer 2008.

[54] 1 Lt Col Bruce Black, "The Future of Unmanned Air Power," The International Institute for Strategic Studies Conference, 20th April 2011.

[55] LeakSource.info, 9th September 2014, report accessible at the following link: http://leaksource.info/2014/09/09/ussocom-outsourcing-surveillance-drone-interrogation-psychological-operations-to-private-contractors-remote-control-report/

[56] Abigail Fielding-Smith, Crofton Black, Reaping the rewards: How private sector is cashing in on Pentagon's 'insatiable demand' for drone war intelligence, TheBureauofInvestigativeJournalism.com, 30th July 2015.

[57] Adam Carlson, CIA to outsource Drone Operations to India, NationalReport.net, 18th October 2015.

[58] Christopher Kinsey, Private Contractors and the Reconstruction of Iraq, Contemporary Security Studies, Routledge Publishing, 2009, p. 119.

[59] Steve Fainaru, Blackwater Employees Were Involved in Two Shooting Incidents in Past Week, Washington Post Foreign, 27th May 2007, p. A01, available on https://wikileaks.org/gifiles/docs/36/369911_-os-us-iraq-blackwater-s-earlier-scandals-coalition.html

[60] Colin Freeman, Nigeria hired South African mercenaries to wage secret war on Africa's deadliest jihadist group, Business Insider, 15th May 2015.

[61] Human Rights Watch, information accessible at this link: https://www.hrw.org/legacy/english/docs/2004/05/05/iraq8547.htm#_ftn4

4. Should the military have a monopoly on drone intelligence and armed strikes?

4.1. Why it should only be a military monopoly

Drone operators that operate under the US and its allies seem to also fall under international humanitarian law obligations, but lately the Russian Federation has been implementing carbon copies of the rules and regulations that the western states had until now, this being evident in the new drone regulation bill that Russia is expected to implement by the end of 2016[62] which states that: "*people or companies who own and use unmanned aircraft systems (also known as drones) must also appoint a crew and a commander responsible for flight safety. In addition, users of registered drones will have to write a flight plan and submit it to the regional body that coordinates air traffic. Just as with conventional piloted aircraft, once the flight plan is agreed the crew must follow it, with the right to conduct an emergency landing only in cases when public safety is under threat*."

Such actions are evidence that the western states have developed an influence in how the legal framework for drones will look under a global initiative, even thou a drone treaty is still to be drafted and adopted. In regards to military operations, armed drones should remain under regular armed forces since these types of weapon platforms wield different load outs that could not be possible for civilian usage. Case and point the new *Kanyon*[63] drone, a submergible drone that can is powered by a nuclear reactor and has the capability of nuclear armament. While the International Court of Justice Advisory Opinion on Nuclear Weapons[64] does not prohibit the owning of nuclear weapons it did however enforce the idea that such weapons must respect the law principles and customary norms of international humanitarian law and by doing so only lawful combatants could use such a platform. This is further nuanced seeing as how starting from 2013[65] and continued in 2015, after the accidental killing of aid workers[66] in April 2015 in Pakistan, the Obama administration reviewed the drone program to ensure that key elements are now governed by the Pentagon.

Back in 2005 the US had a power struggle inside its armed forces when the Navy and Army blocked a provision that was to be added in the national military program[67] regarding the oversight of the Air Force for any drone that could fly higher than 3 500 feet. The provision never made its way in the program, but currently the Air Force has the intention to revisit the decision and develop a centralized operation that would allow 90 drones to be flown in the same time under its direct control, while offering smaller drones to contractors, Special Forces and the Army.

Another reason to have a centralized agency governing drones is to have capable personnel apply the rules of international humanitarian law in a more direct and professional fashion, as opposed to how the CIA and Pentagon collaboration handled it until now[68]. This means that a committee of the Parliament, or in the case of the US, the Senate (Select Committee on Intelligence), could handle reports much better and not have different committees handle the same reports in such a way that could cause a bureaucratic slowdown. This means that in the case of the US this can only be accomplished by the Department of Defense operations, because the foreign relations committees cannot hold hearings on covert CIA drone strikes. Such a solution was already drafted in 2004, as the 9/11 Commission recommended that the "*lead responsibility for directing and executing paramilitary operations, whether clandestine or covert, should shift to the Defense Department*" to avoid the "*creation of redundant, overlapping capabilities and authorities in such sensitive work*."

4.2. Conclusions - Drone operators brought before courts

Current drone programs around the world lack any relevant case laws that could make or break the program, but even so, there are lots of cases based on the Freedom of Information Act from the USA that request the Office of Legal Counsel to issue opinions and memos regarding the legal status of targeted killings of people suspected of ties to terrorist groups[69]. Unfortunately, most of these lawsuits ended up with the *Glomar response*, meaning that courts did not confirm nor denied the existing of legal documents that can verify the orders and justification for drone strikes. In the case of the ACLU versus CIA[70], district court Judge Collyer issued ruling that even summaries of the drone program could compromise CIA structure, interests and involvement and as such could lead to disclosure of sensitive information. Later, the D.C.

[62] Kelsey D. Atherton, Russia's new drone rules look a lot like America's, Popsci.com, 4th January 2016.
[63] Bill Gertz, State official: Russian Nuclear-Armed drone sub threatens US, FreeBeacon.com, 2st December 2015.
[64] ICJ Legality of the threat or use of nuclear weapons Advisory Opinion of 8 July 1996.
[65] RussiaToday, Obama to hand over some CIA drone operations to the Pentagon, 21th May 2013.
[66] Jim Acosta, Obama to make new push to shift control of drones from CIA to Pentagon, CNN, 27th April 2015.
[67] Marcus Weissberger, Should one US service rule the military's drones?, Defenceseone.com, 24th August 2015.
[68] Micah Zenko, Transferring CIA Drone Strikes to the Pentagon Policy Innovation Memorandum No. 31, Council of Foreign Relations, April 2013.
[69] Derek Jinks, Applying International Humanitarian Law in Judicial and Quasi-Judicial Bodies, Asser Press, 2014, p. 83-86.
[70] Cody M. Poplin, D.C. District judge sides with CIA in Drone FOIA Case, Lawfareblog.org, 19th June 2015. Civil Action No. 10-436 (RMC).

Appeal Court rejected the CIA sensitive information case as President Obama admitted the CIA implications in drone strikes and as such the court forced the CIA to release documents or at least the admittance that they exist.

While the current Presidential Administration requests that the CIA should release more information on how its drone program functions, more and more quasi-judicial activities have started to open up, starting from Philip Alston report in 2005[71] and ending with the *May Revolution*[72], as it has been dubbed, the US started shifting its position from constantly blocking any action against its drone program to a more transparent policy where it can be asked through the Freedom of Information Act some issues regarding the legality of the program, it still failed to capture the sentiment that a court could hold accountable a pilot for his or hers actions, but also failed to point out an executive office or branch that is overseeing these drone strikes. While indeed, the U.N. Special Rapporteur, Ben Emerson[73], did see the US drone program in a new light, he did still outlined a lot of serious issues that the speech did not tackle now that it acknowledged that drone strikes have been undertaken. As a further plea for commitment, the same Judge Collyer who sided with the CIA, requested a memorandum from the Government explaining relevant information on the targeted strikes it carried in the Anwar al-Awlaki.

These types of lawsuits must not be looked upon as regular litigations, but rather be analyzed from a procedural stand point. A procedure to try and obtain information, even if it's just a denial or dismissal as it shows how the policies are relevant in such covert operations.

However, if one could seize the International Criminal Court to investigate alleged crimes committed by drone operators, then there are safeguards built into the Rome Statute which will protect the United States. The Court may return the issue to U.S. national courts because of the principle of complementarity. Additionally, the "gravity threshold"[74] may prevent the Court's jurisdiction[75]. Also, there is less clarity as to how the CIA's chain of command enforces the laws of war. If the CIA's chain of command does enforce the laws of armed conflict, then the CIA drone operators are combatants, entitled to the combatants' privilege but also liable to be targeted at all times. If the CIA's chain of command does not enforce the laws of war then the CIA drone operators are unprivileged belligerents. They could potentially face domestic criminal prosecution in places like Yemen or Pakistan, and they would remain targetable at all times as continuous combat functionaries rather than as combatants.[76]

While indeed Spain[77] and Italy[78]both tried to prosecute American soldiers for alleged crimes both abroad and inside their boundaries, both of them had to dismiss the cases, despite public outcry, due to the refusal of the US to offer cooperation in these matters.

These are just samples to how prosecution of drone operators could easily be dismantled in future cases against the drone program. This is further outlined in the recent air strike against Kunduz Hospital[79] where the lack of reaction from the US and its allies to the alleged war crime marks a low-point in how credible the judicial system against army personnel truly is.

As another point, even if a state was a member state of the International Criminal Court, they could still defer to prosecute the drone operators as part of the complementarity principle which allows a state to prosecute a person and allow the Court to observe the trial. Only if the Court is not satisfied with the trial or if the state is not able or willing to prosecute the person, only then could it have jurisdiction over said person.

As a conclusion, drone operations and by extent operators have come a long way but the current state of affairs is still unresponsive and not offering sufficient transparent decision making policies, issues that will only further damage the reputation of armed governmental forces once intelligent drones and autonomous weapons take over the battlefield. If these types of weapon platforms would become viable, then operators and commanders could become even harder to prosecute as they could simply state that it had technical difficulties or that its parameters were designed that way, thus making the manufacturer or even the software programmer liable. As it

[71] Derek Jinks, see supra note 70, p. 90.

[72] Barrack Obama U.S. Policy Standards and Procedures for the Use of Force in Counterterrorism Operations Outside the United States and Areas of Active Hostilities, Speech, May 2013.

[73] OHCHR.org, UN Special Rapporteur urges more clarity on Obama's counter-terrorism policies, 7th June 2013.

[74] Gravity Threshold: The Court investigates and prosecutes crimes of concern to the international community- genocide, crimes against humanity, and war crimes. These crimes "shock the conscience of humanity" and are of "worldwide concern."

[75] Lailey Rezai, U.S. Drone Policy and the International Criminal Court, American NGO Coalition for the International Criminal Court, 22nd July 2014.

[76] Michael W. Lewis, Drones and distinction: How IHL encouraged the rise of drones, Georgetown Journal of International Law, 4th May 2013, p. 1161-1162.

[77] Staff and Agencies, Spain forced to drop inquiry into 2003 killing of cameraman by US shell in Iraq, TheGuardian.com, 9th June 2015.

[78] John Tagliabue, 20 die in Italy as U.S. jet cuts ski lift cable, NYTimes.com, 4th February 1998.

[79] Medicine Sans Frontiers, 3rd October 2015, information accessible at: http://www.msf.org/article/afghanistan-msf-staff-killed-and-hospital-partially-destroyed-kunduz.

currently stands, drone operators may have the legal background to play fair as a member of the governmental armed forces of a state, they however will fall more and more under the tempting shield that is the unregulated field of drone warfare and its lack of judiciary mechanisms.

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DRONE LEGISLATION – A WAR OF ATTRITION

Andrei-Alexandru STOICA*

Abstract

Drones are considered a major breakthrough in robotics, yet, ever since their spearhead, lawmakers have fallen short in providing a clear body law that could be applicable to the emergent trend of unmanned vehicles. This sparks a question that needs to be answered, in short, are drones legal? Other issues that have arisen afterwards that have to be tackled must also find an answer. These issues have become more and more vocal in the halls of the United Nations ever since drone strikes and surveillance operations conducted by major powers on their own, or even carried by the United Nations in its operations, meaning that the core issue that must be worked upon is whether or not should the drone be used in extraterritorial law enforcement missions, United Nations or African Union operations or even in terrorist hunt operations, while also coming to grip with the concept of autonomous or intelligent drones being implemented in these types of procedures. Lastly, the focus on the usage of unmanned aerial vehicles has triggered a very important question, should drones have their own lex specialis?

To sum up, this paper will focus on answering issues regarding the legality of drones; the justification to use drones in key operations by states and international organizations such as the United Nations or African Union, but also to expand the acceptance of autonomous drones in such operations. Lastly, the paper will spotlight if a treaty prohibiting or containing the usage, selling and manufacturing of drones should exist.

Keywords: *drones, peacekeeping, anti-terrorist, autonomous, legality.*

1. Legality of drones in international law.

1.1. Definition of the drone according to primary and secondary sources.

Drones, or how the industry perceives them as unmanned devices and vehicles, represent a new wave of engineering prowess that can ensure that activities which were hazardous and difficult for mankind can be easily done by robotics.

The term *drone* is a notion that was attributed to a category of new types of vehicles that are also unmanned, a notion that is not entirely correct, since the industry is accustomed in using the term *UAV*[1]. The fact that the technology has gone beyond the usage in air commerce or air warfare, and currently is being employed in ground, maritime and space operations is just to show how reliable and useful it really is.

The usage of drones has only recently been brought to the attention of the general public, mostly in campaigns against terrorism, but also, civilian drones are emerging as a new, cheaper and safer way to transport goods, gather information and engage in entertainment activities. More recent, law enforcement agencies started using these platforms to monitor traffic or even persons. As technology progresses, drones are receiving a new upgrade, autonomous systems that can interact with its objective based on a set of parameters designed by a human[2]. This has lead states like the United States of America to introduce a new variable in an old equation regarding military advantages and operations, by conducting new means and methods of warfare with lower costs and less manpower while also capitalizing on obtaining an edge in combat. Such an edge could be considered the *Cicada*[3] drone, a small factor drone that has a special capacity in acquiring information without being spotted, while also having a very low cost of production making it very useful if it falls behind enemy lines or it has to be quickly abandoned. This drone has the capacity to be equipped with microphones, cameras and even sonars.

One of the leading pieces of technology is the X-47B[4], an unmanned vehicle that has a size similar to a modern fighter jet and has the ability to be autonomous, by recording and gathering information on its own based on parameters that the command center attributes to a mission, but this type of drone is still not intelligent enough to act on its own completely, still requiring an operator that can oversee its mission. The drone also has an easy approach since it can be used with just a mouse, without the need of a piloting gear or great piloting abilities. Currently, these types of drones can even be used without having to rely on a propulsion or

* PhD candidate, University "Nicolae Titulescu", Faculty of Law, Doctoral School, Public International Law (e-mail: **stoica.andrei.alexandru@gmail.com**).

[1] UAV Association, 2015, information obtained by visiting https://www.uavs.org/index.php?page=what_is; John F. Guilmartin, Unmanned aerial vehicle, Encyclopedia Britannica, 21 August 2015, accessible at http://www.britannica. com/technology/unmanned-aerial-vehicle.

[2] Patrick Tucker, The US Military is building gangs of autonomous flying war bots, 23 January 2015, Defenseone.com.

[3] Agence France-Presse, US Military's new swarm of mini-drones, 17 May 2015, Defensenews.com.

[4] Claw Dillow, What the X-47B reveals about the future of autonomous flight, 5 July 2013, Popsci.com.

rotary engine, since they can fly using air currents to glide[5].

Progress cannot however be allowed to go unhindered, meaning that while lawmakers did not manage to prevent UAV technology, in part or total, there may still be time to create a legal framework meant to clarify and prevent future issues. For example, Japan in has created a new task force under its law enforcement wing, meant to take down unmanned aerial vehicles[6], so that it can prevent issues similar to the one that happened on the 23rd of April 2015 when a man landed a drone, that was carrying cesium tainted sand, on top of the Prime Minister's office. The man was going to use it as a form of protest against the policies of the government.

Also, while current the debate towards classifying a drone as either a weapon or a platform for carrying and launching other devices or arms, an unmanned aerial vehicle does have an *opinion juris* understanding through the Harvard Manual on International Law applicable to Air and Missile Warfare[7], which classifies both as an all-purpose vehicle and also as a combat vehicle under the same meaning of an aircraft, but also as a platform for the equipment it uses, the *Commentary*[8] to the aforementioned Manual expands the notion towards all unmanned aerial vehicles, whether unarmed (UAV) or armed (UCAV), and whether remotely piloted or operating autonomously.

But as an emerging technology, it too must face the same fate as gunpowder did and must be tackled by the international community if it wants to prevent abuses. Currently, "*drones are not specifically mentioned in weapon treaties or other legal instruments of international humanitarian law. However, the use of any weapon system, including armed drones, in armed conflict situations is clearly subject to the rules of international humanitarian law*"[9].

The International Committee of the Red Cross went further by addressing the issues regarding drones at the United Nations General Assembly's 68th Session[10], on 16th of October 2013, where the message stated that: "*These means of warfare have been the subject of intensive public debate, notably in humanitarian terms. They are not expressly prohibited or regulated by existing treaties, but as with any weapon system, their employment in armed conflict must comply with international humanitarian law, in particular the principles of distinction, proportionality and precaution in attack. In this respect, the ICRC wishes to recall that, before developing or acquiring a new means of warfare, a State must assess its compatibility with international humanitarian law. This is necessary in order to prevent the development of weapons that would violate the law in some or all circumstances. […] A salient feature of armed drones is that they allow combatants to be physically absent from the "battlefield". These weapon systems remain under the control, albeit remotely and often from vast distances, of human operators who select targets and activate, direct and fire munitions carried by the drone. They are similar to manned weapons platforms such as helicopters or other combat aircraft and their use in armed conflict creates some of the same challenges: for instance, ensuring that attacks are directed only at military objectives and avoiding incidental harm to civilians to the greatest extent possible. Under international humanitarian law, those who operate armed drones are, like the pilots of manned aircraft, accountable for their actions."*

Committee stated back in 2011[11], when they envisioned a future where soldiers would be removed from battlefields by technology but also that the impact of lesser soldiers on the ground would translate to less humanitarian actions for civilian populations.

Notwithstanding, the Committee is very vocal on the usage of drones in armed conflicts or humanitarian operations since these types of devices have been the focus of the international community regarding its usage in the War on Terror.

1.2 Legal principles applicable to the usage of drones.

UAVs are governed by a set of rules that can be attributed to the law of armed conflict, meaning that it follows the *jus ad bellum* principle, meaning that states involved in using drones against each other or against non-state actors must comply with

[5] Ryan Maass, Navy tests cooperative soaring for UAV sailplanes, 6 January 2016, UAV News.

[6] Xinhua News Agency Staff, Drone laws tightening in Japan as police deploy air-to-air take down unit, 11 decembrie 2015.

[7] HPCR Manual, Humanitarian Policy and Conflict Research at Harvard University, 15 May 2009, Bern, Article 1, and paragraph 1, letters (dd): "Unmanned Aerial Vehicle (UAV)" means an unmanned aircraft of any size which does not carry a weapon and which cannot control a weapon. and (ee): "Unmanned Combat Aerial Vehicle (UCAV)" means an unmanned military aircraft of any size which carries and launches a weapon, or which can use on-board technology to direct such a weapon to a target.

[8] The Black-Letter Rules of the HPCR Manual, accompanying the Manual, 2009, Article 1, letter D, point 1 pg. 27.

[9] International Committee of the Red Cross, Interview with the president of the ICRC, Peter Maurer, 10.05.2013, and full interview can be read at: https://www.icrc.org/eng/resources/documents/interview/2013/05-10-drone-weapons-ihl.htm.

[10] The UN statement can be read here: https://www.icrc.org/eng/resources/documents/statement/2013/united-nations-weapons-statement-2013-10-16.htm.

[11] Philip Spoerri, Round table on new weapon technologies and IHL – conclusions, accessible at the following link: https://www.icrc.org/eng/resources/documents/statement/new-weapon-technologies-statement-2011-09-13.htm.

article 2 paragraph 4 of the United Nations Charter[12], but it also means that inside its own territory a state can overcome the threshold[13] and use an extensive force against non-state actors.

Another principle that is enshrined in the UN Charter is the principle of self-defense[14], a principle that was at first seen as only possible against the aggressions of another state, but seen from the point of view of the International Court of Justice in its 2004 Advisory Opinion[15] , suggests that the ICJ did not entirely rule out the possibility of self-defense against an armed non-state actor that commits terrorist acts where effective control was not exercised by the state under threat. This is further outlined by the separate opinion of Judge Kooijmans, who stated that:" *if the attacks by the irregulars would, because of their scale and effects, have had to be classified as an armed attack had they been carried out by regular armed forces, there is nothing in the language of Article 51 of the Charter that prevents the victim State from exercising its inherent right of self-defense*."

The two principles of necessity and proportionality must both be met if the use of force by a state claiming to be acting in self-defense is to be lawful. Failure to meet the criteria means that the use of force may even constitute aggression[16]. Proportionality is a balance of two different concepts, military advantage and civilian harm, thus the attacker must analyze whether or not the attack could cause more harm to civilian population than obtain a clear military advantage[17]. Drone operators have the same obligations as air force pilots, who must accept that civilian casualties are sometimes needed to obtain a military advantage. For example, in the Spring of 1944, the Allies planned to attack different segments of French and Belgian railroad elements that were close to some 80 000 civilians, but General Eisenhower took enough precaution as to cause as little harm as possible[18]. Later, Winston Churchill issued a statement that tried to justify the operation even if the damage was at its peak. Nowadays, the Geneva Conventions offer a wider protection to civilian targets, but that does not equate to a lawful applicability of said Convention.

Another example on how airstrikes have to be taken after a long deliberation is that of the hospital complex at Viet Tri[19]. While hospitals are unlawful targets under international humanitarian law, these civilian objectives were extensively used by North Vietnam as anti-air locations and as such Rolling Thunder had to be used even upon civilian targets that were critical but that turned into military objectives. The largest outcry by critics was that even thou the United States of America photographed and mapped out most of these cases, with drones, the air force still continued with the attacks upon the targets instead of exposing the war crimes.

While these are indeed customary norms of international humanitarian law and by extend applicable to armed forces equipped with drones, there are still other principles that must be further respected, notably the *precaution in attack*[20]. There are direct links between respect for the rules on precautions in attacks and respect for other customary rules applicable to the conduct of hostilities, notably distinction (discrimination) and proportionality, as well as the prohibition on using means or methods of warfare that are of a nature to cause superfluous injury or unnecessary suffering. Article 57 of the Additional Protocol I of the Geneva Conventions enshrines the idea that a high contracting party must take all feasible precautions in the choice of means and methods of attack[21] and this article that is considered customary law is applicable in both non-international and international armed conflict.

It is well known that different states have widely differing assessments of what is proportionate. Even close military allies, such as the UK and the USA, appear to differ materially on this issue. An instructive example occurred in Afghanistan in March 2011 when a UK Air Force drone killed four Afghan civilians and injured two others in an attack against insurgent leaders in Helmand province, the first confirmed operation in which a UK Reaper aircraft had been responsible for the death of civilians[22]. The USA in contrast started using Integrated Prioritized Target Lists, devised by

[12] Article 2 para. 4: [a]ll Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.

[13] Noam Lubell, Extraterritorial Use of Force against Non-State Actors, Oxford Monographs in International Law, Oxford University Press, Oxford, 2011, p. 8.

[14] Article 51: Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security.

[15] International Court of Justice, Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (Request for advisory opinion) Summary of the Advisory Opinion of 9 July 2004.

[16] Roberto Ago ,Addendum – Eighth report on State responsibility, Special Rapporteur – the internationally wrongful act of the State, source of international responsibility (part 1), Yearbook of the International Law Commission 1980, Vol. II (1).

[17] Rule 4 and 14 of the International Committee of the Red Cross's Customary International Law Study, Vol. I and II, 2009.

[18] Rebecca Grant, In search of lawful targets, Air ForceMagazine, February 2003, p. 4.

[19] W. Hays Park, Rolling Thunder and the Law of War.

[20] Stuart Casey-Maslen, Pandora 's Box? Drone strikes under jus ad bellum, jus in bello, and international human rights law, International Review of the Red Cross, Vol.94 Number 886 Summer 2012, p. 606.

[21] Also, Rule 17 of the International Committee of the Red Cross's Customary International Law Study, Vol. I and II, 2009.

[22] Nick Hopkins, 'Afghan civilians killed by RAF drone', The Guardian, 5 July 2011.

Department of Defense that had in 2009 over 300 names of individuals who were recruiting, financing or spreading terrorism but unless they were actively taking part in hostiles, simply doing petty crimes or offering money to terrorists could spark an unlawful strike upon the drone program[23].

In contrast, drone operations must comply with international humanitarian law in the same way nuclear weapons[24] must be used only under the customary international humanitarian law provisions, if a treaty or convention targeted at the weapon would not exist. This however is not sufficient for it to function since customary law in the area of military and civilian UAVs is non-existing and current aerospace legislation is only complementary. The lack of a treaty sparked a lot of dissent towards the largest manufacturers and users of drones in any type of operation, causing groups such as Drone Campaign Network, Code Pink, Drones Watch, Article 36 and the International Committee for Robot Arms Control to start movements aimed at drafting a *drone treaty*[25]. The groups hope to achieve the same results that non-governmental agencies achieved in 1995 and 1997 when they managed to draft and enforce the Ottawa Mine Ban Treaty. An attempt[26] in 2013 by non-governmental group The Global Network against Weapons and Nuclear Power in Space had ended without any support from states or governmental experts since up until now most attempts were aimed at banning drones instead of offering guidelines on using them.

The closest to a Drone Treaty that the international community has is the Human Rights Council Resolution 25/L.32[27] which forgoes the obligation that drone operations must comply with international humanitarian law and must comply with the principle that operators and commanders are liable for their actions.

1.3. The Arms Trade Treaty – future addendum that could help protect from abuses.

The Global Arms Trade Treaty is a multilateral, legally-binding agreement that establishes common standards for the international trade of conventional weapons and seeks to reduce the illicit arms trade. The treaty aims to reduce human suffering caused by illegal and irresponsible arms transfers, improve regional security and stability, as well as to promote accountability and transparency by state parties concerning transfers of conventional arms. The document is not an arms control treaty, and does not place restrictions on the types or quantities of arms that may be bought, sold, or possessed by states. It also does not impact a state's domestic gun control laws or other firearm ownership policies.

The Treaty is the product of nearly two decades of advocacy and diplomacy. After years of preparation, a UN diplomatic conference was formally convened in July 2012, but fell short of reaching consensus on a final text and another two week-long diplomatic conference was convened in March 2013 to complete work on the treaty. The treaty opened for signature on June 3, 2013, and entered into force on Dec. 23, 2014[28].

However, the Treaty does not directly address the issue of drones or unmanned vehicles, but rather relies on a list of weapons that is under the UN Register of Conventional Arms, a voluntary arms trade reporting system that mostly covers offensive weapons and lacks an oversight over small arms and light weapons. This however has been tackled by the Arms Trade Treaty as it covers these types of goods.

What the Treaty failed to address is the commercialization of unmanned systems, both radio-controlled and autonomous systems, which could have been done by extending the definition of combat aircraft that article 2 letter d of the Arms Trade Treaty. This was addressed in a report written by a UN General Assembly-mandated Experts and endorsed by Secretary-General Ban Ki-moon, recommended that "Member States report armed unmanned aerial vehicles" – weaponized drones – to the UN Register of Conventional Arms under that categories of "combat aircraft" and "attack helicopters"[29].

Sadly, the Arms Trade Treaty entered into force in December 2014, but has already been left in the past since it failed to address issues like unmanned vehicles, autonomous weapons or cyber weapons, meaning that the Arms Trade Treaty will only be as watertight as states' interpretation of it,

[23] Nils Melzer, Targeted Killings in International Law, Oxford Monographs in International Law, Oxford University Press, Oxford, 2008, p. 3–4.

[24] International Court of Justice Advisory Opinion on Nuclear Weapons, 1996.

[25] Ken Butigan, Envisioning an international treaty banning drones, 23 May 2013.

[26] Sputniknews, Global ban treaty drafted in Sweden, 26 August 2013.

[27] General Assembly adopted said document on the 24th of March 2014, full text is accesibile at the following link: http://www.un.org/ga/search/view_doc.asp?symbol=A/HRC/25/L.32.

[28] Shervin Taheran, The Arms Trade Treaty at a Glance, ArmsControl.org, January 2016; Amnesty International Q&A: Global Arms Trade Treaty enters into force, 22 December 2014 (Q&A accesible at https://www.amnesty.org/en/latest/news/2014/12/global-arms-trade-treaty-enters-force/).

[29] United Nations General Assembly Resolution A/68/140, Report on the continuing operation of the United Nations Register of Conventional Arms and its further development, 15 July 2013, accessible at: http://www.un.org/ga/search/view_doc.asp?symbol=A/68/140, p. 16-18.

especially as digital and robotics technology transforms the arms industry[30].

2. Drones in operations

2.1. Have there been enough drone operations to establish precedent?

The operation of drones should be regulated in a manner proportionate to the risk of the specific operation. The first armed strike launched from a drone was done in 2001 against Supreme Taliban Commander Mullah Omar[31] in Afghanistan, which it botched and caused the program to almost be closed when the Pentagon considered taking over the program from the CIA and repurposed it for Operation Enduring Freedom. The Operation was initially another boots on the grounds situation that would have ended with more casualties than it was needed to secure victory over the Taliban. By repurposing the drones and backing the Operation with almost 400 aircraft it allowed the USA to only send small teams that could help militias fight back while having air superiority against the Taliban. In November 2002, a Predator was credited with killing an al Qaeda operative in Yemen, who was thought to be responsible for the USS Cole bombing in October 2000, ever since the Obama Administration started using drones, there have been over 372 strikes in Pakistan alone[32]. As of 4th of March 2016[33], the United Kingdom had over 500 days of active duty missions for its drone fleet marking it as a very efficient way of dealing of foreign threats and also showcasing that one third of the strikes have been done by drones while also that no civilian death was linked to the program[34].

But as the US, UK, Israel, Russia and China are expanding their drone operations, Major General Stephen Schmidt, who commands NATO's AWACS early warning fleet, noted that armed UAVs did play a role in the recent Libya campaign. Yet the Alliance has no intention of heading down that path itself[35].

Despite Russia and China owning homemade armed drones, they have yet to deploy them in the same way the US has, but rather they use them as surveillance drones, as seen in Syria[36] and Ukraine[37], where by using drones, Russian forces and their allies can spot artillery and sniper positions and counter attack them.

2.2. Armed drones in peacekeeping and peace enforcement operations.

Drone missions have increasingly gain support even in the halls of the United Nations, ever since the Democratic Republic of Congo Peacekeeping Operation, as such they will steadily become a staple. In December 2013, the first UN drones began scanning the eastern Great Lakes region of the Democratic Republic of Congo, where one of the world's deadliest conflicts has seen militias, warlords and government forces battling over the mineral-rich district for more than 20 years[38]. The UN mission showed enough promise that a UN panel, led by Jean Holl Lute[39] (former US Homeland Security and senior UN Peacekeeping Official), managed to elaborate a report that requests further drones to be made available for UN missions. UN peacekeeping missions have used surveillance UAVs in other, less publicized instances, but typically during peacetime. For example, the Security Council in Resolution 1706 mandated the use of aerial surveillance to monitor trans-border activities of armed groups along the Sudanese borders with Chad and the Central African Republic[40]. The main issues that derive from the usage of drones by an international mission is regarding the usage of information gained via drones.

Possibly in anticipation of problems associated with the use of new technologies by the UN, as early as 1999 the General Assembly adopted a resolution[41] expressing concern that the latest information technologies and means of telecommunication that can potentially be used for purposes that are inconsistent with the objectives of maintaining international stability and security, and may adversely affect the security of states. This allowed the Secretary-General of the UN to issue a series of

[30] Matthew Bolton & Wim Zwijnenburg, Futureproofing Is Never Complete: Ensuring the Arms Trade Treaty Keeps Pace with New Weapons Technology, ICRAC, October 2013, accessible at: http://icrac.net/wp-content/uploads/2013/10/Futureproofing-ICRAC-Working-Paper-3-2.pdf

[31] Chris Woods, The story of America's first drone strike, TheAtlantic, 30 May 2015.

[32] Bureu of Investigative Journalism spreadsheet https://docs.google.com/spreadsheets/d/1NAfjFonM-Tn7fziqiv33HlGt09wgLZDSCP-BQaux51w/edit#gid=1000652376. Updated on 22 February 2016.

[33] Chris Cole, 500 days of British drone operations in Iraq and Syria, Dronewars.net, 4 March 2016.

[34] Mikey Smith, Michael Fallon claims there have been zero civilian casualties from air strikes in Iraq, Mirror, 2 December 2015.

[35] Chris Woods, Ten Years since first deadly drone strike, TheBureauofInvestigativeJournalism, 21 November 2011.

[36] Aljazeera, Russia drone footage shows devasted Damascus suburb, 21 October 2015, accessible at: http://www.aljazeera.com/news/2015/10/russia-drone-footage-shows-devastated-damascus-suburb-151021054441887.html.

[37] Sydney J. Freedberg Jr., Russian drone threat: Army seeks Ukraine Lessons, BreakingDefense, 14 October 2015.

[38] Sophie Pilgrim, Are UN drones the future of peacekeeping?, France24, 9 April 2015.

[39] Louis Charbonneau, UN panel urges increased use of drones in peacekeeping missions, Reuters, 23 February 2015.

[40] Kasaija Philip Apuuli, The use of unmanned aerial vehicles (drones) in United Nations peacekeeping: The case of the Democratic Republic of Congo, American Society of International Law, Vol. 18 Issue 13, 13 June 2014.

[41] UN General Assembly Resolution 53/70, 4 January 1990.

reports[42] regarding the usage of information and communications technologies as such information can be withhold from the general public.

Furthermore, in 2008, a United Nations civilian mission, dubbed MINURCAT, was deployed to protect refugees and humanitarian personnel in eastern Chad and Central African Republic. After one year, the United Nations overtook the mission and as such, they were to substitute the European drone pilots who were already using drones as part of their national standard equipment[43]. These types of equipment's allowed the United Nations troops to gain an advantage over the 2009 insurgent movement against refugees and humanitarian aid personnel. Another instance of drone operations under an UN mandate was in 2010 when the Nations Institute for Training and Research used satellite imagery to map disaster-stricken areas and in 2011 to map sites of internally-displaced persons[44].

The usage of drones hast not been uniformly welcomed by member states of the United Nations. In 2014, the Security Council debated on peacekeeping where China and Russia made a clear and in-depth study of legal implications and operational challenges that was required before drones can be considered a standard operating procedure in peacekeeping operations[45] since drones under the MONUSCO force brigade raised issues with how the image of the United Nations was handled when the Organization was picking sides in the conflict. This was after the Secretary-General of the UN, Ban Ki-moon, encouraged broader discussion of how peacekeeping could adapt to new demands; explaining that the groundwork should be laid for extending State authority, reinforcing efforts to ensure adequate force protection, and using all possible forms of technology to ensure that peacekeeping personnel operated more safely and cost-effectively[46].

Unfortunately, while the UN was celebrating a victory for technology, the Congolese rebels and governmental army started a new recruiting phase of their operations, where veterans of the wars in Iraq and Afghanistan have found work here as privately contracted drone experts[47], and with the lack of a proper ground operation from the UN, the conflict in Congo still has a long way to go.

2.3. Usage of drones in anti-terrorist operations and extraterritorial law enforcement operations.

The *Oxford Handbook of the Use of Force in International Law*[48] establishes a situation that outlines the most common situation of how drones in counter-terrorism operations are usually being handled. As such, where a territorial state is willing to take action against terrorists but is unable to do so and its territory continues to be improperly used for a reasonable time, the defending state may cross the border without its consent and dispatch military drones only for the sole purpose of eliminating the threat. As soon as it has been eliminated, the military force must leave the territory. This must be met with a limited scale and time span while affording the defending state more consistent compliance with the principle of double proportionality, meaning that a defending state can use precision strikes to take out cells, camps or the capacity of leadership of the terrorists.

This is just a theoretical outline for the legitimacy of drone strikes in counter-terrorism operations. A practical example is regarding *Reyaad Khan*[49] a British citizen was killed alongside other two other British citizens under the pretext of self-defense by the Royal Air Force in Raqqah, Syria. The weapon of choice by the Air Force was the drone and the motive was that of the alliegence towards Daesh. As the British Prime-Minister stated:"*We were exercising the UK's inherent right to self-defence. There was clear evidence of the individuals in question planning and directing armed attacks against the UK. These were part of a series of actual and foiled attempts to attack the UK and our allies. And in the prevailing circumstances in Syria, the airstrike was the only feasible means of effectively disrupting the attacks planned and directed by this individual. […] The United Nations Charter requires members to inform the President of the Security Council of activity conducted in self-defence. And Today the UK Permanent Representative to the United Nations is writing to the President of the Security Council to do just that."*

Here is just a sample of how drones are part of counterterrorism operations and how efficient they act. However, terrorism is not a stranger to using new technology as well. For

[42] Representatives of the Group of Governmental Experts on Development in the Field of Information and Telecommunications in the Context of International Security, UN Document A/68/98, 24 June 2013.

[43] John Karlsrud, Frederik Rosen, In the eye of the beholder UN and the use of drone to protect civilians, Stability – International Journal of Security & Development, p. Art. 27. DOI: http://doi.org/10.5334/sta.bo.

[44] UNOSAT First UAV Mission for IOM in Haiti. Unmanned Vehicles, February 28 2012, accessible at: https://www.unitar.org/unosat-carries-out-first-uav-mission-iom-haiti.

[45] David Curran, Trudy Fraser and others, Perspective on Peacekeeping and Atrocity Prevention: Expanding Stakeholders and Regional Arrangements, Springer International Publishing, Switzerland, 2015, p. 67.

[46] Security Council, Meetings Coverage, Delegates Argue Merits of Unmanned Arial Vehicles, Other Technologies as Security Council Considers New Trends in Peacekeeping, 2014.

[47] Somini Sengupta, Unarmed Drones Aid UN Peacekeeping Missions in Africa, 2 July 2014, NY Times.

[48] Marc Weller, Oxford University Press, 2015, United Kingdom, p. 1201 and following.

[49] Chris Cole, Briton killed by targeted British drone strike, dronewars.net, 7 September 2015.

example, the Aum Shinrikyo group or Al-Qaeda planned to use remote-controled airplanes to deploy sarin gas and to attack the G8 Summit in Italy[50]*. Going back to counterterrorism operations, the most drone hits that a state sustained up until now is Pakistan*[51] *with over 300 strikes and over 2700 confirmed kills.* Obama himself accepted the fact that drone attacks in Pakistan and Afghanistan have not been foolproof and there had civilian casualties, which for him are "heartbreaking tragedies", which would haunt him and those in his chain of command for "as long as we live"[52].

Such threats made the United Kingdom to rebrand its drone squads from Reaper Drones to Protectors[53]*, while also doubling it in size, meaning that they will focus on repurposing drones for both military and police activities. Other states, such as Ukraine and Russia, have adopted drones in their own counterterrorism operations, notably in the recent conflict between the governmental opposers and far right groups in Ukraine, where t*he press reported on UAVs having been shot down by various sides in Kyiv's war with Russian-backed separatist insurgents operating in Ukraine's far eastern Donbas region. Remarkably, the pressing military need to deploy life-saving unmanned systems during the Anti-Terrorist Operation in Donbas led the state to build a *People's UAV*, financed by the people, for the Ukrainian army. The drone reportedly would increase the survivability of the Ukrainian forces—particularly the airborne forces, which are continually threatened by the insurgents' man-portable, surface-to-air guided missiles. The crowdfunding campaign is ongoing since a drone of this caliber requires a minimum of 33 000 USD to be built, the Ukrainian General Staff says the military needs up to 100 such UAVs[54].

The indicated cases had been speculated beforehand by the United Nations Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism[55], in 2013, when Ben Emmerson launched an inquiry into the usage of drones inside asymmetrical warfare and counterterrorism operations and whether such authorizations would surmount to civilian casualties and the breach of the proportionality principle enshrined in the international humanitarian law. The Report states that in a situation qualifying as an armed conflict, the adoption of a pre-identified list of individual military targets is not unlawful, if based upon reliable intelligence it is a paradigm application of the principle of distinction, however human rights law prohibits operations that the only purpose is that of killing a person[56]. The statements go further and showcase the power of drones and other conventional air support capabilities of states in how NATO conducted operations in Libya. The paradigm that was applicable there was that on precision targeting that had collateral damage, but this case also was explicit enough to warrant a further check on transparency of the killings.

The rules of conduct established in targeting operations[57]in both counterterrorism operations and in other armed situations are those covered by international humanitarian law and human rights law. As such, the only ones to be targetable are those who are either under an organized armed group that has a sufficient degree of militarization and understading of how the rules of war apply, while also take up an active role in an armed conflict or have a continuous combat function. The same rule of targeting applies to civilians who also take part in the aforementioned cases, but are not members of said group. According to ICRC, examples of direct participation include taking part in a direct act of violence; transmitting information for immediate use in an armed attack; transporting equipment in close proximity to an attack; and acting as a guard, intelligence agent or lookout.

Furthermore, the intelligence needed for targeting is critical, as it is a component of the principle of distinction. Currently, there are a few types of targeting assesments[58], first of those being the classic high-value and high-risk target, like for example Osama bin Laden or Abu Bakr al-Bagdadi. This classification implies that the identity and function of the target is critical to the group's operations. The second category that could be used for targeting is that of targeting a group or individual who is part of the activity, this is the classic targeted killing objective who has a pattern of life analysis deployed against him. Past these patterns, the target could also be a location or a type of goods that can be exchanged or has a value for the target (for

[50] Dhrubajyoti Bhattacharjee, Unmanned Aerial Vehicles and Counter Terrorism Operations, Indian Council of World Affairs, 29 April 2015, pg. 5-6.
[51] Datasheet: "Drone Attack in Pakistan" (2015), South Asia Terrorism Portal, 2005-2016.
[52] Steve Coll, The unblinking stare, The New Yorker, 24 November 2014 Issue.
[53] Chris Cole, UK rebrands Predators as Protectors while ignoring difficult questions, Drone Wars UK, 5 October 2015.
[54] Maksym Bugriy, The Rise of Drones in Eurasia (Part One: Ukraine), Eurasia Daily Monitor, Vol. 11, Issue 113, 23 June 2014.
[55]United Nations General Assembly UN Doc. A/68/389, 2013.
[56]United Nations Human Rights Council A/HRC/14/24/Add.6.
[57]As established by international law and confirmed in the The Public Commission to Examine the Maritime Incident of 31 May 2010.
[58] See note 55, para. 74-76 and note 23, pg. 40-43.

example an oil decker[59]), but states also conceive a list of restricted or prohibited targets.

Later on, in 2014[60], Ben Emmerson updated the information on the issue of using drones in counterterrorism operations. This new report opened up with a series of questions regarding the legality of conducting counterterrorism operations outside of the origin state's borders and also if the preemptive doctrine still stands as a argument in favor of such a practice. These questions received a series of answers from states who were targeted by such operations (for example Yemen or Pakistan) and they claimed that a consensus for strikes had been reached between governmental and parliamentary agents and representatives, but they claimed to have also stated a series of rules of conduct which the assisting state ussualy does not follow. For example, Pakistan has been the target of sustained drone strikes because of the unwillingness of incapability of Pakistan do deal with terrorists on its territoriy, thus allowing in a tacit manner for the United States of America to invervene and assist the Pakistani government. This situation has been afoot since 2004[61], ever since the Bush Administration started to target the Tribal Areas along the Afghan-Pakistan border, since then, strikes had been ongoing inside the territory of both states. Although, the United Nations Charter under articles 2 para. 4 and article 51 would allow the usage of force against a terrorist group that is acting inside the territory of another state and certain conditions for that state would be met, critics of such a military doctrine went ahead and issued complaints, but recently, the German Federal Prosecutor General[62], alongside the USA Attorney General[63], concluded that drones who targeted and killed citizens from their states have been authorized in doing so by their respective state and under a legal justification and also that Pakistan had consented unofficialy to targeted killins inside the Federally Administrated Tribal Areas.

Also, the Prosecutor General rejects the oft-heard claim that the use of drones is inherently unlawful. While noting that the physical disconnect between the drone operator and target makes it harder to comply with the principle of distinction in certain circumstances, he emphasizes that in this case drones were operating where ground troops could not, but where the two reports contradict themselves is regarding whether or not the War on Terror could be justified to neutralize more people under a reasonable suspicion. The US General Attorney[64], however expresses that counterterrorism still focuses on the paradigm *kill or capture*, which is a paradigm that is applicable in armed conflict, while the Prosecutor General stated that human rights law is applicable in drone strike under counterterrorism operations and as such, the *capture before killing* paradigm is more appropriated.

The truth is somewhere in the middle, as a meta-study finds that: *" […] one reasonably consistent finding [...] is that drone strikes have little influence, positive or negative, on the amount of insurgent violence that occurs in Afghanistan. This is important, because one objective of the drone strike campaign is to weaken and undermine insurgent organizations based in Pakistan that launch attacks against American, Afghan, and international military forces"*[65], showing that for 26 alleged terrorists killed with drones, 1 civilian died as collateral damage.

While indeed current technology requires a *man-in-the-loop*[66], meaning that a robot is controlled by a human being and has no independent decision-making authority, the current trends forecast that intelligent weapon systems are being prepared and deployed around the world.

3. The new threat of intelligent drones.

3.1 What are autonomous drones?

Robotics is a chapter that is currently gaining a foothold in military operations, because it focuses less on exposing soldiers on the battlefield and rather on achieving more results with less money and resources invested[67]. As stated before, robots are not currently able to operate autonomously, but rather with a person or group of persons that handle the conduct and programming of the drone with the standards of international humanitarian law. Current Reaper drones require a team of minimum 168 people to operate[68]and usually require a lot of time to gather intelligence on targets and aquire authorization to commit to the plan, but if

[59] Loulla-Mae Eleftheriou-Smith, Russia release fresh footage of air strikes in Syria claiming to hit Isis oil targets, Independent, 27 December 2015.

[60] United Nations General Assembly, UN Doc. A/HRC/25/59, 11 March 2014.

[61] Mark Thompson, The CIA's silent war in Pakistan, TIME, 01 June 2009.

[62] Claus Kress, Aerial Drone Deployment on 4 October 2010 in Mir Ali/Pakistan, Germany Federal Prosecutor General, 157 ILD 722, Case No 3 BJs 7/12-4, 23 July 2013.

[63] Neta C. Crawford, Accountability for killing – Moral responsibility for Collateral Damage in America's Post-9/11 Wars, Oxford University Press, 2013, pg. 208-211.

[64] BBC interview with Eric Holder, Bin Laden death "not an assassination", BBC, 12 May 2011.

[65] James Igoe Walsh, The *Effectiveness of Drone Strikes in Counterinsurgency and Counterterrorism Campaigns, Strategic Studies Institute of US Army War College, September 2013.*

[66] Dan Saxon, International humanitarian law and the changing technology war, Martinus Nijhoff Publishers, Boston, 2013, pg. 71-73.

[67] A. Krishnan, Killer Robots: Legality and Ethicality of Autonomous Weapons, Farnham Ashgate, 2009.

[68] R. Johnson, US Civilians are now helping decide who to kill with military drones, Business Insider, 30 December 2011.

autonomous or intelligent drones would start being used, then they could cut-down on a lot of management and ensure that only a few human beings are needed to oversee the drones. For example, the Dalle Molle Institute for Artificial Intelligence[69] used a series of human hikers to map out a forest trail and tracked their time needed to traverse the location, afterwards, they sent a drone which had the images stored in its algorithm and allowed it freedom of exploration which it took and managed to find a faster route than the humans who first marked the trail.

This is backed up by the recent United States of America's Federal Aviation Administration's Notice[70] and Europe's Aviation Safety Agency[71] Guidelines which both allow autonomous computer boards to be installed and used in drones, and as a further notice, this technology is a industry standard.

Due to the secrecy shrouding military technology, it is difficult to ascertain precisely the current cutting-edge capability of military robotics. Prototypes are indeed publicaly shown, like the X-47B drone[72] which managed to do a autonomous refuel during flight, or Super aEgis II[73], a autonomous gun turret that can engage in self-defence different targets that are threatning the border of a state, to the latest Ocean Multipurpose System[74] that could launch nuclear missiles on its own. Professor William Boothby[75] stated that: "*weapons are tools of warfare, of killing, maiming, and destruction*" and as such the ICRC Guide to the Legal Review of New Weapons, Means and Methods of Warfare encompasses a similar approach, but fails to address drones or autonomous weapon systems, except the provision granted by article 36 from the Additional Protocol I of the Geneva Conventions which could be seen as a similar approach to how the 1868 St. Petersburg Declaration was considered the first major international instrument that prohibited the use of a specific weapon in armed conflicts[76].

In order to fully address the legality question of autonomous and remote weapons systems it is essential to consider how they are currently used. While autonomous and remote weapons systems may not be unlawful, the ways they are used may be. If such weapons systems are implicated in legally shady practices, however, it may justify a reconsideration of the legality question[77]. This raises the question of the requirement of distinction between civilians and military targets, or more precise, terrorist suspects. In armed conflicts, lawful targets are easy to spot since they have to have a weapon and be dressed in a military attire, however civilians who take part in the hostilities usually do not have any of the mentioned requirements, as such the discrimination would be possible since the current artificial intelligence would not be able to spot the difference. This is outlined by a lot of critics[78] who seem to focus on the fact that drones are man-made and programmed by humans, thus they do not rival human beings in thinking process. But what critics still miss-out on is that most states will not focus replacing the *man-in-the-loop* principle, but only give him less work as a pilot and more roles in oversight[79]. Without this lack of oversight and allowing full control for autonomous drones to take flight would lead to cases similar to *Bankovic* or *Alejandre*, since in both cases civilians were targeted and killed in international airspace by regular armed forces outside their legality, now the possibility of a drone to acquire a target on its own inside a forbidden would be a diplomatic and legal nightmare[80], which it is to say current drone strikes in Pakistan, Yemen, Somalia and Afghanistan are only the tip of the iceberg.

Another key criticism is that of proportionality, meaning that the use of force must be done in such a manner that it would prevent expressiveness of harm of civilian or civilian objects. This is highly outcry-ed since a computer could not distinguish between civilians and unlawful combatants. While current drone strike estimates81 contradict those from the

[69]Alex Brohaw, Autonomous search-and-rescue drones outperform humans at navigating forest trails, The Verge, 11 February 2016.

[70]Evan Ackerman, FAA Unveils drone rules: autonomy is in, drone delivery is out, IEEE Spectrum, 16 February 2015.

[71]Civil drones in the European Union, European Parliament Briefing, October 2015.

[72] Clay Dillow, What the X-47B reveals about the future of autonomous flight, PopSci, 5 July 2013.

[73]Andrew Tarantola, South Korea's auto-turret can kill a man in the dead of night from three clicks, Gizmodo, 29 September 2012.

[74] Jeremy Bender, Russia may be planning to develop a nuclear submarine drone aimed at inflicting unacceptable damage, Business Insider, 11 November 2015.

[75]William Boothby, Weapons and the Law of Armed Conflict, Oxford University Press, Oxford, 2009, pg. 229–230.

[76]Adam Roberts, and Richard Guelff, Documents on the Laws of War, Oxford University Press, Oxford, 2000, pg. 53.

[77]Hin-Yan Liu, Categorization and legality of autonomous and remote weapons systems, International Review of the Red Cross, Vol. 94, Nr. 886, Summer 2012, pg. 643-646.

[78] Marielle Matthee, Prigit Toebes, Armed conflict and international law: In search of the human face, Springer Publishing, Hague, Netherlands, 2013, pg. 56-58.

[79]As explained in the Unmanned Systems Integrated Roadmap FY 2011-2036, devised by the Department of Defence, United States of America; the report can be downloaded from: https://publicintelligence.net/dod-unmanned-systems-integrated-roadmap-fy2011-2036/.

[80]Directorate-General for External Policies of the Union, Human rights implications of the usage of drones and unmanned robots in warfare, Policy Department, 2013, pg. 15-17.

[81]Drone strike graphs gathered by an independent source: The Bureau of Investigative Journalism – Drone Strike Graphs, accessible at the following link: https://www.thebureauinvestigates.com/category/projects/drones/drones-graphs/

CIA82, whom claim that there had been zero civilian casualties or at the very least 1 civilian for 19-26 terrorists, by a large margin, with almost 1000 civilians killed and almost 2000 injured out of 4000 know hits on suspected terrorist targets, an autonomous drone would have to fill a very serious legal void to be able to fly and be allowed to target and kill a person suspected of terrorism or other serious crime, even with human oversight.

Lastly, if persons who fall under the criteria of injured, sick or hors de combat are not explicitly integrated in the programming of the drone, then they would end up being targeted, shadowed and killed, because of a faulty program or failing to provide enough information back at the human overseer. While critics still state that drones acting on their own could not understand a situation in which a human being would want to surrender or would state that he or she is injured, Samsung developed a technology and the necessary hardware for it to be used with, that allows a computer to recognize a person who wants to surrender by some universally accepted signs (raised hands, weapon over head) programmed into its sensors. The gear that it was developed is called the Techwin SGR-A1 Sentry Guard Robot83 and it allows for the weapon system to not fire on a person who meets the programmed requirements and also to track and give instructions to the person via built-in microphone. There are difficulties inherent in attempting to surrender to remote weapons systems, but these may be overcome, as in an example provided by a scholar, where Iraqi combatants effectively surrendered to an American remotely controlled UAV in the first Gulf War[84].

Unfortunately, technology has to progress further as robotics are currently better employed in repetitive tasks, quality assurance, mass manufacturing and underwater, airspace and cosmic exploration rather than being deployed on the battlefield. Automation has indeed come a long way to help humans to do menial tasks, which would usually end up in either a psychological fatigue or other physical pains (carpal tunnel syndrome)[85]

Current legal frameworks still fail to grasp the power of robotics and its growth spur, meaning that by the time a law or treaty has been passed, the next-generation of robotics will have already been deployed in both civilian and military fields, leaving the rest of mankind struggling to cope with the fallout.

3.2. Not enough legal guarantees to ensure usage.

To understand why legal guarantees are minimal at best, we first have to understand how other technologies evolved. For instance, certain types of conventional weapons such as the dum-dum bullets, chemical, bacteriological, incendiary, mines, blinding lasers and barrel bombs all have been outlawed or prohibited to some extent by international treaties, but this does not necessarily means that drones will follow suite, but rather that mankind has understood by now which path to take.

For this, scholars86 claim that drones have their own benefits, some that could actually be better handled than humans since its sensors are more advanced than a human eye and the microprocessor inside the drone can process information thousands of times faster than a human, as such the quality of the sensors and the programming code will make the difference between a botched operation and a precision strike that only harmed the intended target.

The precise determination of legality to deploy such systems will depend on the system itself, so having an international standard for the load-out may make the difference between a lawful strike and an unlawful one. This means that with enough information gathering and combinations, then the drone could actually refrain from targeting or killing a person until further analysis87. However, as Carl von Clausewitz (1832) stated: “the tendency to destroy the adversary which lies at the bottom of the conception of War is in no way changed or modified through the progress of civilization”, mankind usually forgets the errors from the past in the wake of the future. Scholars88 tend to remind combatants that morality and standards tend to be trampled during war and as such laws are disobeyed. What many others are contemplating is whether or not an autonomous drone or weapon system could actually be able to be more humane on the battlefield than a human being, but the answer is not so staggering since artificial intelligence learns traits from humans, just like Tay89, the Microsoft Twitter bot, learned to be genocidal and racist. This tied to current battlefield trends where a combatant will want to achieve revenge for their fallen friends, family or comrades in arms, we then have a seriously

[82]Scott Shane, C.I.A. is disputed on civilian toll in drone strikes , The New York Times, 11 August 2011.

[83]An overwiev of its functions can be found at this link: http://www.globalsecurity.org/military/world/rok/sgr-a1.htm,

[84]Peter W. Singer, Wired for War, Penguin, New York, 2009, pg. 56-57.

[85]Lucinda H. Cohen, Surrendering to the robot army: why we resist automation in drug discovery and development, Future Science, Bio-analysis 2012, ISSN 1757-6180, pg. 985-987.

[86]Justin McClelland,The review of weapons in accordance with Article 36 of Additional Protocol I , International Review of the Red Cross, Vol. 85, No. 850, 2003, p.g 404.

[87]*Ronald Arkin*, Ethical Robots in Warfare, Technology and Society Magazine , no. 1, Spring 2009.

[88]Ronald Arkin, The case for ethical autonomy in unmanned systems, Georgia Institute of Technology, United States of America, pg. 1-3, accesible at this link: http://www.cc.gatech.edu/ai/robot-lab/online-publications/Arkin_ethical_autonomous_systems_final.pdf

[89]Abigail Beall, Microsoft's artificial intelligence Twitter bot has to be shut down after it starts posting genocidal racist comments one day after launching, DailyMail, 25 March 2016.

dangerous concoction that can spill over in programming as well.

So the real threat to humankind is not whether these drones should be legal or not, but rather if we as a species have evolved enough to understand the need for robotics and artificial intelligence, or based on current trends, we would just be using a drone in the same way as a person would use a gun or knife. Incidents have already happened where persons modified common civilian drones do be equipped with guns or even flamethrowers90 and would only be one step away from using them in highly dense urban centers.

The proliferation of robotics and autonomous weapon systems will become a major trend in the future of warfare. These machines guided by radars, sensors, artificial intelligence, without the need for rest and able to operate equally good in all weather and terrain conditions will slowly push out the humans from some military tasks. Though the absence of human presence can be useful in terms of better combat efficiency and less casualties, it is questionable if these robots can show morals, war ethics and even mercy towards enemies, regarding them as human beings. However, the real test of drone legality will come once responsibility for a strike will be required, seeing as how currently the CIA dismisses civilian casualties and with the recent killing of cases of Reyaad Khan, Anwar al-Awlaki and even Samir Cirsten, citizens of western civilizations (United Kingdom, United States of America and Germany), the problem of responsibility has been brought un against the agencies who are authorized to conduct such operations, but unfortunately the cases were dropped by courts due to the secrecy shrouding the operations91. Clearly a human must stand trial for the harm a machine inflicted, but the problems associated with responsibility are further compounded by the atomized approach of the law to questions of responsibility; that is, that it seeks to attribute responsibility to a concrete and definable entity for the creation of some specified effect. This has implications that not only one human is responsible, but rather an entire network of personnel, since a drone requires a team that sometimes stands to a number of hundreds (a personnel of 300 just for one Global Hawk), could spill a disaster for victims who are trying to get justice for their loved one92. These is similar to how a bee hive works, where there is no singular will but rather a hive mind.

4. Why a drone treaty is needed.

4.1 Failed attempts and the reason they were counterproductive.

Failed attempts have been made up until now regarding the inclusion of drones and lethal autonomous weapon systems in the Arms Trade Treaty, however other strategic movements such as the World Social Forum in Tunisia (March 2013), the annual United Nations Convention on Certain Conventional Weapons Meeting of Experts (more precisely the time frame of 2013-2016), United Nations Human Rights Council and the European Union Parliament, not to mention NATO forums, all of these are trying to find a legal framework that would fit in with the current development trends, but sadly, the time consuming negotiations and inefficient propaganda has led to a stalemate.

This stalemate is caused by misinterpreting[93] drones as a system, since both Russia and the United States of America still consider drones to be classified as missiles and as such must comply with the Intermediate-range Nuclear Forces Treaty (1987) since they have to be launched by a platform. Another factor for the stalling of adopting a legal framework is the non-governmental[94] movements who want to ban drones altogether and do not want to engage in negotiations but rather just enforce their own point of view, which is counterproductive. International law through the International Court of Justice in the case of the *North Sea Continental Shelf*[95]that parties should start negotiate in the hope of reaching a consensus and should not only try to achieve their own agenda, but rather think about the other parties needs as well. The same principle of negotiation sparked treaties such as the Non-proliferation Treaty or the START Treaty, both of which had at their core the International Court of Justice Advisory Opinion on Nuclear Weapons. Even these latter examples did not end up prohibiting nuclear weapons and this is exactly why the initiative that came from Sweden in 2013 failed.

[90]Ben Popper, The teenager behind the drone gun now has a drone-mounted flamethrower, The Verge, 08 December 2015.

[91] For example, in the Al Aulaqi vs. Panetta (United States of America District Court of Columbia Case JDB 10-1469), the Center for Constitutional Rights and the American Civil Liberties Union tried to force the CIA to take up responsibility for their strikes and to release information on how they acquire targets and execute them with drones, but sadly the Court dismissed the case based on the fact that the CIA documents are protected via state secrecy. Recently, British families whose children went to fight for Daesh, could litigate the UK Government for extra-judicial executions, unless the UK will publish some legal justifications for these targets. (DailyMail, 8 September 2015 - http://www.dailymail.co.uk/news/article-3225456/Families-ISIS-fanatics-sue-Britain-millions-RAF-drone-strike-seen-extra-judicial-execution.html).

[92] Mark Coeckelbergh, From killer machines to doctrines and swarms, or why ethics of military robotics is not (necessarily) about robots ,Philosophy and Technology, Vol. 24, 2011, pg. 273.

[93] Tim Farnsworth, Moving beyond INF treaty compliance issues, ArmsControlNow, 5 September 2014.

[94] See supra note 26.

[95] International Court of Justice, judgment 20 February 1969.

Other reasons why the current drone situation has been ongoing without a proper treaty may include issues with the opportunity to adopt written rules for the entire international community. Currently, the United States of America, the European Union, Russia[96] and China[97], all follow similar rules with other states like India, Iran and Israel following close behind in similar, albeit adapted legislation. Ongoing issues with other forms of legislation is the lack of a compliance mechanism to include drones under the Wassenaar Arrangement on Export Controls for Conventional Arms and Dual-Use Goods and Technologies[98], mainly because there is no proper watchdog agency to count the sales of drones.

The United Nations Security Council has begun imposing drone technology in certain armed conflicts, like the one in Ukraine, where through Resolution 2202[99] (2015), where the usage of drones is to be allowed to document the ongoing situation, this resolution being followed up from the MONUSCO mission, where drones proved that they can be a game changer for the international peacekeepers or observatory missions.

4.2. Conclusions from NGO-Governmental talks. A legal war of attrition.

The year 2015 brought hope that a drone treaty or convention is in the works, as the United Nations Convention on Certain Conventional Weapons Expert Meeting that was held between the 13th and 17th of April heavily focused on Lethal Autonomous Weapon Systems and also on the 23rd of October, discussion at the United Nations Office for Disarmament Affairs offered a proper insight towards what governments around the world consider drones, and in particular armed drones. These negotiations allowed the rest of the world to voice out their suggestions through the non-governmental organizations, who took their turn to explain that drones must comply with article 36 of the Additional Protocol I of the Geneva Conventions[100], the ICRC being actually content with progress so far, while others such as the Article 36 group[101]who voiced discontent with how the United Nations not only handles armed drones, but how it handles the usage of armed drones in situations such as Yemen, Pakistan, Gaza or Ukraine, where drones alongside other forms of prohibited ammunitions are being deployed by parties. Another discontent party is the International Committee for Robot Arms Control[102]who voices concern about not equipping drones with sub-lethal or less-than-lethal weapons and only going for heavy weapons and ammunition since these types of means and methods are used in armed conflicts and not a general purpose, in which a state may conduct police activities. ICRAC urges States Parties to continue their work in the forum and others, starting with an open-ended Group of Governmental Experts and moving to substantive negotiations on a preemptive prohibition of all weapons systems that lack meaningful human control over all individual attacks. Increased transparency and better weapons reviews, while crucial, are not enough[103].

Such statements only show how governments try to understand a potential technologic breakthrough, while the non-governmental agencies try to push a one-sided negotiation, thus failing to comply with the founding principles of adopting a treaty, negotiations and the common good orientation.

In conclusion, this paper was meant to be an informative document on how drone technology and drone laws have evolved over the past 3 years, but also its scope was to show that preemptive banning of drones would cripple a new industry that can create over 150 000[104] new jobs, in Europe alone, by 2050. A project for at least 100 000 working spaces related to drones has already begun in the United States of America[105], with many drones being used in farm work and governmental safety and security[106], such as firefighting or police surveillance.

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[96] Edwin Kee, Russia looks into drone registration rules, Ubergizmo, 29.03.2016; Kelsey D. Atherton, Russia's new drone rules look a lot like America's, PopSci, 4 January 2016.

[97] Miriam Mcnabb, China's new drone regulations, DroneLife, 19 January 2016.

[98] 1996; is to complement existing export control regimes aimed at preventing or constraining the proliferation of weapons of mass destruction and their means of delivery.

[99] Meeting coverage can be accessed here: http://www.un.org/press/en/2015/sc11785.doc.htm

[100] CCW Meeting of Experts on "LAWS", 17 April 2015 Closing statement by the International Committee of the Red Cross (ICRC), accesible at: http://www.unog.ch/80256EDD006B8954/(httpAssets)/E2917CC32952137FC1257E2F004CED22/$file/CCW+Meeting+of+Experts+ICRC+closing+statement+17+Apr+2015+final.pdf

[101]Statement by Article 36 to the Convention on Certain Conventional Weapons Geneva, 12 November 2015, accesible at: http://www.article36.org/wp-content/uploads/2015/11/CCW-Statement-Nov-2015.pdf

[102] ICRAC opening statement to the Convention on Certain Conventional Weapons Geneva, 13 April 2015, accesible at: http://www.unog.ch/80256EDD006B8954/(httpAssets)/720A8B54CB5DD46DC1257E2600609A83/$file/2015_LAWS_MX_ICRAC.pdf

[103] ICRAC Closing Statement to the Convention on Certain Conventional Weapons Informal Meeting of Experts at the United Nations in Geneva, delivered by Dr. Matthew Bolton, accesible at: http://www.unog.ch/80256EDD006B8954/(httpAssets)/62045282E84824EFC1257E2D004BF2B7/$file/2015_LAWS_MX_ICRAC_WA.pdf

[104] Lords Select Committee, Drone industry could create 150,000 jobs in EU, United Kingdom's Parliament.

[105] Tim Fernholz, The US Drone economy will create 100,000 jobs, say companies who make drones, Quartz, 12 March 2013.

[106] James Vincent, Firefighters use drone to help rescue stranded rafters, The Verge, 2 July 2015.

The real attrition is whether technology breakthroughs can push lawmakers into adopting *living* legislative tools, meaning that they adopt and modify new rules without having to repeat the preceding steps, thus engaging in invigorating the economy and other economic activities, without punishing or restricting technology in such a way that would cut interest in a technology that could one day be pushed to help explore space or other unreachable locations for human kind.

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THE ROLE OF THE PRESIDENT OF ROMANIA IN THE GOVERNMENT INVESTITURE PROCEDURE

Cătălina SZEKELY[*]

Abstract

Nowadays society is very active and susceptible of continuous, rapid changes in all its sectors, and, therefore, the political geography and its actors are also changing at high speed. In such a context, one needs landmarks and authorities able to operate effectively and to give stability to the society they govern.

The literature identifies a two-headed executive and the President as the representative of the Romanian State and the guarantor of its unity and territorial integrity. One is not to ignore the role of the Romanian president as the mediator between the social system components, mediator which is to provide and guarantee their balance.

The paper aims at analyzing the investiture procedure of the Romanian Government and it will focus on several controversial issues related to the procedure. There will be also investigated a series of laws and the legal doctrine that addresses this topic. In the final section of the article, the author will draw a series of personal conclusions derived from this analysis.

Keywords: *Authorities, mediator, President, Romanian Government, law.*

1. Introduction

The organization and governing of the society concern both political leaders and researchers in various fields. The discussion on the issue of governance and the authorities having powers in this respect is not just a topic in the field of public law, it also represents an object of research in the fields of philosophy of law, political science, sociology and so forth, as all these areas contribute to the proper functioning of a society. It is undisputed that the theme is mainly approached in public law literature. The paper has the following objectives: to analyze the procedure of Government investiture and the role played by the President in this procedure and to analize several opinions expressed in the doctrine in order to identify aspects that might contribute to a more coherent and efficient government of the Romanian society so that it may achieve the desired development. The existence of clear procedures, and, most of all their compliance, but not least, the good faith of leaders who have not only legal but also moral duties towards the population they represent, may become the keys to good governance. How to govern a society has concerned philosophers ever since Antiquity and in time, it has been taken over and continued by other authors. At the local level, the concerns in this respect manifested from the very foundation of the first forms of state organization and they have continued ever since. We shall analyze not only the literature in the field of public law, but also the legislation in order to make reasonable proposals for a ferenda law.

2. Considerations on state organization

Aristotle dicusses the Athenian constitution and the functioning of the Greek city, an archetype still valid nowadays, with all the adaptations that naturally occur due to the inherent social evolution. "The constitution prior to Dracon stipulated that: all public offices were in the hands of the noble or the wealthy. Services were at first for life, and then they lasted for ten years. The most significant and oldest were those of King, captain of the army (the polemarch) and of archon. [...] Thesmotets (i.e. law-makers) appeared much later, at a time when jobs were annual, as only in this way one can explain why out of the nine archons, only the thesmotets were elected for just one year. They were commissioned to keep the text of the law and to put it at the disposal of those who had the skills to judge."[1] One can notice that in his work Aristotle tackles the problem of public services and their role in solving state problems. There emerges the idea of separation of powers. The so-called "makers of laws" had the duty of keeping the text of laws and to help those in charge with resolving any disputes that might arise.

"In any state, there are three parties, with which the legislature will deal, if sensible, so that to organize them and to consider their individual interests before anything else. Once these parties are well organized, the state iself, as a whole, is necessarily well organized; therefore, states can not really be distinguished, if not by judging the different organization of these three elements. The first is the general meeting that deliberates on public affairs; the second is the judiciary, on which one must decide the nature, competences and the

[*] PhD Lecturer, Petroleum-Gas University of Ploiești (e-mail: **catalinaupg@yahoo.com**).

[1] Aristotel, *Statul atenian, apud* Anuarul Institutului de Studii clasice (1928-1932). Part I, pp. 54-64, Antet Publishing House, Bucharest, *sine anno*, pp 20- 21.

appointment; the third is the judiciary."[2] Aristotle, like his predecessors, was a visionary. The origin of the rule of law is to be found in ancient times, even if it is far from the concept of nowadays democracy. "Over its historical evolution, the political organization of the society, especially through its main institution - the State - has based more and more on perfecting the state structures in relation to citizens and on rigorous laws, which set both the rights and freedoms of citizens, as well as the obligations of state authorities to act within the law." [3]

„The Athenian democracy - if one goes from myth to reality – was, though, far from being flawlessly democratic, at least if considering the norms today. It related only to a small part of the population: people exercising their sovereignty represented a mere minority! Slaves were, naturally, excluded, though they were more numerous in Athens than citizens; the metecs (i.e. foreigners) and, obviously, women were also excluded." [4]

In spite of all these "imperfections", it is remarkable the concern for how a city should function and, especially, the individuals' being involved in public affairs, thus becoming true "citizens". The rule of law turns into a priority and it represents the state where law is applied and all authorities function according to it.

There can be identified the following features of the rule of law[5]:

- the existence of an adequate legislative framework, i.e. the principle of the Constitution supremacy being applied;
- state bodies, regardless of their position in the system of authorities, should be chosen - where appropriate - by means of universal, direct and secret vote;
- the existence of powers separation, namely the parliament as the legislative authority, the government as the executive power and the judiciary power;
- the distinction between the state and the political parties;
- military forces and the police should be under the supervision of civil society;
- guaranteed freedom of expression and access to information, as well as the political and professional organization of citizens, make possible the control of power by the civil society;
- the guarantee and respect of citizens' rights and freedoms.

When analyzing the opinions expressed, it can be seen that everything revolves around the law and complying with it. An important role in this respect is played by the Parliament, as the one that creates the legislative framework necessary for a society to function.

"The sovereign, having no other power than the legislative one, works only by means of laws; as the laws are nothing but authentic acts of the general will, then the sovereign would not know to work unless the people gather. One might say: the people gathered, what an idea! It is true, today it is an idea, but it used to be a fact two thousand years ago. Is it possible that people have changed their nature that much?" [6] Today, one discusses the theory of the mandate and the responsibility that resides in it. People can not actually govern as a whole. For this reason, there shall be appointed representatives to do so. Theoretically, sovereignity and power itself belong to the people, but they can be exercised only by appointing their representatives in public offices.

"As for the modern state, to apply direct democracy is virtually impossible, it can not be doubted that parliamentarism is the only really possible form of the idea of democracy." [7] The application of the principle of participation is achieved not only as direct participation, but also as participation through representatives. Based on this general elective rule, there have been attempts to rediscuss the precept of mandate: by voting, the voter gives to the elected a mandate that can not be ignored by the elected one. In other words, the representative is a delegated person; but giving the vote to the delegate, through which the elector frees themselves of their own prerogatives, means not assuming their choices? [8]

When does citizen involvement disappear? Ideally, the individual must be an active citizen and concerned with the „affairs" of their city. They may not just invoke respect for fundamental rights and freedoms. There is no such thing as a part-time citizen. Being an ideal citizen implies taking decisions, but also empowering the political class. It means educating the whole society so that it may become active in a real mode. Awareness should not arise periodically, only when elections. They must be just the climax.

Niccolo Machiavelli has pragmatically developed a number of theories on how ro rule a society. Because of his pragmatism, the Italian philosopher and politician was misunderstood. "Everyone understands that one is to apraise a prince

[2] Aristotel, *Politica*, translation by El. Bezdechi, Antet Publishing House, Bucharest, *sine anno*, p. 152.
[3] Călin Vâlsan (coord.), *Politologie*, ASE University Press, Bucharest, 1994, p. 81.
[4] Lucian Boia, *Mitul democraţiei*, Humanitas Publishing House, Bucharest, 2015, p. 15.
[5] Călin Vâlsan (coord.), *op.cit*., p. 82.
[6] Jean Jaques Rousseau, *Contractul social, sau Principiile dreptului politic*, translation by N. Daşcovici, Mondero Publishing House, Bucharest, 2007, pagina 99.
[7] Domenico Fisichella, *apud* Kelsen, *Ştiinţa politică. Probleme, concepte, teorii*, Polirom Publishing House, Iaşi, 2007, p. 258.
[8] *Idem*, pp. 260-265.

that keeps his word and proceeds honestly, and not cunningly. However, the experience of our times has proven that the princes who have done great things were in fact those who did not take too much account of their word and who knew, in their cunningness, to play with people's minds, and in the end, to defeat those who had trusted their honor." [9] It is a tough lesson addressed not only to political leaders, but to all people. Machiavelli considers that "there are two ways of fighting: one based on laws and the other - on force: the former is intrinsic to people, whereas the latter belongs to animals; but, as the former is not always enough, one has to resort to the latter. Therefore, a ruler has to know how to be both animal and human."[10]

Going even further back in time, Plato analyzed the link between politics and morality, between governance and the human qualities that a sovereign should have: "he is one of the first to consider human qualities and morality as central issues of politics. In this respect, good governance of the city depends only on the circumstances in which laws are established or on the form of the political constitution. A good, correct politics, the one that puts justice into practice, lies in the moral qualities of every citizen, in their virtuous soul, in the aspiration to common happiness and in the contempt towards personal wealth. Government is good when every citizen is able to act according to the Good."[11]

Governance may be defined as the activity of political leadership of a state. [12] What is governance in Romania? "Ever since Romania broke with totalitarianism, we have been witnessing acts and deeds of the legislature, of the executive and of the courts, through which they will prove they are separate powers in the state, defining themselves as such."[13]

According to the Romanian Constitution, the Romanian state is organized and operates according to the principle of separation and balance of powers – namely the legislative, executive and judiciary one- within the framework of the constitutional democracy. Complying with Constitution, its supremacy and with the laws is not optional, it is mandatory. [14] As one can notice, separation of powers does not imply the lack of any form of links. These powers, represented by authorities, be them elected or appointed according to the procedures in place, collaborate, supervize each other and are in constant balance.

The legislative power, responsible for passing laws, is the Parliament, in case of Romania - a bicameral parliament, consisting of the Chamber of Deputies and the Senate; the judiciary power is represented by the High Court of Cassation and Law and other courts, whereas the executive is responsible for the enforcement of the laws adopted by Parliament. "The executive is the generic name used for the third branch of power (along with the legislative and the judicial ones) represented mainly by the government."[15]

Most of the opinions expresses in the doctrine identify a two-headed executive consisting of the Government and the President. "The President belongs to the executive, he is one of the two heads of the executive, holding several executive powers, such as those in the fields of defense, foreign policy, appointment to public offices etc." [16]

There have been expressed other theories on the status of the President of Romania, with respect to their falling within the executive or legislative power, suggesting the idea that the President does not belong to either of those powers. [17]

We consider that some aspects should be taken into account, such as the duties stipulated by the Constitution for the Romanian President, in relation to several other authorities:

- in relation to the Parliament: the President summons the newly elected parliament, not later than 20 days after the elections; he promulgates the laws adopted by the Parliament; he addresses messages to the Parliament; he dissolves the Parliament after consulting the chairmen of the two Chambers and the leaders of parliamentary groups, unless he gave the vote of confidence to form a government within 60 days after the first request and only after at least two requests for investiture have been rejected. The dissolution may be done in certain circumstances, but never within the last 6 months in office as a President, or when it was decreed a state of war, mobilization, siege or emergency;

- powers in the field of foreign policy: the President concludes international treaties, priourly negotiated by the Government, and then submits them to the Parliament for ratification, within a reasonable time; he accredits and recalls diplomatic representatives of Romania, and approves the

[9] Niccolo Machiavelli, *Principele*, translation by Nina Façon, Antet Publishing House, Bucharest, *sine anno*, p. 62.
[10] *Ibidem.*
[11] Olivier Nay, *Istoria ideilor politice*, translation by Vasile Savin, Polirom Publishing House, Iași, 2008, p. 60.
[12] Verginia Vedinaş, Teodor Narcis Godeanu, Emanuel Constantinescu, *Dicţionar de drept public. Drept constituţional şi administrativ,* C.H.Beck Publishing House, Bucharest, 2010, p. 71.
[13] Ioan Alexandru, *Democraţia constituţională, utopie şi/sau realitate*, Universul Juridic Publishing House, Bucharest, 2012, p. 94.
[14] The Constitution of Romania – revised and supplemented, published in *Monitorul Oficial al României*, Part I, no. 758/ 29 October 2003, art. 1, alin. 4 şi 5.
[15] Anton P. Parlagi, *Dicţionar de administraţie publică*, Economică Publishing House, Bucharest, 2000, p. 62.
[16] Verginia Vedinaş, *Drept adminsitrativ*, 7th edition, revised and updated, Universul Juridic Publishing House, Bucharest, 2012, p. 34.
[17] *Ibidem* , apud V. Bara.

establishment, disestablishment or change of rank for diplomatic missions, at the proposal of the Government;

- atributions in relation to the judiciary power: the President appoints judges and prosecutors, excepting the ones still in training, at the recommendation of the Supreme Council of Magistracy; he grants individual pardons;

- in the field of defence: the President is the commander of the armed forces and the chairman of the Supreme Council of National Defence;

- duties in relation to the Government include: the President appoints the new government, based upon the vote of the Parliament; he participates in the meetings of the Government; he chairs the meetings where there are debated matters of national interest on foreign policy, defense, public order and, at the request of the Prime Minister, in other situations; the President dismisses and appoints some members of the government at the proposal of the Prime Minister.

Therefore, the President of Romania has a number of responsibilities falling not only within a single category of power. It is undisputed that he cannot be enclosed as constituting only the legislative power along with the Parliament, nor he is superior to other powers. We do not think that the President may be confined only to the sphere of executive power. As already mentioned, the Romanian President has responsibilities in various fields and he plays a mediating role between the state powers. Therefore, provided one placed him exclusively in the sphere of the executive power along with the government, the role as a mediator would be questioned.

Article 80 from the Constitution identifes the roles of the President of Romania, as follows:

"1. President of Romania represents the Romanian state and is the guarantor of the national independence, of the unity and territorial integrity of the country.

2. The President of Romania shall guard the observance of the Constitution and the proper functioning of public authorities. To do so, the President shall act as a mediator between the powers of the state and between the state and the society."

The Head of State also has popular legitimacy, just like the Members of Parliament, as he is elected by means of uninominal vote, within a constituency covering the entire statal territory. If one candidate obtains the majority of votes, he would effectively ensure representativeness and legitimacy. If no candidate wins a majority of votes in the first round, there will be hold a second round in which there participate the top two candidates, as determined by the number of votes obtained."[18]

After the validation of the results, the President shall take the oath, as stipulated in the Constitution, and will exercise his office for five years. Of course, there may be circumstances when the mandate may end earlier than 5 years. Presidential vacancy occurs in the following situations: resignation, dismissal from office, permanent inability to complete duties, or death. The interim is ensured, in order, by the President of the Senate or by the President of the Chamber of Deputies. When analyzing the text of the Constitution, it can be concluded that the order of the most important positions in the state is the following: the President of Romania, the President of the Senate, the President of the Chamber of Deputies and the Prime Minister.

The Constitution also stipulates the possibility of the President being suspended from office in case of committing serious deeds. This may be done by the Chamber of Deputies and the Senate, in joint session, by the majority of deputies and senators and after the consultation of the Constitutional Court.

Several explanations are to be provided in this respect:

- Constitution does not specify the "serious facts" that a President may be dismissed for, so it is up to the MPs to consider and decide on these grave facts. Maybe, clearly determining what deeds are considered "grave" would help to balance the political scene and will avoid events such as the two attempts of suspending and then dismissing the Romanian President in 2007 and 2012;

- the approval of the Constitutional Court is a consultative one, and, therefore, the Parliament can diregard a possible negative notification of the Court, whom it considers merely "a simple consultative role." If the approval of the Constitutional Court, became reglatory, and the way of appointing judges of the Court were different, perhaps there would not be discussions on whether expressing or not these opinions in case the President is suspended from office. In our opinion, transferring the powers of the Court in the jurisdiction of High Court of Cassation and Justice, by establishing special sections, would lead to the stability of our society.

"In the Romanian constitutional system, the presidential institution and the Government have different legitimacies, derived from different political wills. Thus, the President of Romania has a popular legitimacy, resulting from him being elected directly by the electorate - whereas the government, as a whole, is appointed by the Head of the State, based on the investiture vote of the Parliament." [19]

The procedure of investing the Government is clear and, according to constitutional provisions, it consists of the following steps:

[18] Ioan Alexandru, Mihaela Cărăuşan, Sorin Bucur, *Drept administrativ*, Lumina Lex Publishing House, Bucharest, 2005, p. 184.
[19] *Idem*, p. 183.

- the President designates a candidate for the position of Prime Minister. This is to be done after the consultation with the party which has the majority in Parliament, and in case there is no absolute majority, with the parties represented in the Parliament;

- within 10 days of their designation, the candidate for Prime Minister will ask for the Parliament's vote of confidence upon the governmental programme and on the complete list of the Government;

- the government programme and the list of ministers shall be debated in a joint session of both parliamentary Chambers and then given or not the vote of confidence. It is an attribute of the Parliament to do this, but in case they reject at least two requests, they risk dissolution;

- the Government is officially appointed by the President, by presidential decree and based on the Parliament's vote of confidence, and then the Cabinet members take their oath.

In order to make this appointment, the President must first consult the Parliament. Without the political support of MP-s, a new government can not be appointed. Therefore, it depends on this support. Unfortunately, the actors of the Romanian political scene have often ignored popular reality and have served their party interests.

3. Conclusions

The Government is responsible with domestic and foreign politics, as well as with the general governing of public administration. The President of Romania plays an important role in appointing the Government due to their influence and balance and to their role of mediator between state powers.

We, though, consider that ammending the constitutional text, in order to invest the President as Head of the Romanian Government may prove beneficial, in that he might choose the governmental team and, thus, become responsible with the way the governance is fulfilled.

As a conclusion, it is important that there were a coherent governing policy, given the fact that reforming a society implies time, coherency and, most of all, responsibility. It would be ideal for the Romanian society that the new governments took over measures and viable solutions of former cabinets and developed them in the pursuit of general interest of the society.

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ACTS EXEMPT FROM THE JUDICIAL CONTROL OF THE CONTENTIOUS ADMINISTRATIVE

Elena Emilia ȘTEFAN[*]

Abstract

The decrees of the country President have been contemplated by many theoretical and practical discussions on their classification within the field of the administrative acts likely to be appealed before the contentious administrative. Actually, this is the base of this study, therefore, we will assess a certain category of administrative acts in terms of their possibility to be appealed before the contentious administrative court, in relation to the current provisions of the legislation. We will also point out the directions of the case law in relation to this category of administrative acts.

Keywords: *Constitution, decree, Law no. 554/2004 of the contentious administrative, the Constitutional Court of Romania, administrative act.*

1. Introduction

According to the Constitution, the executive power in Romania is bicephalous[1], consisting of the President of Romania and the Government of Romania. In what concerns their work, both the President and the Government of Romania rule by means of political acts and legal acts. In relation to the subject matter proposed by this study, we will only analyze a category of acts of the President of Romania, namely the legal acts. Therefore, by reading the revised Constitution of Romania, we note that the acts of the President are referred to in two articles, namely: art. 88 (entitled messages) and in art. 100 (entitled decrees). According to art. 100 par. (1) of the Constitution, „In the exercise of his powers, the President of Romania shall issue *decrees* which shall be published in the Official Journal of Romania. Absence of publicity entails the non-existence of a decree". Moreover, the Constitution provides that the legal regime of the decrees of the President of Romania entails their classification in two categories: the first category which, in order to be valid, bears the signature of the head of the state and the second category which must be countersigned by the Prime Minister.

According to art. 100 par. (2) of the revised Constitution of Romania, the following acts shall be countersigned by the Prime Minister, under the penalty of the nullity thereof: *„ The decrees issued by the President of Romania in the exercise of his powers, as provided under Article 91 paragraphs (1) and (2), Article 92 paragraphs (2) and (3), Article 93 paragraph (1), and Article 94 subparagraphs a), b) and d) shall be countersigned by the Prime Minister"*.

As pointed out in an opinion, most of the decrees which are not countersigned by the Prime Minister shall fall under the scope of the relations of the President of Romania with the Parliament, and another category of decrees, especially those on investiture, shall be subject to the conditions established by the law[2]. The Constitutional Court of Romania provides that the decree of the President is an administrative act (legal nature established both by the doctrine and case law of the Constitutional Court – decision no. 399/2013), subject to the review of legality, not being provided in the situations expressly referred to in art. 126 par. (6) of the Constitution, of the acts exempt from such a control[3].

Therefore, the decrees of the President of Romania are administrative acts, according to Law no. 554/2004 of the contentious administrative which defines administrative act in art. 2 letter c) first thesis, as follows: „an unilateral act with individual or regulatory nature issued by a public authority, in the capacity of public power, in order to organize the implementation of the law or to actually implement the law, which creates, modifies or terminates legal relations (...)". [4]According to the doctrine, the administrative act is the main legal form of the activity of local government bodies, which consists of an unilateral and express manifestation of will to create, modify or terminate

[*] Lecturer PhD, Faculty of Law, "Nicolae Titulescu" University of Bucharest (e-mail: **stefanelena@gmail.com**).

[1] It is worth to mention that, at the level of the European Union, there is a sole institution with executive competences, namely the European Commission. We have to point out that this fact does not entail the idea according to which Romania, as a European Union member state, fails to comply with the European Union legislation. For details on the European Commission, see Augustina Dumitrașcu, **Roxana-Mariana Popescu,** *Dreptul Uniunii Europene. Sinteze și aplicații*, edition II, Universul Juridic Publishing House, Bucharest, 2015, p. 65 and the following.

[2] **R.N.Petrescu,** *Drept administrativ,* Hamangiu Publishing House, Bucharest, 2009, p. 71

[3] The Constitutional Court of Romania, Decision no. 459/2014, Published in Official Journal no. 712/2014.

[4] Law no. 554/2004 of the contentious administrative, published in Official Journal no. 1154/2004 (latest amendment by Law no. 138/2014 on the amendment and supplementation of Law no. 134/2010 on the Code of civil procedure, as well as for the amendment and supplementation of related regulatory instruments, published in Official Journal no.753/2014).

rights and obligations, in order to fulfill public power, under the main review of legality of the courts of law[5]. The specialized literature[6] provides that "the value represents the mark of the responsibility and the validity of the rules of law falls under the conditions of the acceptance. According to the quoted author, those who disregard the rules of law defy the values involving them. Therefore, the author emphasizes that, the fulfillment of the law depends on whether it is accepted and assumed as a value and a rule by the members of the society. The coercion is not the one which essentially ensures the force of the law, but the power to valorize the rules of law imposed on the individuals. In this regard, the understanding of the fulfillment of the law is an act of assessment and search of the justice and of the other acknowledged values"[7].

2. The Decrees of the President of Romania

2.1. Are the decrees of the President subject to the control of the contentious administrative courts?

In order to answer the question whether the decrees issued by the President of Romania are subject to the control of the contentious administrative courts, two theses were established under law no. 29/1990: the first one admitted this control[8], and the second one provided a negative answer, by showing that the presidential decrees are exempt from the control of the contentious administrative courts[9]. It is provided that most of the President's powers are fulfilled by means of the issuance of decrees which must be countersigned by the Prime Minister, and therefore, an indirect parliamentary control is exercised over the President by means of the Prime Minister, who is politically liable before the Parliament exclusively[10]. Following the extensive debates and arguments which took place in the doctrine and case law, it was provided that the decrees of the President countersigned by the Prime Minister are complex legal acts, which indicate a constitutional relation between the two heads of the executive, on the one side, and the Parliament, on the other side, by falling under the scope of the motion to dismiss on grounds of inadmissibility[11] provided for by art. 126 par. (6) of the Constitution, republished, namely of the acts which concern the relations with the Parliament.[12]

The specialized literature notes that the idea of categories of administrative acts exempt from the control de contentious administrative courts of law originated in French administrative case law[13]. According to Tudor Drăganu, the patriarch of the Romanian public law, the legal acts of the President of Romania, as administrative acts of authority, shall be exempt from the judicial control of legality if they fall under the scope of one of the motions to dismiss provided by law no. 554/2004 of the contentious administrative and if the provisions of this law were not repealed or amended by the enforcement of Constitution of 1991[14]. The Constitutional Court reiterated in its case law that according to the provisions of art. 100 par. (2) of the Constitution, certain decrees of the President shall be countersigned by the Prime Minister[15]. These legal acts shall be subject to the provisions of art. 126 par. (6) of the Constitution (...). Furthermore, in another decision, the Constitutional Court noted that under Law no. 554/2004 the decrees of the President can be appealed before the contentious administrative, except the decrees falling under the scope of the motions to dismiss on grounds of inadmissibility established by this law[16].

According to the legal definition provided for by art. 2 par. (1) letter k) of Law no. 554/2004, the acts which concern the relations with the Parliament are the acts issued by a public authority in exercising its powers, provided by the Constitution or by an organic law, within the political relations with the Parliament[17]. Under the current constitutional provisions[18], the administrative acts concerning the relations of public authorities with the Parliament, relate either to the direct relation between the executive and legislative power (for example – Government investiture - art. 85 of the Constitution;

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[5] **A. Iorgovan,** *Tratat de drept administrativ*, vol. I, Nemira Publishing House, Bucharest 1996, p. 274.

[6] **Elena Anghel,** *Values and valorization*, in Lex Et Scientia International Journal (LESIJ) XXII, no. 2/2015, p.103-113.

[7] Idem.

[8] **R.N.Petrescu,** *Drept administrativ*, Hamangiu Publishing House, Bucharest, 2009, p. 71, apud **A.Iorgovan,** *Tratat de drept administrativ*, vol.I, All Beck Publishing House, Bucharest, 2005, p.322.

[9] Idem.

[10] **I. Rîciu**, *Procedura contenciosului administrativ.Aspecte teoretice şi jurisprudenţiale*, Hamangiu Publishing House, Bucharest, 2012, p. 174, apud **A Iorgovan**, *op.cit*., 2005, p. 612-614.

[11] In what concerns the scope of the motions to dismiss on grounds of inadmissibility, see, **Marta Claudia Cliza**, *Drept administrativ, Part II*, Universul Juridic Publishing House, Bucharest, 2012, p.102-109.

[12] Idem, p. 614.

[13] **G. Bogasiu**, *Justiţia actului administrativ.O abordare biunivocă*, Universul Juridic Publishing House, Bucharest, 2013, p.157.

[14] **T. Drăganu**, *Drept constituţional şi instituţii politice. Tratat elementar*, vol. II, Lumina Lex Publishing House, Bucharest, 1998, pp. 297 and 298.

[15] The Constitutional Court of Romania, Decision no. 459, published in Official Journal no. 712/2014.

[16] **R. N. Petrescu,** *op. cit.*, p. 72. In the same respect see also **Ştefan Deaconu**, *Constituţia României.Comentariu pe articole*, C.H. Beck Publishing House, Bucharest, 2008, p.930.

[17] The Constitutional Court of Romania, Decision no. 88/2009, published in Official Journal no. 131/1999.

[18] **G. Bogasiu,** *Legea contenciosului administrativ nr. 554/2004.Comentată şi adnotată*, edition III revised and supplemented, Universul Juridic Publishing House, Bucharest, 2015, p. 196.

Dissolution of Parliament - art. 89 of the Constitution, or to the indirect relation, which grants them the character of complex administrative acts, such as the case of the decrees of the President which must be countersigned by the Prime Minister, subject in his turn to the control of the Parliament [art 100 par. (2) of the Constitution][19]. The Constitutional Court notes that the complexity of the powers provided in Title III, Chapter II of the Constitution of Romania, the different areas where they are regulated do not allow the inclusion of all decrees in the category of the motion to dismiss on grounds of inadmissibility exclusively from the perspective of the countersignature, as a modality available to the Prime Minister in order to take political accountability, without an actual assessment of their legal nature in terms of their scope, effects and the real existence of a connection with the political field.

2.2. Case study

Furthermore, in order to develop the proposed topic, we would like to expose a selection of certain decrees of the President of Romania which were contemplated by the review of the case law of the Constitutional Courts and of the national contentious administrative courts. The decrees which were assessed fall under the scope of both categories, respectively the decrees signed exclusively by the President of the country and the decrees countersigned by the Prime Minister.

Case study no. 1. The Decree of the President on the appointment of a judge of the Constitutional Court [20]

In this case, the President of Romania issued Decree no. 326/2013 on the appointment of a judge of the Constitutional Court, decree which was published in Official Journal no. 159/2013. Romanian Magistrates Association filed action before the contentious administrative court against the President of Romania and the Presidential Administration whereby it requested the annulment of the administrative act – namely, the aforementioned decree of the President of Romania.

This type of decree questions the fulfillment of the conditions by the person appointed as judge of the Constitutional Court. Therefore, according to the legal provisions in force, the appointment of the judge of the Constitutional Court entails the fulfillment of three cumulative conditions, respectively: higher legal education, at least 18 years of length of service within higher legal education, high professional competence. The Constitutional Court notes that Law no. 47/1992[21] does not provide the procedural steps involved in the appointment of publicly-appointed office holders, but it is obvious that the assessment of the fulfillment of the three conditions provided for by art. 143 of the Constitution is the exclusive prerogative of the President of Romania. Therefore, the Court notes that the discretion of the President of Romania, the Senate and the Chambers of Deputies in the fulfillment of the power to appoint constitutional judges is not limited to the assessment of the lawfulness issues that the fulfillment of objective and quantifiable conditions entails, but also concerns opportunity issues, the competent authority having in this case, absolute freedom, to choose a certain person who, in its opinion, meets the condition of *high professional competence.*

Therefore, the Court notes that the provisions of art. 8 par. (1) in relation to art. 2 par. (1) letter c) of Law no. 554/2004, are constitutional provided that the decrees of the President on the appointment of the judges of the Constitutional Court are constructed as excluded from the judicial control in terms of the control of the fulfillment of *high professional competence* condition.

Case study no. 2. The decree of the President on the withdrawal of decorations

In one case, the scope of the statement of claim was the annulment of Decree no. 567/May 24th, 2007 issued by the President of Romania whereby knight National Order Steaua României (Star of Romania) was withdrawn[22]. The plaintiff was given the national decoration by Decree no. 1109 of December 10th, 2004 "*as a special token of appreciation for the meritorious contribution to the performance of the legislative act, to the adoption of fundamental laws necessary for the development of the country and to the Euro-Atlantic integration of Romania*". By decree no. 567/May 24th, 2007 the President of Romania withdrew the decoration of the plaintiff "*by taking into account resolution of the Council of Honor of National Order Steaua României of May 15th, 2007*".

The High Court of Cassation and Justice notes that the President of Romania can issue the decree on the withdrawal of order or medal only upon the proposal of the Council of Honor, which adopts the resolution after having fulfilled an administrative procedure expressly regulated by the Regulation on the organization and operation of the Councils of Honor of National Orders Steaua României, Serviciul Credincios şi Pentru Merit (Order of Faithful Service and for Merit), approved by Government Resolution no. 1511/2005, for the application of art. III of Government Emergency Ordinance no. 13/2005 for the amendment and supplementation of Law no. 29/2000 on the

[19] Idem.
[20] The Constitutional Court of Romania, Decision 459/2014, published in Official Journal no. 712/2014.
[21] Law no. 47/1992 on the organization and operation of the Constitutional Court, republished in Official Journal no.807/2010.
[22] Decision no. 3165/2012 of the High Court of Cassation and Justice, published on http://legeaz.net/spete-contencios-inalta-curte-iccj-2012/decizia-3165-2012, accessed on February 20th, 2016.

Romanian national system of decorations, approved by means of Law no. 15/2005.

The High Court of Cassation and Justice, following the specific assessment of the decree nature and the content of the legal report, by noting that the withdrawal of a decoration of a person without powers in what concerns the legal relations with the Parliament, shows that the withdrawal is not exempt from the judicial control of the contentious administrative (...)[23]. Even if it is unchallenged that the President of Romania benefits form a high discretion, the High Court noted that the abuse of power, as defined in the Law of the contentious administrative, art. 2 par. (1) letter n) of the same law, provides a regulatory definition of the court power to investigate the conduct of public authorities, including from the perspective of the way of exercising the discretion and to investigate if it falls under the limits established by the law, by responding to the imperative of maintaining a reasonable balance between public interest and private rights or legitimate interests which may be prejudiced by means of the administrative acts.

This topic, respectively whether the President is entitled to withdraw a granted decoration, was also contemplated by the motion to dismiss on grounds of unconstitutionality[24]. The Constitutional Court considers that the withdrawal of a decoration may occur, on the one side, due to dishonorable deeds which were performed prior to decoration only to the extent that, for various reasons, they could not have been known at the time of granting the decoration and, on the other side, due to subsequent dishonorable deeds, incompatible with the capacity of member of the order, but only under the consideration of establishing a fair relation of proportionality between the facts which resulted in the granting of an order and those which resulted in the proposal of the decoration withdrawal.

According to the legal provisions, both the granting and the withdrawal of the decorations are performed under the decree of the President of Romania, upon the proposal of the authorities established by the law. According to the Court, it is obvious that the proposal submitted to the President is not mandatory for the President and does not prevent the President to exercise his discretion right. Under the law, the President has broad discretion on the proposals submitted to him, for the granting of a decoration, and on the grounds provided in the proposals on the decoration withdrawal. Therefore, by taking into account the nature of the offences, due to which, once committed, a decoration may be withdrawn, there is the possibility that a decoration granted by a particular head of state, to be withdrawn by the following head of state, as both of them would act within the same constitutional status, in the capacity of head of the state.

Case study no. 3. The President decree on the granting of individual pardon

The scope of the statement of claim filed before the High Court of Cassation and Justice consisted of the nullity of Decree no. 1164/2004, on the granting of an individual pardon, the issuer being the President of Romania[25]. The legal issue raised in this case was whether the individual pardon decree was an administrative act subject to the control of the contentious administrative control. The legal regime of individual pardon is established by Law no. 546/2002[26] and by the Constitution of Romania.

According to art. 100 par. (2) of the Constitution, the decree issued by the President of Romania whereby individual pardon is granted, shall be countersigned by the Prime Minister, by the countersignature institution, the Parliament exercising an indirect control by means of the Prime Minister which is held liable before the legislative power. Therefore, the granting of individual pardon, as an act of leniency, is an exclusive prerogative of the President of Romania, provided for by art. 94 letter d) of the Constitution of Romania, due to its effects, the pardon being also a criminal law institution. In exercising his prerogatives, provided for by art. 80-94 of the Constitution, by granting or revoking individual pardon, the President of Romania acts not only as a representative of the executive power, but as the head of the state, by playing the role of mediator between the state and society, but in the same time acting as a guarantor of the Constitution, according to the High Court.

In issuing (granting or revoking) individual pardon acts, the President of Romania has broad discretion, by being entitled to request, only when he deems necessary, advisory and not legal opinions from the Ministry of Justice or information from other authorities, the convicted person not being entitled to the subjective right of being or not being pardoned or to a legitimate interest as defined by art. 52 of the Constitution, but only to a factual right. In other words, there is no specific administrative law relation, subject to the control of contentious administrative court, between the person requesting individual pardon and the President, the decree of granting the pardon being deemed by the doctrine as a complex legal act which is subject to constitutional law regime, with deep implication in the field of criminal procedural law. Therefore, according to the High Court of Cassation and Justice, the court of first

[23] Idem.

[24] The Constitutional Court of Romania, Decision no. 88/2009, published in Official Journal no. 131/2009.

[25] High Court of Cassation and Justice, decision no. 3585/2006, Division of the Contentious administrative, http://legeaz.net/spete-contencios-inalta-curte-iccj-2006/decizia-3585-2006, accessed on February 19th, 2016.

[26] Pardon Law no. 546/2002 on pardon and procedure of granting pardon, published in Official Journal no.755/2002.

instance was right in holding that pardon decree is not an administrative act subject to the review of legality of the contentious administrative court (...), therefore the petition filed for the ascertainment of the nullity of the decree not being admissible (...).

3 Conclusions

This study contemplated the acts exempt from the control of the contentious administrative courts, respectively those legal acts of the President of Romania, namely the decrees. The presidential decree has an unique nature and a complex legal regime, therefore it is deemed an administrative act under Law no. 554/2004 of the contentious administrative. Generally, the decrees of the President can be appealed before the contentious administrative, except those which fall under the scope of the motions to dismiss on grounds of inadmissibility established by the law, a thorough analysis being performed by the judge of the case submitted for judgment, on a case-by-case basis. In conclusion, as provided by the doctrine, every state has its own enacted law according to its own social and political requirements, traditions and values[27].

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[27] See **Elena Anghel**, *Constant aspects of law*, în proceedings-ul CKS-eBook 2011, Pro Universitaria Publishing House, Bucharest, 2011, p. 594.

THE REPRESENTATION OF THE ADMINISTRATIVE AND TERRITORIAL DIVISIONS BEFORE THE COURT OF LAW

Elena Emilia ȘTEFAN[*]

Abstract

The appropriate establishment of the local authority entitled to have the capacity of legal representative before the courts of law, when an administrative and territorial division is party to a case, raised many problems within the judicial practice. Not often, the motion to dismiss on grounds of lack of passive legal standing of the administrative and territorial divisions in the capacity of defendant in a dispute, was claimed or substantiated. This is why, this study aims to determine, in terms of the legislation in force, the local government authorities which are entitled to have the capacity of legal representative of the administrative and territorial divisions within a contentious administrative dispute. In order to emphasize the importance of the appropriate construction of the legal texts which regulate the subject in question, in the end of this study, we will expose a selection of case studies of the national case law.

Keywords: *Constitution, local government authorities, the motion to dismiss on grounds of lack of passive legal standing, contentious administrative, the Constitutional Court of Romania.*

1. Introduction

During the interwar period, the administrative law was the discipline which: „covered the activity of an authority. The state is a community situated on a territory consisting of governors and governed persons[1].” Along with the same lines, in what concerns the activity of the local government, deemed in the same time as an administrative authority, it was shown that it fulfills its duties by means of certain bodies consisting of natural persons or groups of natural persons, such as: ministers, prefects, police commissioners, county councils, town councils etc.[2]

The national legislation provides that the activity of the local government authorities is based on a series of principles of which the lawfulness principle is distinguished as being the base of the organization of state activity in general[3]. While in the field of private law, concepts such as economic freedom, competition[4], the principle of mutual consent, etc prevail, these concepts are unknown for the public law. Principles such as local autonomy, decentralization, public services deconcentration, etc. are specific to local government.

The principle of local autonomy established by art. 120 par. (1) of the Constitution, does not entail total independence and exclusive competence of the public authorities within administrative and territorial divisions, but they are bound to obey the legal regulations valid throughout the territory of the country, the legal provisions adopted in order to protect national interests[5]. The Constitutional Court of Romania states that, in its case law, the local government authorities whereby the local autonomy is fulfilled are the local councils and the mayors appointed within communes and towns, as well as and the county council[6].

Therefore, the European Charter of local autonomy itself, adopted in Strasbourg on October 15th, 1985 according to art. 3 item 1, refers to the internal legal framework, by means of the regulation of the local autonomy concept: “the right and effective capacity of local government authorities to settle and manage, within the law, in own behalf and in the interest of local population, an important part of public affairs”[7] Taking into account that art. 4 par. (2) of the Treaty on the European Union[8], provides that „The European Union observes (…) their national identity inherent to their fundamental, political and constitutional structures, including in what concerns local and regional autonomy”. In a conference which remained memorable within the legal field, held at the Institute of Administrative Sciences on January 31st, 1926, Constantin Argetoianu, concluded the following, in the applause

[*] Lecturer PhD, Faculty of Law, ”Nicolae Titulescu” University of Bucharest (e-mail: **stefanelena@gmail.com**).

[1] **Paul Negulescu,** *Tratat de drept administrativ.Principii generale*, vol.I, ed. IV, Marvan Publishing House, Bucharest, 1934, p.38.

[2] **Anibal Teodorescu,** *Tratat de drept administrativ*, vol.I, ed V, Institutul de Arte Grafice Eminescu S.A., Bucharest, 1929, p.150.

[3] For a broad analysis of lawfulness principle, see **Elena Anghel**, *The lawfulness principle*, in CKS-eBook 2010, vol. I, Pro Universitaria Publishing House, Bucharest, ISSN 2068-779.

[4] See **Laura Lazăr**, *Abuzul de poziție dominantă. Evoluții și perspective în dreptul european și național al concurenței*, C.H.Beck Publishing House, Bucharest, 2013, 272 p.

[5] The Constitutional Court of Romania, Decision no. 1162/2010, published in Official Journal no.747/2010.

[6] The Constitutional Court of Romania, Decision no. 822/2008, published in Official Journal no.593/2008.

[7] The Constitutional Court of Romania, Decision no. 566/2004, published in Official Journal no.155/2004.

[8] For details on the Treaty on the European Union, see **Roxana-Mariana Popescu**, *Introducere în dreptul Uniunii Europene,* Universul Juridic Publishing House, Bucharest, 2011, pag. 62-63.

of the public: "the issue of decentralization is today, the same as yesterday, a problem to be solved in our country"[9].

The powers provided by the law in force for the public authorities within the administrative and territorial divisions include the powers of representation of their interests before the courts of law, according to Law no. 554/2004 of the contentious administrative[10]. In what concerns the legal proceedings within the contentious administrative, we hereby state that they are supplemented, according to art. 28, by the provisions of the Civil Code and the Code of civil procedure, up to the extent they are not inconsistent with the specificity of power relations between public authorities, on the one side and the persons aggrieved in their legitimate rights or interests, on the other side.

2. Content

2.1. The concepts of administrative and territorial divisions and local public authorities

The legal ground of the representation before the courts of law of the administrative and territorial decisions is the following: the Constitution of Romania and Law no. 215/2001 on the local government[11].

First of all, it is necessary to define the meaning of administrative and territorial divisions, according to the legislation in force and then to analyze the local government authorities which are entitled to represent before the courts of law the legal interests of the administrative and territorial divisions. The Constitutional Court of Romania considered that the administrative organization of the territory means its delimitation, according to economic, social, cultural, environmental, population etc. criteria, in administrative and territorial divisions, for the purpose of the organization and operation of the local government under the decentralization, local autonomy and public services decentralization principles, and under the eligibility principle of the local government authorities[12].

As we know, according to the Constitution of Romania, there are provisions on the administrative and territorial divisions and on the local government authorities in various articles, as follows:

Art. 3 par. 3: „the territory is organized administratively into communes, towns and counties. According to the provisions of the law, certain towns are declared municipalities".

Art. 120 par 1: "the local government within the administrative and territorial divisions shall be based on the principles of decentralization, local autonomy and public services deconcentration".

Art. 121 par.1: "the local government authorities by which the local autonomy in communes and towns is fulfilled, are local councils and mayors designated according to the law".

Art.122 par.1: "the county council is the local government authority coordinating the activity of commune and town councils, with a view to carry out the public services of county interest".

Art. 123 par. 4: "there are no subordination relationships between prefects, on the one side, local councils and mayors, as well as county councils and their chairmen, on the other side".

Law no. 215/2001 on local governments provides on the subject approached by us on various articles, of which we hereby mention the following:

Art. 1 alin.2 letter d): "deliberative authorities – local council, county council, General Council of Bucharest, local councils of administrative and territorial subdivisions of municipalities".

Art. 1 par. 2 letter e): "executive authorities: mayors of communes, towns, municipalities, administrative subdivisions of municipalities, general mayor of Bucharest, the chairman of the county council".

Art. 20 par. 1: "communes, towns, municipalities are the administrative and territorial divisions the local autonomy is exercised in and where the local government authorities are organized and function".

Compared to the revised constitutional text, Law no. 286/2006 which brought essential amendments and supplementations to Law on the local government by leading to its republishing, identifies an executive authority within the level of county government, in the person of the chairman of the county council referred to in art. 1 par. 2 letter e) dedicated to the definition of certain terms and phrases (together with the mayors of communes, towns, municipalities and administrative and territorial subdivisions and with the general mayor of Bucharest), as executive authority[13].

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[9] **Constantin Argetoianu,** *Administrative decentralization and regionalism*, Conference held at the Institute of Administrative Sciences on January 31st, 1926, published in Revista de Drept Public no. 2/1995, pp.99-111.

[10] Law no. 554/2004 of the contentious administrative, published in Official Journal no. 1154/2004 (latest amendment by Law no. 138/2014 on the amendment and supplementation of Law no. 134/2010 on the Code of civil procedure, as well as for the amendment and supplementation of related regulatory instruments, published in Official Journal no.753/2014).

[11] Law no.215/2001 on local public government published in Official Journal no.204/2001 with latest amendment by law no. 265/2015 for the approval of Government Emergency Ordinance no.68/2014 for the amendment and supplementation of certain regulatory instruments.

[12] The Constitutional Court of Romania, Decision no. 1177/2007, published in Official Journal no.871/2007, mentioned by **Toader Tudorel**, *Constituția României reflectată în jurisprudența constituțională,* Hamangiu Publishing House, Bucharest, 2011, p. 246.

[13] **Dana Apostol Tofan**, *Unele considerații privind reprezentarea unităților administrativ-teritoriale în justiție*, în Curierul Judiciar no.11/2010, Bucharest, p. 635.

2.2. The representation of the administrative and territorial divisions before the courts of law

Therefore, according to the legislation in force, the local deliberative authorities of Romania are the following: local council, county council, General Council of Bucharest, local councils of administrative and territorial subdivisions of municipalities, while the executive authorities are the following: mayors of communes, towns, municipalities, administrative subdivisions of municipalities, general mayor of Bucharest, chairman of the county council.

The question that arises is the following: in case of a dispute submitted for settlement to the contentious administrative court, which is the representative of the administrative and territorial division before the courts of law, the local deliberative authorities or the local executive authorities?

The answer to this question is simple. Law no. 215/2001 of the local government is the one providing the answer in art. 21 par. (2): the administrative and territorial divisions are represented before the courts of law by the mayor or by the chairman of the county council, as the case may be. According to the doctrine, this provision establishes the correlative right and obligation of the mayor (in case of communes, towns and municipalities) and respectively, of the chairman of the county council (in case of county), to represent before the courts of law the administrative and territorial divisions, in any circumstance, in relation to the place where the legal text is situated, in chapter called "*General provisions*".[14]

Furthermore, an interesting provision is the indication according to which in order for the protection of the interests of the administrative and territorial divisions, the mayor, respectively the chairman of the county council, represents the administrative and territorial divisions before the courts of law in the capacity of legal representative and not on own behalf (art. 21 par. 2ˆ1).

According to an author, such an explanation was not necessary because the fact that the two authorities do not represent themselves before the court of law, bur the administrative and territorial division, was inhered from the provisions of par.(2)[15]. The quoted author states that this matter is reinforced by the provisions of par.(3), which provide the right of the mayor, respectively of the chairman of county council to authorize a long term higher legal education person within the specialized body of the mayor, respectively of the county council, or a lawyer, to represent the interests of the administrative and territorial division, and of the local government authorities before the courts of law[16].

In what concerns the meaning of the concepts of capacity to be a party to legal proceedings and of legal standing, it should be noted that each concept has a different meaning. According to the Code of Civil procedure, there are two types of capacity to be a party to legal proceedings: use and exercise capacity. Therefore, as an author stated, the capacity to be a party to legal proceedings is the reflection on the procedural plan of the of the civil capacity of the material civil law, defined as that part of legal capacity of the person consisting of the capacity to have and exercise civil rights and to have and to undertake civil obligations, by concluding legal instruments[17]. According to art. 36 of the Code of civil procedure, the legal standing emerges from the identity between the parties and the subjects of the legal dispute, as it is submitted to the court of law.[18] The doctrine stated that the legal standing is the title which grants to a person the power to bring before the court of law the right of which sanction is required[19]. The quoted author showed that it is the procedural rendering of the capacity of holder of the right under which a person files a court action.

We should not fail to take into account the provisions of art. 123 par. 6) of the Constitution which expressly state that the prefect may appeal before the contentious administrative court, an act of the county and local council or of the mayor, if the act is deemed illegal[20]. This right of the prefect is called public guardianship. The institution of the public guardianship is established within the constitutional level in art. 123 par. (5) of the Fundamental Law. It is inconceivable in a state subject to the rule of law that an illegal act of a local authority cannot be appealed before the court of law by the prefect, as the Government representative, taking into account the fundamental mission of the Government to ensure the applications of the laws[21].

Law no. 215/2001 on the local government provides that the administrative and territorial

[14] Idem, p. 637.

[15] **Mihai Cristian Apostolache**, *Primarul în România şi Uniunea Europeană*, Universul Juridic Publishing House, Bucharest, 2015, p. 69.

[16] Idem, pp.69-70.

[17] **Oliviu Puie**, *Contractele administrative în contextul noului Cod civil şi al noului Cod de procedură civilă*, Universul Juridic Publishing House, Bucharest, 2014, p. 59.

[18] Law no. 134/2010 on the Code of civil procedure, republished in Official Journal no. 247/2015 (with the last amendment by Government Emergency Ordinance no. 1/2016 for the amendment of Law no. 134/2010 on the Code of civil procedure, and of related regulatory instruments, published in Official Journal no. 85/2016).

[19] Idem.

[20] In what concerns the parties to disputes submitted for settlement to contentious administrative courts, see Marta Claudia Cliza, *Drept administrativ, Part II*, Universul Juridic Publishing House, Bucharest, 2012, pp.109-115.

[21] The Constitutional Court of Romania, Decision no. 314/2005, published in Official journal no.694/2005.

divisions are legal entities of public law, with full legal capacity and patrimony. These are legal subjects of fiscal law, holders of the sole registration code and of the accounts opened with treasury and banking units.

The Constitutional Court of Romania, by means of Decision no. 356/2002 established that the mayor has the capacity to represent the administrative and territorial divisions before the court of law only in relations with third parties and not with the local council which, as in case of the mayor, is a body of the administrative and territorial division and has the same legitimacy as the mayor[22].

According to the Code of civil procedure, the conditions for the filing of a civil action are the following: any petition can be filed and supported if the person filing it has the capacity to be a party to legal proceedings, has the legal standing, raises a claim and substantiates an interest. Legal liability is involved in ensuring lawfulness, as the mere approval of sanction measures would not be effective if their application did not pursue the restoration of the rights established by the law[23].

2.3. Case studies

In a case, the High Court of Cassation and Justice noted that the arguments of the appellant and of intervener commune Becicherecu Mic on the existence of a typing mistake and on the impossibility to remedy it on the merits, are unsubstantiated[24]. The High Court of Cassation and Justice showed that the Court of Appeal correctly noted that art. 19 of Local government law provides that towns, communes and counties are legal entities of public law and that they have patrimony and legal capacity, and that the real estate in question is the property of commune Becicherecu Mic. In this case, the signature of the mayor on the statement of claim is obviously biding on the administrative and territorial division which is the holder of the real estate contemplated by the dispute, respectively commune Becicherecu Mic, a fact which was not challenged by either party and which was noted in the recitals of the ruling under appeal.

Last but not least, we state that by means of Decision no. 12/2015 of the Panel for the settlement of law matters, the High Court of Cassation and Justice recently established that, under law no. 215/2001 of the local government (...) and of law no. 554/2004 of the contentious administrative (...), the administrative and territorial division, by means of its executive authority, namely the mayor, is not entitled to appeal before the contentious administrative court the resolutions adopted by its deliberative authority, respectively the local council, or the General Council of Bucharest, as the case may be[25].

In another case, the court held that the local public authorities have passive legal standing in case of a legal action on an element of the service report of a public officer within the local government body, as the commune, as a legal entity and therefore, a collective subject of law, can only undertake and fulfill obligations by means of its authorities which the law-maker vested with a certain competence[26].

As the concession right on the goods which are public and private property of the commune belongs, according to art. 36 par.(5) letter a) and b) exclusively to the local council, the mayor is not entitled, neither on own behalf, nor in the capacity of representative, to challenge the lawfulness of such a resolution, the decision to grant concession adopted by the local council being the decision of the administrative and territorial division, according to another case.[27]

3. Conclusions

As the title of this study anticipated, we analyzed an extensive bibliography in order to identify which authority is entitled to represent the interests of the administrative and territorial divisions of Romania before the courts of law. According to the legislation, doctrine and case law, the administrative and territorial divisions are represented before the court of law, by the mayor or by the chairman of the county council, as the case may be. We exposed in the conclusions of the study, a selection of case studies which were meant to reinforce the conclusions we reached during the draw up of this study.

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[22] The Constitutional Court of Romania, Decision no. 66/2004, published in Official Journal no.235/2004.

[23] **Elena Anghel**, *The responsibility principle*, in Proceedings of the Challenges of the Knowledge Society Conference (CKS) no. 5/2015, pag. 364-370.

[24] The High Court of Cassation and Justice, division of contentious administrative and fiscal, decision no. 2298 of May 3rd, 2007, not published, *apud* **Gabriela Bogasiu**, *Legea contenciosului administrativ comentată și adnotată*, edition III, revised and supplemented, Universul Juridic Publishing House, Bucharest, 2015, p.34-35.

[25] The High Court and Cassation and Justice, the Panel for the settlement of legal matters, decision no. 12 of May 25th, 2015, published in Official Journal no. 773/2015, **Dana Apostol Tofan**, *Drept administrativ*, vol. II, edition 3, C.H.Beck Publishing House, Bucharest, 2015, p.206.

[26] Craiova Court of Appeal, division of contentious administrative and fiscal, decision no. 898 of September 20th, 2005 in Culegere de practică judiciară 2005, Lumina Lex Publishing House, Bucharest, 2006, p.27-30.

[27] Suceava Court of Appeal, division of contentious administrative and fiscal, decision no. 311 of February 26th, 2010, apud **G Bogasiu**, *op.cit.*, p. 36.

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- The Constitutional Court of Romania, Decision no. 566/2004, published in Official Journal no.155/2004;
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MIGRATION AND REFUGEE CRISIS: A MAJOR CHALLENGE FOR THE EUROPEAN UNION. MEASURES AND POSSIBLE SOLUTIONS IN THE CONTEXT OF YEAR 2016

Dan VĂTĂMAN*

Abstract

The rising number of people trying to get into Europe from the Middle East and Africa has highlighted some structural problems of EU migration policy, fact which revealed the need for setting out and adoption of immediate and long-term responses to the migration challenges that Europe faces. Taking into account the complexity of the migration phenomenon and possible impact of the refugee crisis on the proper functioning of the European Union, the aim of this study is to highlight the way in which the crisis is managed, a particular attention being paid to the initiatives of the European Commission for shaping an effective and balanced European migration policy. For a full understanding of the real situation, were analysed the implementation of EU asylum and migration law by Member States, especially because the crisis has been made worse by the failure to implement existing laws in this area. Also, a particular attention was given to Romania's involvement in finding solutions and resolving the crisis.

Keywords: *Common European Asylum System, European Agenda on Migration, implementation of EU law, refugee crisis, migration management.*

1. Introduction

Migration crisis is probably the most difficult challenge for European Union in last decades, this because is the first time from the Second World War to the present when so many populations are displaced from several conflict zones. According to the Office of the United Nations High Commissioner for Refugees (UNHCR), by end-2014 the number of individuals forced to leave their homes due to conflict and persecution has grown to a staggering 59.5 million forcibly displaced persons worldwide.[1]

Consequently, in the last period the European Union has experienced exceptionally large numbers of refugees and migrants, many of these people arrived by sea in southern Europe, particularly in Greece, come from countries affected by violence and conflict, such as Syria, Iraq and Afghanistan. According to UNHCR data, only in 2015 almost a million people having crossed the Mediterranean as refugees and migrants. Also, in 2016, up to one million refugees and migrants could attempt to use the Eastern Mediterranean and Western Balkans route to Europe.[2]

In light of the unprecedented situation, the importance of this study is that it highlights the fact that European Union was caught unprepared for such large numbers of refugees and migrants, situation which requires that all Member States must act together in response to the growing emergency and, at the same time, to demonstrate responsibility and solidarity in accordance with their international obligations. For this purpose, the objectives of this study are to highlight the way in which the crisis is managed, a particular attention being paid to the initiatives of the European Commission for shaping an effective and balanced European migration policy. For a full understanding of the state of play in refugee crisis I considered that is necessary to be analysed the implementation of EU asylum and migration law by Member States, especially because the crisis has been made worse by the failure to implement existing laws in this area. Also, a particular attention will be given to Romania's involvement in finding solutions and resolving the crisis. Although the specialised literature comprises several studies on the refugees and migrants crisis I believe that a new study is necessary, on the one hand, because the European Union is currently facing a huge migratory pressure and this trend may continue to rise in 2016. On the other hand, the European citizens are entitled to be informed about the measures taken at European level and the local communities need to be supported to respond to the refugee and migrant flow in a manner that complements humanitarian assistance focused on refugees and migrants.

* Professor PhD, "Ștefan cel Mare" University, Suceava, Romania (e-mail: **danvataman@yahoo.com**).

[1] These included 19.5 million refugees: 14.4 million under UNHCR's mandate and 5.1 million Palestinian refugees registered with the United Nations Relief and Works Agency for Palestine Refugees in the Near East (UNRWA). The global figure also included 38.2 million internally displaced persons (source: IDMC) and close to 1.8 million individuals whose asylum applications had not yet been adjudicated by the end of the reporting period - http://unhcr.org/556725e69.html

[2] This scenario is based on analysis of the current level of arrivals, the push and pull factors affecting the movements, and the situation in countries of origin related to this emergency - REGIONAL REFUGEE AND MIGRANT RESPONSE PLAN (January-December 2016), http://reporting.unhcr.org/sites/default/files/2016%20RMRP%20for%20Europe.pdf, accessed on January 18, 2016.

2. Legal basis of immigration and asylum policies and responsibilities of the European Union and its Member States

Pursuant to Treaty on European Union (TEU), the Union shall offer its citizens an area of freedom, security and justice without internal frontiers, in which the free movement of persons is ensured in conjunction with appropriate measures with respect to external border controls, asylum, immigration and the prevention and combating of crime[3].

The overarching framework of the EU immigration and asylum policies is established in Treaty on the Functioning of the European Union (TFEU), according to which the Union shall frame a common policy on asylum, immigration and external border control, based on solidarity between Member States, which is fair towards third-country nationals[4].

TFEU provides that the Union shall develop a common policy on asylum, subsidiary protection and temporary protection with a view to offering appropriate status to any third-country national requiring international protection and ensuring compliance with the principle of non-refoulement, in accordance with the Geneva Convention Relating to the Status of Refugees of 28 July 1951, as supplemented by the New York Protocol of 31 January 1967[5]. Also, TFEU states that the Union shall develop a common immigration policy aimed at ensuring, at all stages, the efficient management of migration flows, fair treatment of third-country nationals residing legally in Member States, and the prevention of, and enhanced measures to combat, illegal immigration and trafficking in human beings[6].

It should be noted that in accordance with TFEU these policies of the Union and their implementation shall be governed by the principle of solidarity and fair sharing of responsibility, including its financial implications, between the Member States[7]. Moreover, TFEU contains a solidarity clause based on which the Union and its Member States shall act jointly in a spirit of solidarity if a Member State is the object of a terrorist attack or the victim of a natural or man-made disaster[8]. These provisions are combined with those relating to the Union's operations in the field of humanitarian aid, such operations shall be intended to provide ad hoc assistance and relief and protection for people in third countries who are victims of natural or man-made disasters, in order to meet the humanitarian needs resulting from these different situations. For this purpose, the Union's measures and those of the Member States shall complement and reinforce each other[9].

For sketching an overview on the subject of this study we must also mention the Schengen Borders Code, document which establishes the rules governing border control of persons crossing the external borders of the Member States of the European Union. According to the stated purpose, these rules shall apply to any person crossing the internal or external borders of Member States, without prejudice to the rights of refugees and persons requesting international protection, in particular as regards non-refoulement[10].

3. The evolution of the refugees and migrants crisis and response of the European Union

Following to the so-called "Arab Spring" a revolutionary wave swept several countries in North Africa and the Middle East, and even if following these social movements were ousted several dictators, these countries have not reached a Western-type democracy. More than that, their internal life continued to be marked by civil war, terrorist attacks and, recently, an exodus of civilian populations.

Deterioration of security and increasing poverty in countries from North Africa, Middle East and South Asia have spawned migration trends toward Europe, fact which made that European Union witnessing a mixed-migration phenomenon in which refugees, displaced persons and other migrants travel together, either escaping conflict in their country or in search of better economic prospects[11].

As a consequence of this huge migratory pressures and in response to tragedies in which many people have died trying to cross the Mediterranean Sea to reach Europe, EU officials have stated the consensus for rapid action to save lives and to step up EU action. Having regard to the European

[3] Article 3(2) of TEU.
[4] Article 67(2) of TFEU.
[5] Article 78(1) of TFEU (These provisions are retrieved in Article 18 of Charter of Fundamental Rights of the European Union).
[6] Article 79(1) of TFEU.
[7] Article 80 of TFEU.
[8] Article 222 of TFEU.
[9] Article 214 of TFEU.
[10] Article 3 of Regulation (EC) No 562/2006 of the European Parliament and of the Council of 15 March 2006 establishing a Community Code on the rules governing the movement of persons across borders (Schengen Borders Code) - OJ L 105, 13.4.2006, pp. 1–32.
[11] It is very important to distinguish between migrants and refugees because these categories of people benefit to different levels of assistance and protection under international law. This clarification is necessary because as a result of war atrocities the Syrian citizens have benefited from preferential treatment, their application for asylum being evaluated by the EU Member States authorities in an accelerated regime, prompting many migrants to lie about their nationality, claiming to be Syrians.

Council statement[12] and European Parliament Resolution[13], the European Commission presented a European Agenda on Migration outlining the immediate measures that will be taken in order to respond to the crisis situation in the Mediterranean as well as the steps to be taken in the coming years to better manage migration in all its aspects. This Agenda sets out a European response, combining internal and external policies, making best use of EU agencies and tools, and involving all actors: Member States, EU institutions, International Organisations, civil society, local authorities and third countries.[14]

Since then, a number of measures have been introduced – including the adoption of two emergency schemes to relocate 160 000 people in clear need of international protection from the Member States most affected to other EU Member States, and the endorsement of the Commission Action Plan on Return. Also, the European Commission presented a set of priority actions to implement the European Agenda on Migration, this included both short term actions to stabilise the situation as well as longer term measures to establish a robust system that will bear the test of time. The list of priority actions set out the key measures immediately required in terms of: operational measures; budgetary support and implementation of EU law[15].

A first implementation package on the European Agenda on Migration including a proposal to trigger for the first time Article 78(3) of the TFEU in order to urgently relocate 40 000 asylum seekers for the benefit of Italy and Greece; a Recommendation for a resettlement scheme for 20 000 persons from outside the EU; an Action Plan on Smuggling; and the necessary amendments to the EU Budget to reinforce the Triton and Poseidon operations at sea so that more lives can be saved.[16]

It should be mentioned that, in its proposal for a Council Decision, the European Commission has submitted an emergency relocation scheme to assist Italy and Greece in which Romania should have received 6,351 asylum seekers from these countries, a fact which generated discontents of Romanian leaders who expressed dissatisfaction on introducing mandatory quotas for Member States. They had the same reaction before the Justice and Home Affairs Council of 14 September 2015 when the mandate of the Romanian Minister of Interior was "to not declare Romania's adherence to the mandatory quotas"[17]. Similar points of view have had the representatives of Czech Republic, Slovakia and Hungary which voted against the decision to allocate mandatory quotas for EU Member States. For all that, the Council adopted a decision establishing a temporary and exceptional relocation mechanism of 40 000 refugees from Greece and Italy[18]. On 22 September 2015 the Council adopted a new decision establishing a mechanism over two years which will apply to 120 000 persons, as follows: in the first year 66 000 persons will be relocated from Italy and Greece (15 600 from Italy and 50 400 from Greece), and the remaining 54 000 persons will be relocated from Italy and Greece in the same proportion after one year of the entry into force of the decision[19].

The measures proposed by the Commission and adopted by the Council on 14 September and 22 September to relocate 160 000 people from Greece, Italy and other Member States directly affected by the refugee crisis are intended to lessen the strain on the Member States under greatest pressure and to restore order to the management of migration. But it requires effective cooperation between relocating countries and the receiving Member States and, however, that several deadlines have not been met and many commitments are still slow to be fulfilled. In opinion of the Commission, political responsibilities need to be assumed at highest level in all Member States to ensure that the agreed coordinated European response can address the refugee crisis swiftly and efficiently on the ground by national and local authorities with the EU support and assistance that has been made available over the past months.[20]

The problem is the fact that some EU Member States (Hungary, Poland, Czech Republic and

[12] Extraordinary European Council meeting (23 April 2015) - The latest tragedies in the Mediterranean and EU migration and asylum policies - http://www.consilium.europa.eu, accessed on December 23, 2015.

[13] European Parliament resolution of 29 April 2015 on the latest tragedies in the Mediterranean and EU migration and asylum policies (2015/2660(RSP)) - http://www.europarl.europa.eu, accessed on December 27, 2015.

[14] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions - A EUROPEAN AGENDA ON MIGRATION, COM(2015) 240 final, Brussels, 13.5.2015, http://ec.europa.eu, accessed on December 27, 2015.

[15] Communication from the Commission to the European Parliament, the European Council and the Council - Managing the refugee crisis: immediate operational, budgetary and legal measures under the European Agenda on Migration, COM(2015) 490 final/2, Brussels, 29.9.2015, http://ec.europa.eu, accessed on December 28, 2015.

[16] http://europa.eu/rapid/press-release_MEMO-15-5038_en.htm, accessed on January 3, 2016.

[17] http://www.agerpres.ro/english/2015/09/10/iohannis-intmin-mandated-at-jha-council-to-not-declare-adherence-to-mandatory-immigr an t-quotas-14-15-03, accessed on January 3, 2016.

[18] Council decision establishing provisional measures in the area of international protection for the benefit of Italy and of Greece, Brussels, 14 September 2015 - http://www.consilium.europa.eu, accessed on January 6, 2016.

[19] Council Decision establishing provisional measures in the area of international protection for the benefit of Italy and Greece, Brussels, 22 September 2015 - http://www.consilium.europa.eu, accessed on January 6, 2016.

[20] Communication from the Commission to the European Parliament and the Council on the State of Play of Implementation of the Priority Actions under the European Agenda on Migration, COM(2016) 485 final, Brussels, 10.2.2016, http://ec.europa.eu, accessed on January 6, 2016.

Slovakia) are opposing the quota system, saying it will only encourage more asylum seekers to come to Europe. Thus, the European relocation scheme for asylum seekers has sparked discontent among Member States that made the calls to defend national borders to be stronger than calls for European solidarity. Countries like Greece, Bulgaria, Macedonia, Hungary, Slovenia, Austria, Sweden, Denmark, Italy, Finland, Austria, and Germany have all imposed some form of border control amid the refugee crisis, ranging from simple document checks to razor wire fences. The most eloquent in this regard is the case of Hungary which has erected a barbed-wire barrier along its border to Serbia and other along its border with Croatia in order to try and stem a flow of refugees and migrants and also threatened to raise similar one along part of its border with Romania.

Hungary's Prime Minister Viktor Orban announced in June 2015 that it would construct the fences because of the increasing number of refugees and migrants who want to enter the country, people who, as stated by the Prime Minister, were "now not just knocking on our door, but breaking it down". More than that, addressing Hungarian parliament he stressed that it is Hungary's historic and moral obligation to protect Europe, and when Hungary is protecting its borders, it is also protecting Europe"[21].

4. Efforts aimed at stemming the unprecedented migratory flows Europe is facing

The influx of more than a million migrants and refugees who crossed into Europe in 2015 greatly increased the pressure on Schengen area and, therefore, in accordance with the Schengen Borders Code, several Member States decided to reintroduce border controls at the internal borders, thus putting into question the proper functioning of the Schengen area of free movement and its benefits to European citizens and the European economy.

In these circumstances, the Commission has presented in December 2015 an ambitious set of measures aimed at securing the EU's borders, managing migration more effectively and improving the internal security of the European Union, while safeguarding the principle of free movement of persons. This package includes proposals on a Regulation establishing a European Border and Coast Guard, a targeted revision of the Schengen Borders Code and a Regulation on a European travel document for the return of illegally staying third-country nationals[22].

A few days later, on 18 December 2015, the European Council[23] took stock of the implementation of decisions taken in previous meetings and agreed to speed up actions on: the operation of hotspots; the implementation of the relocation decisions and returns; the control of the EU's external borders; cooperation with countries of origin and transit. Also, asked the Council to rapidly examine the European Commission's proposals of strengthening the EU's external borders[24].

On 10 February 2016, the Commission presented a Communication on a State of Play on the Implementation of the Priority Actions under the European Agenda on Migration[25]. In opinion of the Commission, in the last months, a route has formed through the Eastern Mediterranean and across the Western Balkans which sees migrants passing swiftly north through one border after another, in fundamental contradiction with the principles of the Common European Asylum System and the Schengen rules. For this reason it is urgent to do whatever is necessary to restore order into the migration system and impose control of the migratory flows, whereas restoring orderly management of borders on the Eastern Mediterranean/Western Balkans route is the most pressing priority for the European Union at this moment. However, the Commission stressed that this approach will require tough decisions, determined action, responsibility and, solidarity, by all Member States.

The Commission's view was supported by the European Council at its meeting in February 2016, on which occasion showed that the objective must be to rapidly stem the flows, protect EU's external borders, reduce illegal migration and safeguard the integrity of the Schengen area. In its turn, the European Council emphasized the need to build an European consensus on migration and on implementation of decisions already taken.[26] During this meeting, the President Klaus Iohannis has pleaded for the preservation of the Schengen area and stressed that Romania is part of the solution to the migration crisis. Iohannis revealed that "Romania maintains its position on approaching the root causes of migration, not just attempting to fight its effects". Therefore, has added Iohannis, "we must focus on implemented the decisions already agreed on a European level to combat illegal migration; on effectively defend the outer borders of the EU, where

[21] http://www.kormany.hu – Website of the Hungarian Government, accessed on January 7, 2016.

[22] European Agenda on Migration: Securing Europe's External Borders, Strasbourg, 15 December 2015 - http://europa.eu/rapid/press-release_MEMO-15-6332_en.htm, accessed on January 15, 2016.

[23] Should be noted that at this European Council's meeting, President Klaus Iohannis delegated Prime Minister Dacian Cioloș to participate in the reunion.

[24] Conclusions of the European Council, 17-18 December 2015 - http://www.consilium.europa.eu, accessed on January 20, 2016.

[25] COM(2016) 85 final.

[26] Conclusions of the European Council, 18-19 February 2016 - http://www.consilium.europa.eu, accessed on February 25, 2016.

Romania has an active role; and on the cooperation with the origin and transit states"[27].

The current migratory situation, including the monitoring of implementation of the measures already agreed, were analysed on 25 February 2016 by Justice and Home Affairs Council. During this meeting, the Council aimed to reach a general approach on the proposed regulation to reinforce checks against relevant databases at external borders, a demarche which seeks to improve security inside the EU by making mandatory the current possibility of checks on EU citizens against all relevant databases. Ministers also was briefed on the state of play on the proposed regulation establishing a European Border and Coast Guard, an agency would bring together resources from FRONTEX and member states in order to monitor migratory flows, identify weak spots and respond in situations where the EU's external border is at risk (as shown in outcome of the meeting, the Netherlands presidency of the Council intends to reach a political agreement before the end of its term on 30 June 2016)[28]. During the meeting was devoted a particular attention to current developments on the Western Balkans route, for which reason the ministers discussed cooperation with Turkey in the presence of the Turkish Deputy Minister of Interior. It should be noted that the meeting was be chaired by Klaas Dijkhoff (Minister for Migration of the Netherlands) who showed that the crisis can be solved "if all member states are ready to work together, as well as work with the countries on the Western Balkan route and with Turkey"[29]. Just two days before he held a joint press conference with Dimitris Avramopoulos, during which the two officials have expressed their concern about the developments along the Balkan route and the humanitarian crisis that might unfold in certain countries. Therefore, they have called on all countries and actors along the route to prepare the necessary contingency planning to be able to address humanitarian needs, including reception capacities. Moreover, they stressed that all countries involved have a responsibility and obligation to respect the European rules and put an end to the "wave through" approach. Thereby "all Member States should act in a joint spirit of solidarity and responsibility, especially in times when unity and common solutions are needed"[30].

For a better highlight of existing situation we really need to mention the statements of Natasha Bertaud (a spokeswoman for the European Commission), who said that "some member states are acting outside of the agreed framework for the Western Balkan route cooperation" and expressed the belief that "Member States should work together other, and not against each other in this respect"[31].

5. Conclusions

Taking into account the data presented above, I am convinced that the wave of migrants tends to become the largest and most complex challenge facing the European Union in its entire history and, therefore, the way in which the refugees and migrants crisis is managed may affect the future evolution of the Union.

Thus, a problem facing the entire European Union demands a common and coherent approach, desiderate which it seems difficult to achieve given that the crisis has opened up an east-west divide between Member States concerning idea of forced distribution of asylum-seekers under an EU quota system. More than that, on the background the migration crisis appeared intent of UK to withdraw from the Union, fact which accentuates the impression of weakness of the European Union as a whole, feeling that can be speculated very well by the Eurosceptics.

As can be seen, the Member States are united in that they face the same crisis, but so very divided in their attitudes and decision making.

In these circumstances, many European officials appealed for solidarity and called sharing responsibility of Member States, because the flow of refugees and migrants could be manageable if European Union countries work together. Eloquent in this regard is the statement of the EU foreign policy chief, Federica Mogherini, who warned that the European Union risks "disintegrating" over the ongoing migrant crisis if not respond "collectively" and equipped with necessary instruments[32].

In its turn, the European Commission is working in order to ensure a strong and coordinated European response, in this regard could be mentioned the proposal for a Council Regulation enabling the provision of emergency support in response to exceptional crises or disasters within EU

[27] http://www.presidency.ro/ro/presedinte/agenda-presedintelui/declaratia-de-presa-a-presedintelui-romaniei-domnul-klaus-iohannis1455925984, accessed on February 25, 2016.

[28] Outcome of the Council meeting, Home Affairs, Brussels, 25 February 2016 - http://www.consilium.europa.eu/en/meetings/jha/2016/02/25, accessed on February 29, 2016.

[29] Ibid.

[30] Joint Statement by Dutch Minister for Migration Klaas Dijkhoff and European Commissioner for Migration, Home Affairs and Citizenship, Dimitris Avramopoulos, Brussels, 23 February 2016 - http://europa.eu/rapid/press-release_STATEMENT-16-395_en.htm, accessed on February 29, 2016.

[31] https://euobserver.com/migration/132416, accessed on March 2, 2016.

[32] http://www.eubusiness.com/news-eu/europe-migrants.14xv, accessed on March 5, 2016.

Member States, which give rise to severe humanitarian consequences[33].

Analysing the efforts made at European level in recent months I express my hope that Member States will be able to overcome misunderstandings between them, because the European Union urgently needs to put in place a coherent, long-term and comprehensive strategy that tackles both the causes and the consequences of the current crisis.

Also, I am confident that European Union will show solidarity for refugees and migrants in need, but at the same time, we stress that it must be combated firmly intentions of those trying to risk citizens' security, especially that, as shown in the recent statements of a NATO official, "violent extremists, criminals and foreign fighters are part of the daily refugee flow into Europe"[34].

Seriousness of these affirmations and NATO's involvement in helping to stem the flow of migrants into Europe leads us to believe that finding solutions to the crisis will be the pivotal issue of the next months, whereas the better manage of the migration phenomenon will strengthen Union and, therefore, will restore confidence in the European project.

Remains to be seen if the European Union and its Member States will succeed in their common action to cope with this historical challenge or will behave like legendary orchestra which continued playing the hymn "Nearer, My God, to Thee" during the Titanic's sinking. We will see!

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[33] COM(2016) 115 final, Brussels, 2.3.2016.

[34] Statements of U.S. Air Force Gen. Philip Breedlove, commander of the U.S. European Command and NATO Supreme Allied Commander for Europe - http://www.militarytimes.com, accessed on March 5, 2016.

CYBER HOSTILITIES: CIVILIAN DIRECT PARTICIPATION

Dan-Iulian VOITAȘEC[*]

Abstract

The manner in which hostilities are being conducted has changed in recent years. The battle field has transpired beyond the physical realm and now has a virtual component. Because of this, it is now easier than ever for civilians to get involved in hostilities. International Humanitarian Law applies to all situations of armed conflict and according to the principle of distinction, the parties to the conflict must, at all times, distinguish between civilians and combatants. The problem arises when the line between combatants and civilians starts to get blurry. Direct civilian participation in hostilities has been addressed in both Additional Protocols to the Geneva Conventions of 1949 and in 2009 the International Committee of the Red Cross published the Interpretive guidance on the notion of Direct Participation in Hostilities under international humanitarian law. Another document that addresses the problem of civilian direct participation is the Tallinn Manual on the International Law Applicable to Cyber Warfare prepared by an international group of experts at the invitation of the NATO Cooperative Cyber Defence Centre of Excellence in 2013. The guide prepared by the ICRC addresses the problem of civilian direct participation during conventional situations of armed conflict, while the Tallinn Manual addresses direct participation in situations of cyber warfare. The purpose of this paper is to study the application of civilian direct participation to situations of cyber warfare.

Keywords: *international humanitarian law, civilian direct participation, cyber war, cyber-attacks, Tallinn Manual.*

1. Introduction

According to a customary IHL rule, civilians are persons who are not members of the armed forces and the civilian population comprises all persons who are civilians[1]. A more complex definition of civilians and civilian population can be found in Article 50 of the Additional Protocol I (AP I) to the Geneva Conventions of 1949[2]. A fundamental principle of International Humanitarian Law (IHL), the principle of distinction, states that parties to the conflict must, at all times, distinguish between civilians and combatants and that attacks may only be directed against combatants. We see that IHL protects the civilian population but what happens when the line between civilians and combatants gets blurred. Most modern conflicts are no longer international in nature; this means that they are not fought between two or more states but between the governmental authorities of a certain state and organized armed groups or between such groups within a state. This has led to fighting in civilian populated areas and increased the number of civilians that get involved in the conduct of hostilities. Also, the development of cyber warfare has allowed for an increasing number of civilians to get involved in hostilities.

What are the consequences that civilians face if they get involved in hostilities? The answer to that question comes in the form of direct participation in hostilities. The notion of direct participation in hostilities (DPH) has been addressed in both AP to the Geneva Conventions; in the Interpretive guidance on the notion of Direct Participation in Hostilities under international humanitarian law published by the ICRC in 2009 and in the Tallinn Manual publishes by the NATO Cooperative Cyber Defence Centre of Excellence in 2013. This article will focus on direct civilian participation in hostilities in situations of cyber warfare.

2. Content

The notion of direct participation in hostilities can be found in Article 51 (3) of Additional Protocol I to the Geneva Conventions[3] that focuses on international armed conflict and in Article 13 (3) of Additional Protocol II[4] to the Geneva Conventions

[*] PhD candidate, Faculty of Law, "Nicolae Titulescu" University of Bucharest (e-mail: **dan.voitasec@gmail.com**).

[1] International Committee of the Red Cross – Customary IHL Database – Rule 5 – Definition of civilians accesed February 22, 2016. - https://www.icrc.org/customary-ihl/eng/docs/v1_cha_chapter1_rule5.

[2] AP I to the GC of 1949 – art. 50:

1. A civilian is any person who does not belong to one of the categories of persons referred to in Article 4 A (1), (2), (3) and (6) of the Third Convention and in Article 43 of this Protocol. In case of doubt whether a person is a civilian, that person shall be considered to be a civilian.

2. The civilian population comprises all persons who are civilians.

3. The presence within the civilian population of individuals who do not come within the definition of civilians does not deprive the population of its civilian character.

[3] Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection Of Victims Of International Armed Conflicts Of 8 June 1977.

[4] Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection Of Victims Of Non-International Armed Conflicts Of 8 June 1977.

that deals with non-international armed conflicts. The notion of DPH is not defined in the Protocols, it is just stated that civilians are protected against attacks "unless and for such time as they take a direct part in hostilities". Although the two AP are not ratified by all United Nation (UN) members, some parts of the Protocols are considered customary IHL. The fact that direct participation in hostilities leads to a loss of protection is also stated in ICRC's Customary IHL study. Rule 6 of the study reflects the wording of Article 51 (3) and Article 13 (3). In the commentary on Rule 6 it is also stated that a precise definition of DPH does not exist[5].

Due to the lack of definition and guidance on the interpretation of the concept of direct participation in hostilities, the ICRC launched, in 2003, a research project to further explore the subject. The results of the project were published by the ICRC in May 2009. The "Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law" is not a binding document and due to its controversial nature it expresses solely the ICRC's views[6]. Although controversial, even critics of the project agreed that the Guide "clearly advances general understanding of the complex notion of "direct participation"[7].

The ICRC made a number of 10 recommendations concerning the interpretation of IHL relating to the notion of DPH. These recommendations concern the following areas: the concept of civilian in international armed conflict, the concept of civilian in non-international armed conflict, private contractors and civilian employees, direct participation in hostilities as a specific act, constitutive elements of DPH, beginning and end of DPH, temporal scope of the loss of protection, precautions and presumptions in situations of doubt, restraints on the use of force in direct attack, consequences of regaining civilian protection.

In the Interpretative Guidance, the ICRC defines the term "civilian" differently for situations of international armed conflict and non-international armed conflict. The concept of civilian for the purposes of the principle of distinction in international armed conflict is defined as "*all persons who are neither members of the armed forces of a party to the conflict nor participants in a levée en masse are civilians and, therefore, entitled to protection against direct attack unless and for such time as they take a direct part in hostilities*." [8] The ICRC mimics the wording of AP I article 50 and 51 (3) and defines civilians negatively as not being part of certain groups.

A different approach can be found while defining civilians for the purposes of the principle of distinction in non-international armed conflict, in these situations civilians are defined as "*all persons who are not members of State armed forces or organized armed groups of a party to the conflict are civilians and, therefore, entitled to protection against direct attack unless and for such time as they take a direct part in hostilities. In non-international armed conflict, organized armed groups constitute the armed forces of a non-State party to the conflict and consist only of individuals whose continuous function it is to take a direct part in hostilities ("continuous combat function")."* [9]

The ICRC introduces the concept of *continuous combat function* to distinguish members of organized armed groups that function as the armed forces of a non-State actor party to the conflict from civilians that take part in hostilities and form the civilian population. This means that a persons that serves a continuous combat function, for example "individuals whose continuous function involves the preparation, execution, or command of acts or operations amounting to direct participation in hostilities"[10] are subject to attack at any time.

The concept of continuous combat function does not apply to those individuals that support an organized armed group but are not directly involved in hostilities. According to the ICRC's commentary "recruiters, trainers, financiers and propagandists may continuously contribute to the general war effort of a non-State party, but they are not members of an organized armed group belonging to that party unless their function additionally includes activities amounting to direct participation in hostilities"[11]. Also the concept does not apply to civilians that undertake sporadic actions for an organized armed group that amounts to direct participation. These civilians lose the protection granted to them by IHL only for such time as they directly participate in hostilities.

Regarding civilians in situations of cyber hostilities, Rule 29 of the Tallinn Manual does not define the civilian population but states that "civilians are not prohibited from directly participating in cyber operations amounting to

[5] ICRC – Customary IHL Database – Rule 6 Civilians' Loss of Protection from Attack. Accessed on 24.02.2016 - https://www.icrc.org/customary-ihl/eng/docs/v1_rul_rule6

[6] ICRC, Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law (Nils Melzer, 2009) p. 6 – available at https://www.icrc.org/eng/assets/files/other/icrc-002-0990.pdf

[7] Michael N. Schmitt - The Interpretive Guidance on the Notion of Direct Participation in Hostilities: A Critical Analysis (Harvard National Security Journal, vol.1, 2010) p. 2 Accessed on 24.02.2016 - http://ssrn.com/abstract=1600243. Michael N. Schmitt was one of the experts that took part in the research project and withdrew his name after reviewing the final draft.

[8] Interpretive Guidance (2009) - p. 20.

[9] Idem p. 27.

[10] Idem p. 34.

[11] Idem.

hostilities but forfeit their protection from attacks for such time as they so participate."[12] It is also stated in the Tallinn Manual that the principle of distinction shall apply to cyber attacks[13] and that the civilian population should not be subject to cyber attacks[14].

Another recommendation made by the ICRC in the Interpretative Guidance refers to the constitutive elements of direct participation in hostilities. An act must meet three cumulative criteria to qualify as direct participation in hostilities: threshold of harm, direct causation and belligerent nexus.[15] The group of experts that worked on the Tallinn Manual "generally agreed with the three cumulative criteria set forth by the ICRC Interpretative Guidance"[16]

For a specific act to reach the *threshold of harm* it *"must be likely to adversely affect the military operations or military capacity of a party to an armed conflict or, alternatively, to inflict death, injury, or destruction on persons or objects protected against direct attack."*[17] The definition distinguishes between two situations. Firstly for an act to reach the threshold of harm it must adversely affect the military operations of a party to the conflict. The other situation in which an act can reach the threshold of harm is when it inflicts death, injury or destruction on protected persons or objects.

For the first situation presented in the definition, to reach the threshold of harm the effects of an action *must be likely* to produce harm but the actual materialization is not required.[18]

The ICRC also refers to cyber operations launched by civilians against the military operations or capacity to a party to the conflict. In the Guidance it is stated that: *"Electronic interference with military computer networks could also suffice, whether through computer network attacks (CNA) or computer network exploitation (CNE), as well as wiretapping the adversary's high command or transmitting tactical targeting information for an attack."* [19] A cyber operation launched by a civilian which causes military harm will reach the threshold of harm.

In the situation where an act does not cause harm to the military capacity or military operations of a party to an armed conflict, an action must be likely to inflict death, injury or destruction on persons or objects protected against direct attack to reach the threshold of harm. This situation refers to actions directed against civilians and civilian objects. According to the ICRC *the interruption of electricity, water, or food supplies […] the manipulation of computer networks […]* would not reach the threshold of harm in the absence of adverse military effects. [20]

Although the Tallinn Manual generally agrees with the criterion put forward by the Interpretive Guidance some differences of opinion can be found. Firstly, the Tallinn Manual excludes the "likelihood" description from its interpretation of the threshold of harm and includes intention[21]. Also, in the Tallinn Manual it is stated that "there is no requirement for physical damage to objects or harm to individuals" [22] which means that actions that do not qualify as a cyber attack[23] will still reach the threshold of harm if they cause military harm to the enemy.[24]

The second constitutive element of direct participation in hostilities is called *direct causation* and is defined in the Interpretive Guidance as follows: *"In order for the requirement of direct causation to be satisfied, there must be a direct causal link between a specific act and the harm likely to result either from that act, or from a coordinated military operation of which that act constitutes an integral part."* [25]

In the Guidance, the ICRC differentiates between direct and indirect participation in hostilities. For an act to be consider direct participation in hostilities "there must be a sufficiently close causal relation between the act and the resulting harm"[26]. The ICRC affirms that the harm caused by an action had to be "brought in one causal step"[27] to satisfy the direct causation criterion. Another requirement set forward by the ICRC to satisfy the direct causation criterion is that the harm has to be caused directly, it is not sufficient that the

[12] Michael N. Schmitt et al., Tallinn Manual on the International Law Applicable to Cyber Warfare – Cambridge University Press, Cambridge, 2013 p. 90.
[13] Idem Rule 31, p. 95.
[14] Idem Rule 32, p. 97.
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[16] Tallinn Manual, Rule 35, p. 102.
[17] Interpretive Guidance (2009) - p. 47.
[18] Idem.
[19] Idem – p. 48.
[20] Idem – p.50.
[21] Collin Allan - Direct Participation in Hostilities from Cyberspace – p. 181 (Virginia Journal of International Law, Vol. 54, No. 1, 2013) Accessed on 24.02.2016 - http://ssrn.com/abstract=2617867
[22] Tallinn Manual – p. 102.
[23] Tallinn Manual – Rule 30 Definition of Cyber Attack: A cyber attack is a cyber operation, whether offensive or defensive, that is reasonably expected to cause injury or death to persons or damage or destruction to objects.
[24] Tallinn Manual – p. 102.
[25] Interpretative Guidance – p. 51.
[26] Idem – p. 52.
[27] Idem – p. 53.

act and its consequences to be connected through an uninterrupted causal chain of events[28]. For example acts such as providing financial assistance or certain services (electricity, fuel) to a party to an armed conflict are considered indirect participation.

In the case of collective operations an act that does not reach the threshold of harm could still satisfy the direct causation criterion if it "constitutes an integral part of a concrete and coordinated tactical operation that directly causes such harm." [29]

No commentary on the direct causation criterion is found in the Tallinn Manual. It is only stated that "a direct causal link between the act in question and the harm intended or inflicted must exist" [30] for the action of a civilian to qualify as direct participation.

The last of the three cumulative criteria needed to qualify an act of a civilian as direct participation in hostilities is the *belligerent nexus*. In the Guidance the belligerent nexus is defined as an act that *"must be specifically designed to directly cause the required threshold of harm in support of a party to the conflict and to the detriment of another."* [31]

The concept of direct participation in hostilities is restricted only to those acts that are an integral part of the hostilities[32]. Not all acts that cause harm in a situation of armed conflicted can be linked to a party to the conflict. Even in situations of armed conflict some civilian acts are driven by private gain and they will engage in acts that cause harm. One of the examples given by the ICRC is the exchange of fire between civilians and the police during a bank robbery. [33] The belligerent nexus does not exist because the action was not realized in support of a party to the conflict. The action of a civilian to resort to violence in self-defense lacks belligerent nexus[34].

Even though, out of the three criteria, the belligerent nexus is the least controversial, Michael Schmitt considers that the criterion should be defined differently, instead of *in support of a party to the conflict and to the detriment of another* to an *act in support or to the detriment of a party*[35]. A similar approach can be found in the Tallinn Manual where the belligerent nexus is interpreted as an act directly related to the hostilities[36]. The belligerent nexus of a cyber operation launched by a civilian exists when it is directly related to the hostilities, the requirements that the act should be in support of a party to the conflict and to the detriment of another is not taken into consideration by the Tallinn Manual.

The group of experts involved in writing the Tallinn Manual agreed with the ICRC that acts of purely criminal or private nature are ruled out of the belligerent nexus criterion.[37]

Another problem arising from the concept is the beginning and the end of direct participation in hostilities. According to the sixth recommendation made by the ICRC in the Interpretive Guidance *"measures preparatory to the execution of a specific act of direct participation in hostilities, as well as the deployment to and the return from the location of its execution, constitute an integral part of that act."*[38]

Preparatory measures amount to direct participation in hostilities when they are an integral part of a hostile act. Preparatory measures "*aiming to carry out a specific hostile act qualify as direct participation in hostilities, whereas preparatory measures aiming to establish the general capacity to carry out unspecified hostile acts do not"*[39] The ICRC also states that the temporary proximity or close geographical proximity is not required for the preparatory measures to be an integral part of the hostile act.[40]

In the Guidance it is stated that for acts that do not require geographical displacement as is the case for certain cyber operations *"the duration of direct participation in hostilities will be restricted to the immediate execution of the act and preparatory measures forming an integral part of that act"*[41] In the case of cyber operations launched by civilians only the execution of the act will be considered direct participation in hostilities according to the ICRC. The civilians will not be targetable for the duration of the deployment and return.

This view is not shared by the Tallinn Manual expert's that state: *"Any act of direct participation in hostilities by a civilian renders that person targetable for such time as he or she is engaged in the qualifying act of direct participation. All of the Experts agreed that this would at least include actions immediately preceding or subsequent to the qualifying act. For instance, travelling to and from the location where a computer used to mount an operation is based would be encompassed in the notion."*[42]

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[28] Idem – p 54.
[29] Idem – p.55.
[30] Tallinn Manual – p. 102.
[31] Interpretative Guidance – p.58.
[32] Idem.
[33] Idem – p. 60.
[34] Idem – p. 61.
[35] Michael N. Schmitt (2010) – p. 34.
[36] Tallinn Manual – p. 102.
[37] Idem – p. 103.
[38] Interpretative Guidance – p.65.
[39] Idem – p. 66.
[40] Idem.
[41] Idem – p. 68.
[42] Tallinn Manual – p. 103.

The seventh recommendation made by the ICRC refers to the temporal scope of the loss of protection. In the Guidance the ICRC differentiates between civilians who sporadically participate in hostilities and those who serve a continuous combat function: *"Civilians lose protection against direct attack for the duration of each specific act amounting to direct participation in hostilities, whereas members of organized armed groups belonging to a non-State party to an armed conflict cease to be civilians and lose protection against direct attack, for as long as they assume their continuous combat function."*[43]

The ICRC based this definition on the two AP to the Geneva Conventions that state that civilians will be protected against attack "unless and for such time as they take a direct part in hostilities"[44]. The part of the definition found in the Guidance regarding the loss of protection of civilians who sporadically take part in hostilities is called "the revolving door" due to the loss and regaining of protection[45] . The revolving door concept is highly controversial, even the experts that worked on the Tallinn Manual could not reach a consensus regarding this issue. Some experts accepted the view presented in the Interpretive Guidance and stated that civilians who launched repeated cyber operations that qualify as direct attack should lose protection against attack for the duration of each specific acts while others argued that direct participation begins with the first cyber operation launched and continues "throughout the period of intermittent activity"[46]. In the case of cyber operations some problems may arise due to the short time span in which they take place, some cyber attacks last minutes or less while others will have delayed effects. In the opinion of Michael N. Schmitt if the revolving door concept is applied to cyber operations "there would appear to be no window of opportunity for the victim of an attack to respond"[47]. Schmitt considers that the reasonable interpretation of "for such time" in a situation of cyber conflict is to encompass "the entire period during which the direct cyber participant is engaging in repeated cyber operations"[48]

3. Conclusions

The ICRC is the leading humanitarian organization and the States party to the Geneva Conventions have given it a mandate to protect victims of international and non-international armed conflict thus the views of the ICRC will always be geared towards protecting the victims. On the other hand, IHL experts who have a different professional background may not always share the views of the ICRC. This situation can be observed in the different approaches found in the Interpretive Guidance and the Tallinn Manual. Although the Interpretive Guidance and the Tallinn Manual share the same view regarding the three cumulative requirements needed for direct participation in hostilities, the interpretation of certain criteria may differ. This article has highlighted that the ICRC's interpretation of direct participation in hostilities offers a higher degree of protection to the civilian population while the Tallinn Manual increases the window of opportunity for civilians who take part in cyber hostilities to be targeted.

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[43] Interpretative Guidance – p.70.
[44] AP I to GC – article 51 (3), AP II to GC – article 13 (3).
[45] Interpretative Guidance – p. 70.
[46] Tallinn Manual – p. 104.
[47] Michael N. Schmitt - Cyber Operations and the Jus in Bello: Key Issues (2011) – p. 14. Accesed on 02.03.2016 - http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1801176
[48] Idem.

MEANS AND METHODS OF CYBER WARFARE

Dan-Iulian VOITAȘEC*

Abstract

According to the Declaration of Saint Petersburg of 1868 "the only legitimate object which States should endeavor to accomplish during war is to weaken the military forces of the enemy". Thus, International Humanitarian Law prohibits or limits the use of certain means and methods of warfare. The rapid development of technology has led to the emergence of a new dimension of warfare. The cyber aspect of armed conflict has led to the development of new means and methods of warfare. The purpose of this paper is to study how the norms of international humanitarian law apply to the means and methods of cyber warfare.

Keywords: *cyber warfare, means and methods, international humanitarian law, Tallinn manual, armed conflict.*

1. Introduction

International Humanitarian Law (IHL) limits the way in which hostilities are being conducted by limiting or prohibiting certain means and methods of warfare. According to Article 22 of The Hague Regulations of 1907 "the right of belligerents to adopt means of injuring the enemy is not unlimited."[1] The limitation is reiterated in Article 35(1) of Additional Protocol I (AP I) to the Geneva Conventions of 1949 and in the preamble of the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons. The norms of IHL that limit or prohibit the use of certain means and methods of warfare are also known as the law of weaponry. The law of weaponry contains both general principles and specific rules. The general principles refer to the prohibition of weapons that are by nature indiscriminate or cause unnecessary suffering while the specific rules refer to the limitation or prohibition of certain means and methods of warfare.[2] The norms of IHL that limit or prohibit the usage of certain means and methods of warfare were adopted before the development of cyber capabilities, some of the norms were adopted before the invention of the television set. The modern battle space presents more dimensions, is more complex to manage and employs a larger number of weapons and tools. Due to the rapid development of cyber capabilities, cyberspace has been recognized as one of the five domains of warfare. Although no IHL norms deal directly with situation of cyber warfare, the growing importance of cyber operations has led to the publication, in 2013, of the Tallinn Manual on the International Law applicable to cyber warfare. The Manual was prepared by an international group of experts at the invitation of the NATO Cooperative Cyber Defence Centre of Excellence. The Tallinn Manual is a non-binding document that has the scope of examining the international law governing cyber warfare. The scope of this article is to study how the law of weaponry will apply to cyber means and methods of warfare.

2. Content

Rule 41 of the Tallinn Manual distinguishes between means of cyber warfare and methods of cyber warfare stating that the means of cyber warfare are "cyber weapons and their associated cyber systems" while cyber methods of warfare include the "tactics, techniques and procedures by which hostilities are being conducted."[3] These definitions will apply in both situations of international and non-international armed conflict.[4]

In the commentary on Rule 41, the group of experts state that cyber weapons are "by design, use, or intended use capable of causing either (i) injury to, or death of, persons; or (ii) damage to, or destruction of objects, that is, causing the consequences required for qualification of a cyber operation as an attack" [5] The cyber infrastructure that is used to launch a cyber attack (in this case the internet) is not viewed as a means of warfare because it is not under the control of the attacking party.[6] The definition of methods of cyber warfare does not include communication between allies but it is intended to "denote more than those operations that

* PhD candidate, Faculty of Law, "Nicolae Titulescu" University of Bucharest (e-mail: **dan.voitasec@gmail.com**).

[1] Convention (IV) respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land. The Hague, 18 October 1907. - Art. 22.

[2] Heather Harrison Dinniss - Cyber Warfare and the Laws of War (Cambridge University Press, 2012) – p. 252.

[3] Michael N. Schmitt et al., Tallinn Manual on the International Law Applicable to Cyber Warfare – Cambridge University Press, Cambridge, 2013 p. 118.

[4] Idem – p. 119.

[5] Idem.

[6] Idem.

rise to the level of an attack"[7]. Even though communications between friendly forces are not viewed as methods of cyber warfare, interfering with the enemy's communication using a Denial of Service (DoS) attack that does not reach the threshold necessary to be considered a cyber attack[8] would constitute a method of warfare.

The development of new means and methods of warfare is not prohibited by international law but the same norms that apply to conventional means and methods of warfare will also apply to the newly developed ones. In a 2011 report the International Committee of the Red Cross (ICRC) stated that IHL will apply to "means and methods of warfare which resort to cyber technology"[9]. The same view is shared by the international group of experts that developed the Tallinn Manual. All new technologies, including cyber capabilities, used in a situation of armed conflict fall under the scope of article 36 of AP I to the Geneva Conventions of 1949 that states: "In the study, development, acquisition or adoption of a new weapon, means or method of warfare, a High Contracting Party is under an obligation to determine whether its employment would, in some or all circumstances, be prohibited by this Protocol or by any other rule of international law applicable to the High Contracting Party." [10]

Although article 36 is not considered customary IHL even some states that are not party to AP I to the Geneva Conventions of 1949, like the United States of America, apply the review of new means and methods of warfare.[11]

The use of new means and methods of warfare is unlawful if they are of a nature to cause superfluous injury or unnecessary suffering[12], their effects are indiscriminate[13] or are intended or expected to cause long-term and severe damage to the natural environment.[14]

Superfluous injury or unnecessary suffering

Rule 42 of the Tallinn Manual states that: *"It is prohibited to employ means or methods of cyber warfare that are of a nature to cause superfluous injury or unnecessary suffering."*[15] This rule reflects both treaty law[16] and customary IHL and is applicable in both international and non-international armed conflict[17]. Unnecessary suffering was defined by the International Court of Justice (ICJ) in the Nuclear Weapons case as "harm greater than that unavoidable to achieve legitimate military objectives."[18]

Article 35(2) of AP I to the Geneva Conventions presents a test for new means a methods of warfare. The effects of the new means and methods must be judged in relation to their military utility. The test is "only valid for weapons designed exclusively for antipersonnel purposes" inasmuch as weapons designed to destroy, for example, military materiel "may be expected to cause injuries to personnel in the vicinity of the target which would be more severe than necessary to render these combatants hors de combat."[19] It is accepted that anti-personnel weapons and weapons used to destroy enemy materiel or fortifications differ in effect and character and that the latter ones will cause more serious injury or lead to the death of more personnel. Their use is not unlawful and does not violate article 35(2) because the military advantage that they offer means that the additional suffering cannot be characterized as unnecessary.[20] In the opinion of Yoram Dinstein "the injunction against superfluous injury or unnecessary suffering hangs on a distinction between injury/suffering that is avoidable and unavoidable."[21] A test of the weapon in question and other available options is required in order to see whether there is an alternative weapon that causes less injury and suffering and if its effects are

[7] Idem.

[8] Rule 30 of the Tallinn Manual - A cyber attack is a cyber operation, whether offensive or defensive, that is reasonably expected to cause injury or death to persons or damage or destruction to objects.

[9] ICRC - International Humanitarian Law and the challenges of contemporary armed conflicts (2011) – p. 37. Accessed on 10.03.2016. Available at: https://www.icrc.org/eng/assets/files/red-cross-crescent-movement/31st-international-conference/31-int-conference-ihl-challenges-report-11-5-1-2-en.pdf

[10] Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts of 8 June 1977 – article 36.

[11] Marco Roscini - Cyber Operations and the Use of Force in International Law (Oxford University Press, 2014) – p. 171.

[12] AP I to Geneva Conventions – art. 35 (2).

[13] Idem – art. 51(4).

[14] Idem – art. 35(3).

[15] Tallin Manual – p. 119.

[16] Article 35(2) of AP I to the Geneva Convention and Article 23 (e) of Hague Convention IV of 1907.

[17] ICRC Customary IHL Database – Rule 70 – Accessed on 10.03.2015. Available at: https://www.icrc.org/customary-ihl/eng/docs/v1_rul_rule70.

[18] International Court of Justice - Legality of the threat or use of Nuclear Weapons, Advisory Opinion (1996) – p. 66. Accessed on 11.03.2016. Available at: http://www.icj-cij.org/docket/index.php?p1=3&p2=4&k=e1&p3=4&case=95.

[19] Bothe et al. – New Rules for Victims of Armed Conflicts – Commentary on the two 1977 Protocols Additional to the Geneva Conventions of 1949, 2nd edition (Brill | Nijhoff, 2013) p. 226. Accessed on 11.03.2016. Excerpts, including page 226, available at: https://books.google.ro/books?id=rVy2AgAAQBAJ&pg; Yoram Dinstein - The Conduct of Hostilities under the Law of International Armed Conflict 1st edition (Cambridge University Press, 2004).

[20] Bothe – p. 226; Christopher Greenwood - The Law of Weaponry at the Start of the New Millennium (International Law Studies – Vol. 71, 1998) – p. 196.

[21] Y. Dinstein – p. 60.

sufficiently effective in neutralizing enemy personnel.[22]

Regarding cyber means and methods of warfare, the Tallinn Manual states that Rule 42 applies only to injury or suffering caused to combatants, civilians directly participating in hostiles and members of organized armed groups while any incidental harm caused, during a military operation, to persons protected against attack would be governed by the principle of proportionality and the requirement to take precautions in attack.[23]

Given the nature of the test it could be argued that the usage of means or methods of cyber warfare, against certain targets, could be more effective than conventional means or methods. Most cyber attacks tend to neutralize or destroy a target while causing fewer casualties. However, the test is not limited just to the immediate effects of the two weapons (or methods of warfare); other factors should be taken in consideration before choosing between the two such as: the availability (including the expense) of both types of weapon, the logistics of supplying the weapon and its ammunition at the place where it is to be used and the security of the troops which employ it.[24] All these factors tend to be in favor of increasing the usage of cyber means and methods in certain situations. It should be noted that most means and methods of cyber warfare are not directed against individuals but against military materiel. As stated in the Tallinn Manual most means and methods of cyber warfare will rarely violate Rule 42[25] but there are some situations in which lawful means and methods of cyber warfare could cause unnecessary suffering. In the example given in the Tallinn Manual a state takes control of the pacemaker of an individual in order to kill him or render him hors de combat by stopping his hart. This action is lawful and does not cause unnecessary suffering to the individual. The act of controlling the peacemaker of the individual, stopping his heart, reviving him multiple times before finally killing him serves no military purpose and would violate rule 42.[26] It may sound like science fiction to take control of an individual's pacemaker but in 2011, Jerome Radcliffe, a security consultant and researcher, hacked his insulin pump and suspended the delivery of insulin[27]

Indiscriminate Means or Methods

The prohibition of indiscriminate attacks can be found in article 51(4) of AP I to the Geneva Conventions of 1949. In subparagraph (b) it is stated that indiscriminate attacks employ means or methods of combat which cannot be directed against a specific military objective; subparagraph (c) prohibits attacks that employ means or methods of combat the effects of which cannot be limited as required under the Protocol and "consequently, in each such case, are of a nature to strike military objects and civilians or civilian objects without distinction." [28] The rule that indiscriminate means or methods of warfare are prohibited also reflects customary IHL and applies to both situations of international and non-international armed conflict[29]. Rule 43 of the Tallinn Manual is based on article 51(4)(b) and (c) and stated that:

"It is prohibited to employ means or methods of cyber warfare that are indiscriminate by nature. Means or methods of cyber warfare are indiscriminate by nature when they cannot be:

a) directed at a specific military objective, or

b) limited in their effects as required by the law of armed conflict

and consequently are of a nature to strike military objectives and civilians or civilian objects without distinction."[30]

It is stated in the commentary accompanying the Tallinn Manual that Rule 43 deals only with means and methods of cyber warfare that are inherently discriminate. Subparagraph (a) prohibits those means and methods of cyber warfare whose effects are impossible to predict.[31] For example the launch of a malware, designed without any specific safeguards, that will infect and deploy the payload component[32] to all computer systems infected without distinguishing between military computer systems and computer systems protected by IHL. Subparagraph (b) prohibits the usage of means and methods of cyber warfare that are capable of being directed against a specific target but also will cause harmful effects on civilians or civilian objects. The rule does not prohibit the use of means and methods of cyber warfare that only cause effects that are "inconvenient or annoying". [33] For example, the Stuxnet virus spread indiscriminately but created effects only on computer systems that had a specific component structure. In this case, the weapon is not

[22] Idem.
[23] Tallin Manual – p. 120.
[24] C.Greenwood – p. 198.
[25] Tallin Manual – p. 120.
[26] Idem – p. 121.
[27] Jerome Radcliffe – Hacking Medical Devices for Fun and Insulin: Breaking the Human SCADA System (Black Hat USA, 2011).
[28] AP I to the G.C – art. 51(4).
[29] ICRC Customary Database – rule 12, 71.
[30] Tallinn Manual –rule 43, p. 121.
[31] Idem.
[32] The part of the packet, message or code that carries the data. In information security, the term payload generally refers to the part of malicious code that performs the destructive operation.- http://www.securityfocus.com/glossary/P
[33] Tallinn Manual, p. 121.

prohibited under Protocol I and Rule 43 of the Tallinn Manual because even though the spread was indiscriminate the effects were limited to specific computer systems.

In the Manual it is also stated that all indiscriminate effects caused by means or methods of warfare, during a particular attack, will not violate rule 43 if they were caused by an unforeseeable system malfunction or reconfiguration.[34] Even though that is the case, states are required to ensure that new means and methods of warfare that they develop comply with the rule of IHL that bind the state. This requirement is found in article 36 of A.P. I to the Geneva Conventions and is also reflected in Rule 48 of the Tallinn Manual[35].

The International Group of Experts that worked on the Tallinn Manual found it difficult to identify means and methods of cyber warfare that might violate Rule 43[36]. Indeed, given the rapid development in the field of IT&C it is hard to believe that states could not create a cyber weapon capable of targeting certain military objectives without causing harm to objects and individuals protected by IHL. Stuxnet, discovered in 2010 was capable of targeting only Siemens supervisory control and data acquisition (SCADA) systems[37]. Given the amount of time that has passed since the discovery of the malware it is plausible to believe that state have the capability to develop even more powerful and precise cyber weapons. Having that in mind, the application of this norm of international law on all means and methods of cyber warfare is important for the safeguard of civilians and civilian objects.

Cyber booby traps

The usage of conventional weapons is generally not prohibited by IHL but a series of treaties were adopted that limit or prohibit the usage of certain conventional weapons that do not respect the norms of IHL[38]. Although, at this time, there is no norm of IHL that limits or prohibits the usage of cyber capabilities, some means and methods of cyber warfare could be the subject of definitions of other weapons conventions[39]. The usage of cyber booby traps fall under such definition. Protocol II and Amended Protocol II of the Conventional Weapons Convention define booby traps as "any device or material which is designed, constructed or adapted to kill or injure, and which functions unexpectedly when a person disturbs or approaches an apparently harmless object or performs an apparently safe act. " [40] Rule 44 of the Tallinn Manual states that "it is forbidden to employ cyber booby traps associated with certain objects specified in the law of armed conflict."[41] The rule is based on the definition of booby traps found in the Conventional Weapons Convention; it reflects customary international law in both international and non-international armed conflict.[42]

According to the International Groups of Experts for a cyber booby trap to fall under the scope of this rule it must include the following factors[43]:

- the cyber booby traps should be deliberately designed to operate unexpectedly
- it must be "designed, constructed or adapted to kill or injure"
- the act that triggers the cyber booby trap should appear harmless.

The cyber weapon should be associated with specific objects defined in art. 7 of Amended Protocol II to the CWC[44]

Perfidy

Perfidy is defined in article 37 of AP I to the Geneva Conventions of 1949 as: "Acts inviting the confidence of an adversary to lead him to believe that he is entitled to, or is obliged to accord, protection under the rules of international law applicable in armed conflict, with intent to betray that confidence."[45] The Tallinn Manual states in Rule 60 that "in the conduct of hostilities

[34] Idem, p. 122.

[35] Tallinn Manual – Rule 48: a. All States are required to ensure that the cyber means of warfare that they acquire or use comply with the rules of the law of armed conflict that bind the State.

b. States that are Party to Additional Protocol I are required in the study, development, acquisition, or adoption of a new means or method of cyber warfare to determine whether its employment would, in some or all circumstances, be prohibited by that Protocol or by any other rule of international law applicable to that State.

[36] Tallinn Manual, p. 122.

[37] Nicolas Falliere - Stuxnet Introduces the First Known Rootkit for Industrial Control Systems. Available at: http://www.symantec.com/connect/blogs/stuxnet-introduces-first-known-rootkit-scada-devices

[38] Beatrice Onica Jarka – Drept International Umanitar (Universul Juridic, 2010) – p.99.

[39] H.H Dinniss – p. 258.

[40] Protocol II to the 1980 CCW Convention as amended on 3 May 1996 – art. 2(4).

[41] Tallinn Manual – Rule 44, p. 122.

[42] ICRC Customary IHL Database – Rule 80.

[43] Tallinn Manual, p.123.

[44] Protocol II to the 1980 CCW Convention as amended on 3 May 1996, Article 7(1) […] (a) internationally recognized protective emblems, signs or signals; (b) sick, wounded or dead persons; (c) burial or cremation sites or graves; (d) medical facilities, medical equipment, medical supplies or medical transportation; (e) children's toys or other portable objects or products specially designed for the feeding, health, hygiene, clothing or education of children; (f) food or drink; (g) kitchen utensils or appliances except in military establishments, military locations or military supply depots; (h) objects clearly of a religious nature; (i) historic monuments, works of art or places of worship which constitute the cultural or spiritual heritage of peoples; or (j) animals or their carcasses; 2. It is prohibited to use booby-traps or other devices in the form of apparently harmless portable objects which are specifically designed and constructed to contain explosive material.

[45] AP I to the Geneva Conventions – article 37.

involving cyber operations, it is prohibited to kill or injure an adversary by resort to perfidy."[46] The definition of perfidy found in Rule 60 of the Tallinn Manual mimics the definitions found in AP I. The norm applies in both international and non-international armed conflicts and is considered customary international law[47]

According to the International Group of Experts, customary international law includes perfidious acts intended to result in the injury or death of an adversary while article 37 includes acts that also result in the capture of the adversary.[48] Temporal proximity is not required for an act to violate rule 60[49]. An example of cyber perfidy is sending the enemy an email inviting them to meet with a representative of the ICRC. The email will be sent from a genuine but hacked ICRC email address. Several days later, when the enemy arrives at the location they are "greeted" by an explosion causing injury or death to several of them.

The confidence of cyber systems was a topic of debate for the International Group of Experts. In the example given in the Manual, a malware is created that will disrupt the rhythm of an enemy commander's pacemaker. In order to cause the heart attack, the malware will falsely authenticate itself as being generated by a legitimate medical source. The majority of experts considered that in this situation the confidence of an adversary's computer system was betrayed and that Rule 60 was violated while others consider that the notion of confidence presupposes human involvement.[50] Perfidy does not extend to perfidious acts that cause damage or destruction of property, as stated above, the acts should result in the injury or death of the adversary.[51]

The usage of ruse of war is not prohibited by international law. Article 37(2) states that "ruses of war are not prohibited. Such ruses are acts which are intended to mislead an adversary or to induce him to act recklessly but which infringe no rule of international law applicable in armed conflict and which are not perfidious because they do not invite the confidence of an adversary with respect to protection under that law. The following are examples of such ruses: the use of camouflage, decoys, mock operations and misinformation."

The Tallinn Manual states in Rule 61 that "cyber operations that qualify as ruses of war are permitted."[52] Examples of ruses used during cyber operation include: "(a) creation of a 'dummy' computer system simulating non-existent forces; (b) transmission of false information causing an opponent erroneously to believe operations are about to occur or are underway; (c) use of false computer identifiers, computer networks (e.g., honeynets or honeypots), or computer transmissions; (d) feigned cyber attacks that do not violate Rule 36; (e) bogus orders purported to have been issued by the enemy commander; (f) psychological warfare activities; (g) transmitting false intelligence information intended for interception; and (h) use of enemy codes, signals, and passwords."[53]

Improper use of protective symbols

According to article 38 of AP I to the Geneva Conventions it is prohibited to make improper use the distinctive protection emblems used by the Red Cross, the flag of truce, the protective emblem of cultural property and the emblem of the United Nations without authorization from the Organization. A similar provision can be found in article 12 of AP II to the Geneva Convention, in this case the prohibition is against the misuse of the Red Cross protective symbols. Article 6(1) of AP III to the Geneva Conventions of 1949 and article 23(f) of the Hague Regulations of 1907 contain similar provisions. This prohibition is absolute, the misuse does not have to be linked to actions that result in death, injury or capture of an adversary.[54]

Rule 62 of the Tallinn Manual states that: "it is prohibited to make improper use of the protective emblems, signs, or signals that are set forth in the law of armed conflict." The Rule is based on treaty provisions and customary international law and applies in both situations of international and non-international conflict.[55] The International Group of Experts had split opinions regarding the improper usage of protective symbols in a cyber context. Some considered that using a fake @icrc.org or UN email to send malware to the adversary is not prohibited because the symbol of protections was not misused while others considered that the action violated Rule 62 because the domain name invites confidence as to the affiliation of the originator[56]. I believe that hacking the ICRC database to create a fake email address or hack the private e-mail address of an ICRC employ to send malware to the adversary could violate Rule 62, while using similar domain

[46] Tallinn Manual – p. 149.
[47] ICRC Customary Database – rule 65.
[48] Tallinn Manual – p. 149.
[49] Idem – p. 150.
[50] Idem – p. 151.
[51] Idem.
[52] Idem – p. 152.
[53] Idem.
[54] H.H Dinniss – p. 265.
[55] ICRC Customary IHL Database – Rules 58 to 60.
[56] Tallinn Manual – p. 154.

names, for example @ierc.org, @ic-rc.org etc. would not violate rule 62.

Belligerent reprisals

Belligerent reprisals "consist of action which would normally be contrary to the laws governing the conduct of armed conflict (the ius in bello) but which is justified because it is taken by one party to an armed conflict against another party in response to the latter's violation of the ius in bello."[57]

According to the ICRC Customary IHL Study, five conditions must be met before belligerent reprisals could be launched: reprisals may only be taken in reactions to a prior serious violation of IHL, reprisals may only be carried as a measure of last resort, they must be proportionate to the violation, the decision to resort to reprisals must be taken at the highest level of government, the reprisal action must cease as soon as the adversary complies with the law.[58]

Reprisals launched against the wounded, sick, medical personnel, medical buildings and equipment[59], prisoners of war[60], shipwrecked persons[61], civilians and their property[62] and cultural property are prohibited[63]. The notion of belligerent reprisals applies only in situations of international armed conflict.

Rule 46 of the Tallinn Manual states that Belligerent reprisals by way of cyber operations against:

(a) prisoners of war;

(b) interned civilians, civilians in occupied territory or otherwise in the hands of an adverse party to the conflict, and their property;

(c) those hors de combat; and

(d) medical personnel, facilities, vehicles, and equipment are prohibited.

Where not prohibited by international law, belligerent reprisals are subject to stringent conditions.

Due to the fact that there is no condition stating that reprisals should be in kind, a state could resort to cyber operations in response to kinetic violations of IHL.

3. Conclusions

The world is more connected and we rely more on computer systems than ever before. This situation can be seen even in the field of military development. The newest development in the field of conducting hostilities is represented by means and methods of cyber warfare. As is the case with conventional means and methods of warfare, the same limitations and prohibitions apply to means and methods of cyber warfare. It may prove difficult to apply some norms of IHL to means and methods of cyber warfare but states that are party to AP I have an obligation to determine if the employment of newly acquired means and methods of warfare are prohibited by international law. In the future we could see more states deciding to resort to means and methods of cyber warfare due to the fact that, in certain situations, they could be more effective and lead to fewer casualties.

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[57] Y. Dinstein – p. 220.

[58] ICRC – Customary IHL Databaste – Rule 145. Accessed on 13.03.2016. Available at: https://www.icrc.org/customary-ihl/eng/docs/v1_rul_rule145

[59] Geneva Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field– article 46.

[60] Geneva Convention (III) relative to the Treatment of Prisoners of War – article 13.

[61] Geneva Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea – article 47.

[62] Geneva Convention (IV) relative to the Protection of Civilian Persons in Time of War – article 33.

[63] Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict– article 4(4).

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GETTING TECHNIC WITH COLOR: GRAPHIC REPRESENTATION OF COLOR TRADEMARKS IN THE NEW EUROPEAN LEGISLATION ON TRADEMARKS

Paul-George BUTA*

Abstract

The paper looks at the changes operated in the very final part of last year to the Trademark Directive and EU Trademark Regulation in order to ascertain some of the effects the change in terms of trademark definition and, especially, graphical representation of colors has produced.

We have analyzed how representing graphically colors has become the crux of determining the possibility to registering color trademarks and how different states have tried to accommodate the need to have an as-wide-as-possible category of registrable signs with the need for legal certainty.

Keywords: *color, trademark, application, registration, procedure, graphical representation.*

1. Introduction

1.1. New laws before the New Year

In the last days of 2015 (23 and 24 December) the Official Journal of the European Union published two new enactments that would modify the European trademark landscape: a new Directive – 2015/2436 – to approximate the laws of the Member States relating to trade marks (and replace the codified Directive 2008/95) and Regulation 2015/2424 (amending Regulation 207/2009 on the Community trade mark and Regulation 2868/95 which had implemented Regulation 40/94 on the Community trade mark).

While the regulation is directly applicable in all member states as of its entry into force, the directive requires that member states transpose its provisions within the deadline set by the directive itself.

Article 4 of Regulation 2015/2424 provides that its provisions shall enter into force on 23 March 2016 except for some which are to take effect from 1 October 2017 and one specific provision will take effect not later than 1 October 2018.

In its turn, article 54 of the Directive provides that member states are to transpose its provisions in their national laws not later than 14 January 2019 with the exception of article 45 which is to be transposed by 14 January 2023. Article 55 indicates that Directive 2008/95 is repealed with effect from 15 January 2019.

Therefore, by means of the above-mentioned enactments, the EU has altered the trademark regime in Europe, in what concerns EU trademarks (the change in denomination being one such alteration) with quasi-immediate effect and in what concerns national trademark laws, with a delayed effect, depending on the transposition of the provisions and deadline for such.

1.2. The change in representation

Among the changes brought by these two new acts is the enactment of a new article 3 of the Directive which provides for a significant change from the provision as existing in article 2 of Directive 2008/95 and the amendment of article 4 of Regulation 207/2009.

As per article 4 of Regulation 2015/2424, the amendment of art. 4 of Regulation 207/2009 is to take effect from 1 October 2017 only, therefore bringing it closer to the deadline for transposition of the provisions of Directive 2015/2436.

The change that interests the present article is the following:

1.3. The significance of the change with respect to color trademarks

The change identified is obviously significant with respect to non-traditional trademarks. This is evident, given that the Explanatory Memorandum of the Proposal for a Directive of the European Parliament and of the Council to approximate the laws of the Member States relating to trade marks (Recast)[1] states that "[a]t present, signs must be capable of being represented graphically in order to be protected as a trade mark. This requirement of 'graphic representability' is out of date. It creates a great deal of legal uncertainty around the representation of certain non-traditional marks, such as mere sounds". The Proposal for a Regulation of the European Parliament and of the Council amending Council Regulation (EC) No 207/2009 on

* Assistant Professor, PhD, Faculty of Law, "Nicolae Titulescu" University of Bucharest (e-mail: **paul.buta@univnt.ro**).

[1] European Commission „Proposal for a Directive of the European Parliament and of the Council to approximate the laws of the Member States relating to trade marks (Recast)", COM/2013/0162 final - 2013/0089 (COD), p. 5.

Directive 2008/95 – art. 2	Regulation 207/2009 – art. 4
A trade mark may consist of any signs capable of being represented graphically, particularly words, including personal names, designs, letters, numerals, the shape of goods or of their packaging, provided that such signs are capable of distinguishing the goods or services of one undertaking from those of other undertakings.	A Community trade mark may consist of any signs capable of being represented graphically, particularly words, including personal names, designs, letters, numerals, the shape of goods or of their packaging, provided that such signs are capable of distinguishing the goods or services of one undertaking from those of other undertakings.
Directive 2015/2436 – art. 3	Regulation 2015/2424 – art. 4
A trade mark may consist of any signs, in particular words, including personal names, or designs, letters, numerals, colours, the shape of goods or of the packaging of goods, or sounds, provided that such signs are capable of: (a) distinguishing the goods or services of one undertaking from those of other undertakings; and (b) being represented on the register in a manner which enables the competent authorities and the public to determine the clear and precise subject matter of the protection afforded to its proprietor.	An EU trade mark may consist of any signs, in particular words, including personal names, or designs, letters, numerals, colours, the shape of goods or of the packaging of goods, or sounds, provided that such signs are capable of: (a) distinguishing the goods or services of one undertaking from those of other undertakings; and (b) being represented on the Register of European Union trade marks, ("the Register"), in a manner which enables the competent authorities and the public to determine the clear and precise subject matter of the protection afforded to its proprietor.

the Community trade mark[2] contains a quasi-identical statement: "Article 4 is amended to remove the requirement of 'graphic representability'. The prerequisite that it should be possible to produce a graphic representation of the sign applied for is out of date. It creates a great deal of legal uncertainty with regard to certain non-traditional marks, such as mere sounds".

But non-traditional trademarks refer to more than sounds. AIPPI has advanced the proposition that 'non-conventional' trademarks include (without being limited to) colors, shapes, sounds and smells[3]. Other authors[4], naming such 'exotic' marks, refer to sounds, shapes, colors, smells, gestures etc. Yet another author, when talking about "extensions of trademarks beyond traditional word marks and design marks (logos; trade dress [get-up]) to the more controversial categories" mentions "product shape, colors, sounds, smells, tastes and touch"[5].

The change thus made has affected all types of non-traditional trademarks, not just sounds, and among those types of sign mentioned in all the above listings of 'non-traditional' trademarks, there is the category of colors.

The present article will deal with effects the change will have on the registration and protection of color trademarks, an important topic, given the fact that color trademark applications rank second in number of 'non-traditional' trademark applications at the OHIM, though with a very small percentage of actual applications (less than 0.05% of applications)[6].

2. Content

2.1. From black to black and white

Historically, color trademarks per se could not be registered in most countries.

In Germany, a color per se was deemed not to meet the legal conditions to be registered as a trademark[7], that having been the position of the German courts for a long time[8] also in respect of

[2] European Commission „Proposal for a Regulation of the European Parliament and of the Council amending Council Regulation (EC) No 207/2009 on the Community trade mark", COM/2013/0161 final - 2013/0088 (COD), p. 7.

[3] AIPPI, "Resolution on Question Q 181 - Conditions for registration and scope of protection of non-conventional trade marks" in AIPPI *Yearbook*, vol. I, 2004, pp. 579-580.

[4] Lionel Bently, Brad Sherman *Intellectual Property Law*, 4th ed., Oxford University Press (Oxford, 2014), p. 893.

[5] Jane C. Ginsburg ""See me, feel me, touch me, hea[r] me" (and maybe smell and taste me too): I am a trademark – a US perspective" in Lionel Bently, Jennifer Davis and Jane C. Ginsburg (eds.) *Trade Marks and Brands. An Interdisciplinary Critique*, Cambridge University Press (Cambridge, 2008), p. 92.

[6] Lionel Bently, Brad Sherman *Intellectual Property Law*, 4th ed., Oxford University Press (Oxford, 2014), p. 893, note 42.

[7] Peter Mes "Bericht Q 96 für die Deutsche Landesgruppe" in AIPPI *Annuaire 1988*, vol. VIII, AIPPI (Zurich, 1988), p. 15.

[8] Bundespatentgerichshof in Ständiger Rechtsprechung, Z.B., in *GRUR* 1979, p. 835, 855 (LILA) cit. in Peter Mes "Bericht Q 96 für die Deutsche Landesgruppe" in AIPPI *Annuaire 1988*, vol. VIII, AIPPI (Zurich, 1988), p. 15.

color combinations[9]. The position was identical in Brazil[10] and Canada[11].

In other countries, where color combinations were allowed registration, colors per se were still not able to be registered as trademarks. This was the situation in Spain where, exceptionally, color combinations were allowed registration as trademarks but only for "bull rosettes aimed at distinguishing the bulls or in the making of selvedges on cloths"[12] but colors per se were still denied registration (even though there was a proposed amendment that would have allowed registration of colors where such were delimited by a certain shape – but such would not have qualified as a color trademark per se).

In Finland colors per se were not allowed registration but color combinations could be so registered[13]. Hungary presented the same situation, with color combinations specifically allowed by law (article 2.2 of the Hungarian Law on Trademarks) but with colors per se denied registration[14]. In Italy color combinations were allowed where "precisely described", which made such no different from figurative signs in color, but colors per se were not (however colors could be protected under unfair competition provisions where such would grant distinctiveness unto a product or its packaging)[15]. In Mexico, while color combinations were allowed with no express provisions authorizing such, the registration of colors per se was expressly forbidden by the law (art. 91 sec. IV)[16]. The same applied in Portugal, where art. 79 (2) of the Industrial Property Code expressly excluded colors per se from registration[17]. In Norway, the registration of color combinations was allowed where such combination would grant distinctiveness to the sign but colors per se were always denied registration[18]. Similarly, in New Zealand, registration of color combinations was allowed "subject to definition of the relative prominence of the respective colours, by way of representation"[19].

In yet other countries, the position was not yet clear, this being the case in Israel[20] and Japan (where color combinations were allowed but only where in a defined/fixed form, i.e. closer to classic figurative trademarks)[21].

In Denmark[22], though the position was that there can be no registration of a color trademark, jurisprudentially the courts have held that a color applied to a product may generate an exclusive right through use (the case of blue scaffolding where the court had apparently denied infringement on account of the fact that the color nuances were different[23]).

In the United States colors (either per se or in combinations) would not be normally registered as trademarks except where there would be "an extremely strong showing that the relevant purchasing public attributes trademark significance to the color or colors"[24]. Special circumstances were also required in the United Kingdom for a color per se to gain registration (such as Blue for paraffin) while the visible surface of the goods, fully covered by a single color, was held to also be registrable in certain circumstances[25]. The position in Ireland was similar, in that it allowed both the registration of color combinations and colors upon evidence of use[26].

In Sweden single colors could not normally be registered (even though color combinations were allowed) but such result could be, in theory, achieved after extensive use[27]. A similar position was adopted in Switzerland where combinations of colors were allowed if distinctive (i.e. well established on the market), base colors were denied but specific nuances were, theoretically, registrable upon a

[9] Bundespatentgerichshof 7, 137, 139 (WHITE-RED) cit. in Peter Mes "Bericht Q 96 für die Deutsche Landesgruppe" in AIPPI *Annuaire 1988*, vol. VIII, AIPPI (Zurich, 1988), p. 15.

[10] "Report on Q 96 on behalf of the Brazilian Group" in AIPPI *Annuaire 1988*, vol. VIII, AIPPI (Zurich, 1988), p. 34.

[11] R.M. Perry, D. Burwash, R. Carson "Report on Q 96 on behalf of the Canadian Group" in AIPPI *Annuaire 1988*, vol. VIII, AIPPI (Zurich, 1988), p. 39.

[12] "Report on Q 96 in the name of the Spanish Group" in AIPPI *Annuaire 1988*, vol. VIII, AIPPI (Zurich, 1988), p. 55.

[13] Sirkka-Liisa Lahtinen, Virpi Tiili, Marja Tommila "Report on Q 96 in the name of the Finnish Group" in AIPPI *Annuaire 1988*, vol. VIII, AIPPI (Zurich, 1988), p. 74.

[14] "Rapport sur Q96 au nom du Groupe Hongrois" in AIPPI *Annuaire 1988*, vol. VIII, AIPPI (Zurich, 1988), p. 103.

[15] M.E. Boitani, M.G.F. Dragotti, M.G. Pellegrino, M.A. Perani "Rapport sur Q96 au nom du Groupe Italien" in AIPPI *Annuaire 1988*, vol. VIII, AIPPI (Zurich, 1988), p. 116.

[16] Mariano Soni "Report on Q 96 in the name of the Mexican Group" in AIPPI *Annuaire 1988*, vol. VIII, AIPPI (Zurich, 1988), p. 123.

[17] "Report on Q 96 in the name of the Portuguese Group" in AIPPI *Annuaire 1988*, vol. VIII, AIPPI (Zurich, 1988), p. 145.

[18] Henry Bakke, Per A. Martinsen, Helge Stensland "Report on Q 96 in the name of the Norwegian Group" in AIPPI *Annuaire 1988*, vol. VIII, AIPPI (Zurich, 1988), p. 127.

[19] "Report on Q 96 in the name of the New Zealand Group" in AIPPI *Annuaire 1988*, vol. VIII, AIPPI (Zurich, 1988), p. 130.

[20] Aman Gabrieli "Report on Q 96 in the name of the Israel National Group" in AIPPI *Annuaire 1988*, vol. VIII, AIPPI (Zurich, 1988), p. 111.

[21] "Report on Q 96 on behalf of the Japanese Group" in AIPPI *Annuaire 1988*, vol. VIII, AIPPI (Zurich, 1988), p. 121.

[22] Jette Sandel "Report on Q 96 in the name of the Group of Denmark" in AIPPI *Annuaire 1988*, vol. VIII, AIPPI (Zurich, 1988), p. 47.

[23] In *UFR* 1962, p. 860 cit. in Jette Sandel "Report on Q 96 in the name of the Group of Denmark" in AIPPI *Annuaire 1988*, vol. VIII, AIPPI (Zurich, 1988), p. 47.

[24] Daniel D. Fetterley "Report on Q 96 in the name of the American Group" in AIPPI *Annuaire 1988*, vol. VIII, AIPPI (Zurich, 1988), p. 70.

[25] "Report on Q 96 in the name of the British Group" in AIPPI *Annuaire 1988*, vol. VIII, AIPPI (Zurich, 1988), p. 98.

[26] "Report on Q 96 in the name of the Irish Group" in AIPPI *Annuaire 1988*, vol. VIII, AIPPI (Zurich, 1988), p. 55.

[27] Annika Ryberg, Gunnar Sundkvist, Bo Wretling "Report on Q 96 in the name of the Group of Sweden" in AIPPI *Annuaire 1988*, vol. VIII, AIPPI (Zurich, 1988), p. 172.

showing of distinctiveness by having been well established on the market[28].

It was only in a minority of countries that colors per se were normally allowed registration as trademarks. In Belgium both colors per se and color combinations could be registered as trademarks where they had not become ordinary at the filing date[29]. The situation was the same in the Netherlands where colors per se[30] and color combinations[31] were allowed registration upon a show of distinctiveness (taken in this case to mean that they were widely recognized by the public as distinctive for the given product)[32].

In France the registration of color combinations was provided by law while the registrability of colors per se was a product of jurisprudence[33]. However, not base colors but only shades of a color could be registered and these shades needed to be precisely defined so as not to extend the protection to the whole color as registration of a shade was not to preempt use of a different shade of the same color by a competitor[34].

Promoting an expansion of the 'registrable trademark', AIPPI proposed in 1989 that "colour per se should be registrable when it is or has become distinctive"[35].

In Romania, Law no. 28/1967 concerning manufacturing, trade and service marks[36] ("1967 Trademarks Law") expressly provided at art. 2 par. (2) that "trademarks can consist of … one or more colors, … or other similar elements". The Decision of the Ministers Council no. 77/1968 for the implementation of the 1967 Trademark Law, provided, at art. 6 letter d), that the application is to be accompanied by 10 reproductions of the sign where a certain color or color combination is claimed as a component of the trademark, in such case the reproductions to be supplied would have to reproduce the colors of the mark.

This would seem enough to conclude that, under the 1967 Trademark Law, colors per se could be registered as trademarks. However, the literature has indicated that, at the time, both authors and courts have held that a single color may not be registered as a trademark[37]. Moreover, the Instructions issued by the former General Directorate for Metrology, Standards and Inventions, concerning the application of the 1967 Trademarks Law and of the Decision of the Ministers Council no. 77/1968 for the implementation of the 1967 Trademark Law[38] had also established that a single color was not distinctive enough to be registered as a trademark[39].

The situation in Romania had not changed by 1998 with the entry into force of the new trademarks law no. 84/1998 ("1998 Trademarks Law") which provided, at art. 3 letter a) that trademarks may "consist of distinctive signs such as … color combinations" even though the literature had expressed the view that registration of a color per se could be, under condition of distinctiveness acquired by extensive use, registered as the enumeration in the law is not limitative[40].

What is to be noted is that the practice of national offices differed and there was no guidance that could generate some predictability in respect of applications for color trademarks.

2.2. The code of colors

Over the next 10 years things changed in respect of color trademarks. At the Eighth Session of the WIPO Standing Committee on the Law of Trademarks, Industrial Designs and Geographical Indications[41] the Committee had proposed that further discussion be made in respect of, among others, the definition of a mark, indicating that „Provisions could be proposed to give a more complete and broader definition of a mark, for

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[28] "Bericht Q96 im Namen der Schweizergruppe der AIPPI" in AIPPI *Annuaire 1988*, vol. VIII, AIPPI (Zurich, 1988), p. 177.

[29] Louis Van Bunnen, D. Crassaerts, J. Vigneron, Louis De Roover, Jacques Rosenoer, Fl. Gevers "Rapport sur Q96 au nom du groupe belge" in AIPPI *Annuaire 1988*, vol. VIII, AIPPI (Zurich, 1988), p. 30.

[30] Benelux Court of Justice, decision of 9 March 1977 – *Blue color of Camping Gaz tank* in *NJ* 1978, p. 416 cit. in R.E.P. de Ranitz, Ch. Kik, R. Laret, E.A. Mout-Bouwman, A.A.M. Reijns-Kouwenaar, J.H.H. de Carpentier Wolf "Report on Q 96 in the name of the Group of the Netherlands" in AIPPI *Annuaire 1988*, vol. VIII, AIPPI (Zurich, 1988), p. 135.

[31] Benelux Court of Justice, decision of 5 February 1977 – *Red/black capsules* in *NJ* 1978, p. 415, Benelux Court of Justice, decision of 27 August 1981 – *Rainbow colours* in *BIE* 1982, p. 136, both cit. in R.E.P. de Ranitz, Ch. Kik, R. Laret, E.A. Mout-Bouwman, A.A.M. Reijns-Kouwenaar, J.H.H. de Carpentier Wolf "Report on Q 96 in the name of the Group of the Netherlands" in AIPPI *Annuaire 1988*, vol. VIII, AIPPI (Zurich, 1988), p. 136.

[32] R.E.P. de Ranitz, Ch. Kik, R. Laret, E.A. Mout-Bouwman, A.A.M. Reijns-Kouwenaar, J.H.H. de Carpentier Wolf "Report on Q 96 in the name of the Group of the Netherlands" in AIPPI *Annuaire 1988*, vol. VIII, AIPPI (Zurich, 1988), pp. 135-136.

[33] "Rapport sur Q96 au nom du Groupe français" in AIPPI *Annuaire 1988*, vol. VIII, AIPPI (Zurich, 1988), p. 92.

[34] Idem, p. 93.

[35] AIPPI "Resolution on Question Q92 C and Q96 Q92: Absolute grounds of refusal of registration of trademarks Q96: What may constitute a registrable trademark?" in AIPPI *Yearbook* 1989 vol. II, p. 316.

[36] Published in *Buletinul Oficial* no. 114/29.12.1967.

[37] Yolanda Eminescu *Mărcile de fabrică, de comerț și de serviciu*, Editura Academiei Republicii Socialiste România (Bucharest, 1974), p. 52.

[38] Published in *Invenții și Inovații*, 1968, no. 5, p. 174.

[39] Yolanda Eminescu *Mărcile de fabrică, de comerț și de serviciu*, Editura Academiei Republicii Socialiste România (Bucharest, 1974), p. 53.

[40] Viorel Roș, Octavia Spineanu-Matei, Dragoș Bogdan *Dreptul proprietății intelectuale. Dreptul proprietății industriale. Mărcile și indicațiile geografice*, All Beck (Bucharest, 2003), pp. 55-56.

[41] WIPO Standing Committee on the Law of Trademarks, Industrial Designs and Geographical Indications „Suggestions for the Further Development of International Trademark Law", SCT/8/3, 26 April 2002.

example by going beyond current definitions such as "visible signs" (Article 2(1)(a) TLT). The provisions could build on Article 15(1) of the TRIPs Agreement in providing that Members "shall" require, as a condition of registration, that signs be visually perceptible, or capable of being represented graphically, depicted or described by written notation, diagram or any other visual means. They also could expressly include hologram marks, sound marks and olfactory marks". At the Ninth Session of the Committee a Questionnaire was proposed, and it was revised at the Eleventh Session. When answers to the revised questionnaire were reviewed, at the Fourteenth Session of the Committee out of the 73 valid answers provided, 45 countries indicated that it was possible to register a single color as a trademark there and 68 that it was possible to register a color combination as a trademark . The group of 45 countries that now indicated that they allowed the registration of a single color as a trademark included Germany, Canada, Spain, Finland, Hungary, Italy, Norway, New Zealand, Israel, the United States, the United Kingdom, Ireland, Sweden, Switzerland, Belgium, France and the Netherlands.

Brazil, Mexico, Portugal, Japan indicated that it was still not possible to register a single color as a trademark while the position had become unclear in Denmark.

Interestingly, in spite of the position taken by the literature, the official position in Romania in 2005 was that it was not possible to register a color trademark per se.

The change in position was probably most striking in Germany where there had been for many

years attempts to register color trademarks[42] and where, starting with 2002, there was an increasing number of applications for such trademarks and over 20 of those had been successful by 2004[43].

This momentum for registering single colors as trademarks was linked[44] to the decision of the CJEU (under its previous denomination) in *Libertel*[45].

This was a CJEU case concerning the registrability of a color *per se*[46] in which the Hoge Raad had referred the following questions: "(1) Is it possible for a single specific colour which is represented as such or is designated by an internationally applied code to acquire a distinctive character for certain goods or services within the meaning of Article 3(1)(b) of the Directive? (2) If the answer to the first question is in the affirmative: (a) in what circumstances may it be accepted that a single specific colour possesses a distinctive character in the sense used above? (b) does it make any difference if registration is sought for a large number of goods and/or services, rather than for a specific product or service, or category of goods or services respectively? (3) In the assessment of the distinctive character of a specific colour as a trade mark, must account be taken of whether, with regard to that colour, there is a general interest in availability, such as can exist in respect of signs which denote a geographical origin? (4) When considering the question whether a sign, for which registration as a trade mark is sought, possesses the distinctive character referred to in Article 3(1)(b) of the Directive, must the Benelux Trade Office confine itself to an assessment in abstracto of distinctive character or must it take account of all the actual facts of the case, including the use made of the sign and the manner in which the sign is used?"[47].

In his Opinion, AG Léger, importantly noted that the Joint Declaration of the Council of the European Union and the Commission appearing in the minute of the meeting of the Council at which the Directive of 21 December 1988 to approximate the laws of the Member States relating to trade marks[48] was adopted and in which it was stated that "the Council and the Commission consider that Article 2 [of the Directive] does not exclude the possibility: of registering as a trade mark a combination of colours or one colour alone ... provided that such signs are capable of distinguishing the goods or services of one undertaking from those of other undertakings" does not have legal force.

The AG held that "[c]onsideration of the scheme of the Directive and the purpose underlying the requirement in question also suggests that a colour per se should not be a sign capable of constituting a trade mark"[49]. He founded his opinion on the following reasoning: Since protection of the trademark is to be granted upon registration, it is upon registration that a number of conditions are to be fulfilled[50]. Since these conditions are to be examined before registration, independently of any use of the sign, these are to be weighed in consideration of the sign as described in the application[51]. Therefore the sign as filed must allow

[42] Bundespatentgerichshof in Ständiger Rechtsprechung, Z.B., in *GRUR* 1979, p. 835, 855 (LILA) cit. in Peter Mes "Bericht Q 96 für die Deutsche Landesgruppe" in AIPPI *Annuaire 1988*, vol. VIII, AIPPI (Zurich, 1988), p. 15

[43] "On the Art of Protecting a Color as a Trademark" in *Markenbusiness*, 9 November 2004, <http://www.markenbusi ness.com/en/ news.php?newsid=1722>

[44] Idem.

[45] CJEU, *Libertel Groep BV v. Benelux-Merkenbureau* (C-104/01), 6 May 2003 in *ECR*-I p. 3793.

[46] See Spyros Maniatis, Dimitris Botis *Trade Marks in Europe: A Practical Jurisprudence*, 2nd ed., Sweet & Maxwell (London, 2006), p. 70.

[47] Idem, par. 20.

[48] Published in *OJ* 1989, L 40, p. 1.

[49] Opinion of AG Léger of 12 November 2002 in case *Libertel Groep BV v. Benelux-Merkenbureau* (C-104/01), ECLI:EU:C:2002:650, par. 55.

[50] Idem, par. 56.

[51] Idem, par. 58.

a precise determination of what is claimed protection for, which means that the requirement of the sign being capable of being represented graphically is based on the principle of legal certainty[52] (quoting the Opinion of the AG in *Sieckmann*[53]). He concluded that the graphic representation must meet two conditions: "First, the representation must be clear and precise in order that one may know beyond any possible doubt what it is that is being given the benefit of exclusive rights. Secondly, it must be intelligible to persons wishing to inspect the register, namely other manufacturers and consumers. It should not be necessary to go to inordinate lengths to ascertain what sign the applicant will actually use"[54]. Finally, he concluded that colors per se did not meet either of these conditions: "the reproduction or designation of a colour in itself does not provide any means of determining what sign the applicant proposes to use in order to distinguish his goods and services"[55] and "registration of a colour *per se* as a trade mark would not allow other traders inspecting the register to determine what their rights were"[56].

The AG went on to state that a color per se could not have an intrinsic distinctive character[57] mainly because it can't "be defined in a way that is sufficiently precise that it indicates without any possible confusion the origin of goods or services"[58].

In its judgment in *Libertel* the court indicated that "a colour *per se* cannot be presumed to constitute a sign. Normally a colour is a simple property of things. Yet it may constitute a sign. That depends on the context in which the colour is used. None the less, a colour *per se* is capable, in relation to a product or service, of constituting a sign"[59].

With regard to graphic representation of the color, the court established that the *Sieckmann* criteria would need to be met in order for its function to be fulfilled, to which end a mere sample of the color (which could deteriorate in time) would not suffice[60], but a verbal description or a combination of sample and description could (if it were clear, precise, self-contained, easily accessible, intelligible, and objective)[61] just as a "designation of a colour using an internationally recognised identification code may be considered to constitute a graphic representation"[62].

Importantly, the court also noted that "there is, in Community trade-mark law, a public interest in not unduly restricting the availability of colours for the other operators who offer for sale goods or services of the same type as those in respect of which registration is sought. The greater the number of the goods or services for which the trade mark is sought to be registered, the more excessive the exclusive right which it may confer is likely to be, and, for that very reason, the more likely is that right to come into conflict with the maintenance of a system of undistorted competition, and with the public interest in not unduly restricting the availability of colours for the other traders who market goods or services of the same type as those in respect of which registration is sought"[63] and that "registration as a trade mark of a colour per se is sought for a large number of goods or services, or for a specific product or service or for a specific group of goods or services, is relevant, together with all the other circumstances of the particular case, to assessing both the distinctive character of the colour in respect of which registration is sought, and whether its registration would run counter to the general interest in not unduly limiting the availability of colours for the other operators who offer for sale goods or services of the same type as those in respect of which registration is sought"[64].

Following the court's judgment in *Libertel*, the President of EUIPO (under its former denomination) issued Communication No 06/03 of the President of the Office of 10 November 2003 concerning colour marks, by means of which the Office indicated that "In accordance with Rule 84 (1) of the Implementing Regulation (CTMIR) the Register of Community Trade Marks is, in practice, kept in electronic form. The representations of all trade marks, except word marks, are scanned and stored electronically. The question of durability addressed by the Court does not, therefore, arise in respect of Community trade marks. Nevertheless, the Office would recommend that where registration for a colour mark per se is applied for the indication of the colour required under Rule 3 (5) CTMIR should where possible include a designation from an internationally recognised identification code. Where such an indication is not possible, for example because the

[52] Idem, par. 61-62.
[53] CJUE, Ralf Sieckmann v. Deutsches Patent- und Markenamt (C-273/00), decision of 12 December 2002 in *ECR*-I p. 11737.
[54] Opinion of AG Léger of 12 November 2002 in case *Libertel Groep BV v. Benelux-Merkenbureau* (C-104/01), ECLI:EU:C:2002:650, par. 64, cit. omitted.
[55] Idem, par. 66.
[56] Idem, par. 73.
[57] Idem, par. 84.
[58] Idem, par. 88.
[59] CJEU, *Libertel Groep BV v. Benelux-Merkenbureau* (C-104/01), 6 May 2003 in *ECR*-I p. 3793, par. 27.
[60] Idem, par. 33.
[61] Idem, par. 34-36.
[62] Idem, par. 37.
[63] Idem, par. 55-56.
[64] Idem, par. 71.

colour or shade of colour does not exist in the coding system, appropriate indications to this effect may be made under the aspect of "indication" pursuant to Rule 3 (5) CTMIR. The Office is of the view that the indication of the colour code as well as any description are formalities which should not be confused with the examination for distinctiveness, which will be based on the colour mark as represented in the database of the Office and the goods and services for which registration is claimed. As regards colour marks per se filed before the date of this communication or already registered, the Office will accept clarifications as to the indication seeking to add a colour code indication or an explanation for the absence of such colour code indication".

As can be seen from the above, the Communication of the President seems to have taken the CJEU's decision in *Libertel* as clearly allowing the registration of colors *per se* as trademarks and, with respect to the condition of susceptibility of graphic representation, has noticed that there needs to be no change made to the EUTM registration process, since the electronic storage of the applications would allow for a retrieval of the sample unaffected by time.

The Communication obviously ignores all the concerns the Court and the AG had expressed with regard to the difficulty in such signs fulfilling the functions of a trademark and in clearly delimiting the exclusive rights granted, all this with potential detrimental effect on the legal certainty of third parties.

These concerns were however mentioned in the Working Guidelines on Q 181 ("Conditions for registration and scope of protection of non-conventional trademarks") of AIPPI[65] and so was the variation in the legislation and practice in various states in respect of color marks.

In Australia[66], for instance, all that was required consisted of "a clear and concise description and a pictorial representation of the trade mark", such representation needing to "show the colour claimed and the manner in which it is to be applied to the goods or packaging" but not necessarily having to indicate "the outline, contours or proportions in which, or the shape or object to which, the colour is to be applied". The indication of the color as specified by an international color code was not mandatory but commonplace in practice[67]. The approach was identical in Paraguay[68], Peru[69], Portugal[70], Singapore[71] and similar in Spain[72] where a sample was required but the designation of the color by code was deemed more pertinent

A similar position was adopted in Denmark where samples or color codes were not required but the Danish Patents and Trademarks Office was recommending that codes be filed[73]. This approach was also used in South Africa[74] where, in absence of express requirements, filing a sample and code became standard practice.

In Latvia, both a sample and verbal description were required, with the colorometric reference optional[75].

In Belgium, where there was a more liberal approach to start with, after Libertel (and the Communication of the President of EUIPO), the Benelux Office has decided that it would allow for (but not require) an indication of the color code as per an internationally-recognized system while only requiring a description in words of the color[76]. Similarly, in France, the requirement was for a sample with the code indication being optional[77].

Interestingly, the Czech Patent Office seems to have been refusing the code indication as insufficient while only allowing the application upon the filing of a sample[78]. Clearly this approach has no longer been tenable after the Czech Republic's accession to the EU.

In Finland, following *Libertel*, there was a requirement to file both a sample "or to otherwise depict the colour in question the application for the

[65] Luis-Alfonso Duran, Jochen E. Bühling, Ian Karet, Dariusz Szleper, Thierry Calame „Working Guidelines on Q 181 – Conditions for registration and scope of protection of non-conventional trademarks" in AIPPI *Yearbook 2004*, vol. I, AIPPI (Zurich, 2004), p. 220.

[66] Peter Chalk, Matthew Swinn "Report on Q 181 in the name of the Australian Group" in AIPPI *Yearbook 2004*, vol. I, AIPPI (Zurich, 2004), p. 252.

[67] Idem.

[68] "Report on Q 181 in the name of the Paraguayan Group" in AIPPI *Yearbook 2004*, vol. I, AIPPI (Zurich, 2004), p. 457.

[69] "Report on Q 181 in the name of the Peruvian Group" in AIPPI *Yearbook 2004*, vol. I, AIPPI (Zurich, 2004), p. 452.

[70] Ana Ferreira Silva "Report on Q 181 in the name of the Portuguese Group" in AIPPI *Yearbook 2004*, vol. I, AIPPI (Zurich, 2004), p. 473.

[71] "Report on Q 181 in the name of the Singaporean Group" in AIPPI *Yearbook 2004*, vol. I, AIPPI (Zurich, 2004), p. 483.

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[76] L. Van Bunnen, Antoine Braun, Emmanuel Cornu, Brigitte Dauwe, Charlotte Garrigues, Isabelle Goes "Rapport sur Q 181 au nom du Groupe belge" in AIPPI *Yearbook 2004*, vol. I, AIPPI (Zurich, 2004), p. 264.

[77] Evelyne Roux, Delphine Brunet, Valérie Delaunay, Juliette Disser, Stéphane Guerlain, Catherine Mallet, Sophie Micallef, Béatrice Thomas "Rapport sur Q 181 au nom du Groupe français" in AIPPI *Yearbook 2004*, vol. I, AIPPI (Zurich, 2004), p. 327.

[78] "Report on Q 181 in the name of the Czech Group" in AIPPI *Yearbook 2004*, vol. I, AIPPI (Zurich, 2004), p. 297.

graphical representation of the mark" and "to specify the colour in question with a colorimetric reference, colour code or in other sufficiently precise manner"[79]. The same approach was followed in Italy[80] and Switzerland[81].

In Germany the *Libertel* approach was followed thoroughly: a mere sample of the color on paper was insufficient but a sample and color could suffice. A reference to a standardized color code was preferred[82]. The situation was identical in Norway[83], Malaysia[84], the Netherlands[85], Panama[86], Sweden[87], the United Kingdom[88].

AIPPI's resolution on Q 181 established that "Non-conventional" trade marks should, in principle, be capable of constituting registered trade marks. 2) The representation of a "non-conventional" trade mark must be clear, precise, easily accessible and intelligible. The public must be able to understand the nature of the trade mark. 3) A colour per se can be capable of registration as a trade mark. In many cases a colour per se will only be registrable on the basis of distinctiveness acquired through use. There may also be circumstances where a colour per se may be registered on the basis of inherent distinctiveness in relation to certain goods or services"[89].

From the above, one can notice that there was growing international consensus on the importance of the color coding that was to be employed for the applications as a trend towards harmonization of applications for such trademarks.

2.3. Beyond the code: the future in technic color

As we have mentioned in the introduction to this paper, the change operated in the provisions of the Trademark Directive and EU trademark Regulation will have explicitly removed any precondition for a code of color to be provided upon application. This should mean that colors per se should be more easily registered as trademarks, given the leeway the modifications have insured.

Now the limit of 'graphic representation' appears to solely refer to the technical possibility to record the sample electronically (or in such a way that it remains unaffected by the passage of time). We do not know how far that possibility will now (or later) extend.

3. Conclusions

The paper has focused on the legislative changes to the condition of graphical representation and how different states have sought to accommodate this condition with the wider implications this can have. We have shown that this delicate balance had shifted after *Libertel* in the sense that such has opened the doors to have more color trademarks applied for and registered. In this context the latest moves have clearly tipped the scales in favor of registrability of such signs.

However, we need to point out that in focusing solely on the technical issue of graphic representation, the debate surrounding this issue has lost out of sight all the concerns that had prompted AG Léger to reject the possibility of registering a single trademark.

In this context it is imperative that research in this matter is continued and the scope of graphical representation tied to the concerns mentioned by the European courts and the national courts, especially those of EU Member States.

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THE DURATION OF RIGHTS CONFERRED BY COPYRIGHT

Cornelia DUMITRU[*]

Abstract

The duration of copyright protection has been a controversial issue. And yet never completed. It was and is the key issue of copyright, the same as are those concerning the recognition of their nature and content. If the first law to protect a new creation, gave the exclusive right for the author as long as a year, today its duration is, basically the whole life of the author's plus 70 years for the heirs. Some argue that it is unwise. Others that should not be as such at all.

In reality, the copyright in the widest sense of the term of copyright for the purposes of law complex that regulates the relations between the author with his work and of the relations between the authors and others on his work, this right never ceases.

As for the right created by and after recognizing and codifying copyright notice that he is trying to harmonize the interests of authors and those of the public and to make peace between the author with his audience in a more general interest, and the solution for reconciliation and / or harmonization was limiting the length of some of the attributes of copyright. A solution that makes copyright law without a right to have the benefits after a while, that every owner has of his property. Furthermore, the link between the author and his work remains eternal because none other than the author may not claim ever to be the author of and has a copyright on that work. But neither the author can claim ever to have a real ownership of the work that still belongs to him and him only. Copyright proves to be as different from any other category of rights.

Keywords: *Exclusive right, right limited by time, ownership, monopoly operating.*

1. Time limitation of the rights of the author

Referring to the duration of protection of works under copyright disputes (political, legal, doctrinal and jurisprudential) which were long, even after it was admitted that the economic rights are the first to be recognized whereas the moral ones are due much later for the authors. Moral rights, within the protection system of the Berne Convention, we believe, rightly, honestly, that precede the ownership in their existence conditional on the property. But after the economic rights were afforded to the authors, they were severely limited in time, and the opposition against extending the duration of their protection continues to manifest today. And it is noteworthy that during the nineteenth century, personal property rights were afforded to the authors, were resumed and disputes were made on the nature of copyright and qualification copyright as ownership was brought to the date of merchantability rights, the growing **interest including creators**, to patrimonial aspect of copyright, moral rights passing from the point of view of immediate interest of authors in the background.

Arguments against the recognition of copyright have always existed since ancient times, the movement **copyleft** was only apparently new, because nowadays it does not make opposition known to history only as to the means and arguments used not in its substance, which it's the same. The Pirate Party today is manifested even in the parliaments of Western countries which cannot be said to be opponents of copyright. The Pirate Party today is manifested even in the parliaments of Western countries which cannot be said to be opponents of **copyright**[1]. More fair to say that the movement copy left is new only in the designation adopted recently by opponents of copyright, i.e. the position of quasi-majority, which recognizes the right of authors in their own works, to be suggestive and impact greater public debate it causes.

In fact, copyright has enemies since ancient times. Recall that both Plato and Confucius believed that people are born with all her ideas, ideas that come to us from the past and not our own, and our knowledge is a gift of the gods, so we cannot claim any rights over them. Francoise Chaudenson tells us that Socrates and Plato „*artists do not deserve any special consideration because beauty that expressed in their work, was outside and dictated by a divine force, they are merely messengers rather than" creators "nor the owners of their work. Socrates, even "hunts" country poets because they were a threat to the future of the city, as later church fathers condemn the seductions of art and will delay and hinder the city enriching divine."*[2]

Aristotle, a disciple of Plato, was also influenced by the design of his master, of creations and creators, and its concepts, which were the basis of education in Europe for hundreds of years, including the most famous university of the Middle Ages, that of Padova, marked course all those who were formed at the school of Aristotle. For the

[*] PhD candidate, Faculty of Law, "Nicolae Titulescu" University of Bucharest (e-mail: **cornelia_dumitru1973@yahoo.com**).

[1] Pirates Party was founded in Sweden in 2006 by an entrepreneur in IT. European Parliament elections in 2009 won 7.13% of votes and a lawmaker. Conf. Mihăiescu Marius Party Who is it and what do you aim at International Hot News.ro, June 8th.

[2] Chaudenson Francoise, „A qui appartient l`oeuvre d`art", Armand Colin, 2007, p. 19.

ancient Greeks, Socrates, Plato and Aristotle, artistic creation were nothing more than an imitation of nature, or an imitation of imitation. In ancient Greece, the man could not claim to be the creator, the actual meaning of the term, since the ideas, inspiration and words were transmitted artists gods or nine muses, and art imitates nature only. And during the Dark Ages, no matter how genius, he had, he could claim creator, because it clashed with the Church, which claim to be the creator could only be blasphemy of the author and his work were purified by fire.

Some consider that the rights belong to the author as long as the work has not been made public. With the disclosure of her work, it would become of all. Not true! Because if it is true that after being informed, their work has its own destiny and can survive its own author (it happens to all valuable works), one cannot attribute the authorship of the work to another. And it could not do it even when the copyright was not protected by special laws, but with the risk of becoming the target of public opprobrium.

Others argue that if copyright is a property right and that ownership is flexible enough to cover the rights of creators under its umbrella, so property laws offer solutions to all issues raised by copyright. What is not true or is not entirely true, the argument most solid in support of that view is that in almost all countries copyright is governed by special laws, which derogate from the common law of goods and people.

Between theorists that copyright is proprietary, some argue that if it is his nature, he should be unlimited in time, to be perpetual, to convey a whole to the heirs. Which, again, does not happen in reality. Heirs come into possession of their property the author of all the rights and obligations of an economic nature, but they do not acquire by inheritance and the author of the work of de cujus. Cannot substitute for the moral rights of the **cujus**, even if they are transmitted and exercise (note, not rights!) Some moral rights, namely, the right of disclosure of the work, the right to demand recognition of authorship and right to inviolability of the work. As you know, do not transmit any exercise of the right to a name, nor the right of withdrawal (art. 11 of Law no. 8/1996).

Qualification copyright as owned, although questionable because it cannot actually explain moral rights as part of a proprietary, limited duration and failure to transmit their doctrine is the conception majority today.

We believe, however, that the Belgian Edmond Picard, proposing in 1874 to recognize a category autonomous "intellectual rights", along with **1) the rights attaching to those (state and capacity), 2) the obligations and 3) real rights w**as right and that the proposal brought better solutions to many problems and which better qualifications proposed in the doctrine through the ages, including that of ownership, do not. But attached so much a division (**multimillenary**) rights in the three traditional categories, the legal world does not seem willing to accept such a revolution in the law. As a revolution would be for the recognition of this new category of **"intellectual rights".** But if such a revolution was not possible in the nineteenth century, which was a century more open to new and revolutionary in many fields, including law, today, when the theory of magnetic private law seems to have swept the world legal, such a solution seems almost impossible.

We believe, however, that the solution of recognition category to the intellectual property as a distinct category of rights exist ***de facto***, because the theory of monistic the civil law did not involve intellectual property rights, they continue to be governed by special laws and rules that deviate from the rules of common law of persons, goods, obligations, contracts, but refuse to admit them as a distinct category of rights from excessive conservatism.

The issue of the possible temporal limitation of copyright if the copyright is limited in time, it is also questionable. Because, as I said, the right of copyright is, in fact, forever argued. The work bests forever and this happens not only for works that fall into the public domain and may be used freely by anyone, but for works that fall into oblivion and are after a while, resuscitated. If it is well known works of the ancients. But also of many other works, including unpublished works by the author during their life and who they belong, not to publish them

As far as resuscitated scientific works are concerned, things are more complicated, because Directive (EC) no. 116 of 12 December 2006 on the term of protection of copyright and related rights in art. 5 states that "Member States may protect critical and scientific publications of public domain works. The maximum term of protection of such rights shall be 30 years from the time the edition was published legally for the first time."

Limited in time is **not the right of copyright**, but the possibility that the author and his successor to collect things of property from work. As regards non-material things of its recognition as an author, opera notoriety earned it and that may increase after cessation of life - take the case of artists - they will continue to exist after the termination of life of the author.

A property right without **Fructus** for the whole time the work is used, however, is a property right? Unfortunately, that German Josef Kohler, who is less famous in intellectual property law than Edmond Picard, embraced warmly and supported the proposal Belgian, had the effect of formal recognition of new categories of rights: that of intellectual rights.

We therefore have a copyright qualified majority doctrine as ownership, but it is a limited time into an asset, non-transferable and really unable to explain the moral rights covered by the right of the author and is everywhere regulated by special laws. A complex as special, different from any other category of rights.

Romanian legislator avoided, however, to qualify for copyright, confining itself to recognize only attribute exclusive! Legislator hesitation in affirming unequivocal nature of copyright must have an explanation and I think one of them has its origins in the term of protection just right. Or rights. If it would have qualified as ownership in the common law sense, it would not have limited time and would have to admit that is transmitted as a whole. This never happens in reality.

And temporary exclusive monopoly right to use a recognized work in favor of the author, followed by work fall into the public domain when it can be used freely by anyone, deal in some way with the interests of the public author. But affect the substance of the alleged ownership of the author. How to explain in rational terms that copyright is a property right but after some time you have no fructus nor usus nor abusus?! **On the other hand we must admit that the first regulations of intellectual property rights until today, during right (s) copyright was limited.** Or rather**, apparently restricted or limited in some attributes his,** because nobody has ever said that the work fallen into the public domain, the work for which expired term of protection of rights became **res nullius** and that any work anyone can be appropriated by anyone.

2. The Duration of Rights according to Sybaritic Law

According to the information that we provide Athenaios of Alexandria in his work entitled "**Deipnosophistai"**[3], 600 years before Christ in ancient Greek colony

Sybaris in Italy has adopted a law that "If an innkeeper and chef invent a dish of exceptional quality, it will be his privilege and no one else will be able to adopt to use before one year from the date of achieving it by the first inventor and this in order to encourage others to excel by such inventions"[4]In a translation of BTD Boreschievici the same text and demonstrates once again that translations can be original without " betraying " the translated text reads: " and if any baker or chef will invent a dish particular and particularly tasty (excellent ?), no artist (emphasis ours, Ed) will not be entitled to own things resulting from the preparation of this kind, over this period (one year, note) and this to make others to work to excel in such pursuits. "[5]

3. The duration of the rights and privileges granted to publishers

Duration of rights and privileges granted to publisher's privileges royal princely court granted were those that preceded rights afforded to publishers and from which they were born copyright, ie monopoly author's exclusive right to dispose of his work. But as it is, in a sense, also a privilege

Library privileges were granted exclusive rights booksellers and theater companies for the reproduction and dissemination of books, or for their representation and were granted the pleasure of those who have the right to grant. The privileges granted to booksellers fulfill three functions: i) the possibility offered monarchs control prints, censorship already having tradition before drawing up a list of books prohibited by the Catholic Church in 1559 and brought the royal treasury income; ii) provide booksellers agreed exclusive right of reproduction and dissemination of works and obviously a profit; iii) recognizing implicitly in favor of some specific rights of the author, because no book could not be published without authorization and no authorization was given for a card belonging to another.

We must distinguish, however, between privilege Booksellers (include here and theater companies) for reproduction, dissemination and / or representation right or obligation works and authors to give their works manuscripts such privileged. The author was forced to concede only work if he wanted it to be reproduced, distributed and / or edited to obtain benefits from it and the assignment can be made only in favor of those who obtained and enjoyed privileges bookstore. Privilege struck, therefore, indirectly the author, because the privilege does not create a right of ownership over the work, but was effective right into the hands of him who purchase from the author and obtained a privilege reproduction, distribution or editing the work of the king. Transfer of rights to work by booksellers and librarians' royal privilege granted for exploitation of the work was to lose any connection between the author and his work, once the rights were assigned the privilege obtained. The author was not associated in any way in the exploitation of the work and had no control over it, even on later called moral rights, as soon as allowed by its first broadcast.

[3] In Romanian language work has been translated as the "Athenaios - Feast wise" by Nicholas Barbu, Minerva, 1978.

[4] Foyer Jean, Vivant Michel, Le droit des brevets, Presses Universitaires de France, p. 5-11.

[5] Boreschievici Bogdan D. T., Interferențe, Vol. II, Fragments of the history of the protection of industrial property, OSIM Publishing House, 2009, p. 11.

The privileges were granted, usually booksellers and libraries defended these privileges fighting for them both among themselves and with the authorities and authors of works. Such privileges were granted sometimes and others, as a reward for services to the Crown, and later, and authors. But it is worth noting that when the privileges were granted to persons other than some booksellers (third party or authors), they could not themselves exploit the work, being forced to cede exploitation of the work of librarians, because they were the only ones who can truly exercise the privilege.

The first known library privileges are granted in 1495, in Venice, for an edition of the works of Aristotle, followed in France in 1507 and 1508, the privileges of Louis XII for an edition of the Epistles of St. Paul, respectively for works of St. Bruno. Privileges for authors are also encountered. Thus, in 1516 a privilege is granted on request, Guillaume Michel Tours for his book "The forest of conscience" (Forest of consciousness)and another privilege granted in 1517 by Jean de Celaya[6] for philosophical work ("insoluble")[7], these first author privileges being granted but exceptionally[8]. Another privilege in favor of an author was granted to reward the author for services to the Crown. Thus, Pierre de Ronsard[9], poet Court's highly praised by King Charles IX and his mother, Catherine de Medici for advice given in delicate problem at the time, the Huguenots enjoys a huge appreciation from King for which he received the right to stand for King and privilege to print work. Privilege that another King (Louis XIII) and refused one of the three great playwrights of France, Pierre Corneille[10] in 1643.

In England, who have a tradition in granting monopoly for inventions by a law (monopolies) adopted in 1623/1624, in 1662 it adopted a law license, under which publishers, organized since 1556 in company stationery, printed enjoyed monopolies, so the authors were compelled to call on them to publish works. And he could not only under the conditions of stationery and a work once transferred to a publisher, it became virtually his property.

Granted at the pleasure of the king's privileges were usually temporary (lettres patentes), and vary the conditions during which they were granted and did not involve a systematic exploitation of the work. One and the same work may be subject to two privileges: one for a bookseller for reproduction and dissemination granted to other theater companies for representation.

Beginning of the end of privileges was to come to England in 1709 with the adoption of state Queen Anna, the first copyright law that will be recognized for authors. But it will still take 80 years until the privileges are abolished in France and the history for almost three centuries of their ends. Period the Parisians and the provincial libraries have faced each other for obtaining privileges and ended defend themselves against each other with arguments in favor of authors.

Louis lawyer d`Hericourt, for instance, appeared in bookstores in the province anul1725 on their dispute with Parisian bookstores because they're not receiving "privileges bookstore" actually advocate in favor of authors, stating that a manuscript is a good own it, because it is the fruit of his labor and therefore he should be free to dispose of his work according to his will to acquire honors and means to cover its needs and even the people that is united by ties family, friendship or gratitude. If an author is considered the owner and therefore sole master of the work, only he and those who are may validly assign another these rights, the king, having no right in the work as long as its author is alive or represented by his heirs and cannot send anyone a favor without the consent of privilege which the work belongs[11]. In turn, the Parisian booksellers' authors have claimed ownership over their work and that libraries could not claim any rights over the works entrusted to the authors than their assignees under quality.

Following this trial, the Council Regal amended policy privileges process will at a fair distribution of work between libraries Parisians and in the provinces, but the authors of works important, however, was the assertion thesis their ownership of the work, even after it had been "sold" to be printed and sold, and that King "did not remain insensitive to the demonstration of force booksellers Parisians and began to consider the interests of authors."[12]

In 1761, after a conflict of interest between community of booksellers and grandchildren of La Fontaine, the rights to his work, he admitted the idea that copyright is a property and therefore is subject to common law, the process heir's writer demanding and obtaining a personal privilege to publish the "fables".

An edict of December 24th, 1762 regulating for the first time how to grant them the privilege of limited duration to 15 years.

The Council Royal family returned in 1777 the Fenelon's the privilege previously granted printers

[6] Jean (Juan) of Celaya (1490-1558), mathematician, physicist, philosopher, cosmologist and Spanish theologian. He studied in Valencia and Paris. He was a professor of theology at the University of Valencia and rector of the university.

[7] L`origine of l`imprimerie of Paris. Disertation historique et critique on https://books.google.ro.

[8] Claude Colombet, Propriété littéraire et Artistique et droits voisins, Dalloz, 1997 Ed. 8, p. 2.

[9] Pierre de Ronsard (1524-1585), created a school in Paris poetic contemporaries called it "Pleiades master Ronsard ".

[10] Pierre Corneille (1606-1684), nicknamed „the founder of French tragedy ", along with Moliere and Racine.

[11] André Bertrand, „Le droit d'auteur et les droits Voisins ", Ed. Dalloz, 1999, second édition, p. 289, p. 3.

[12] Christel Simler, Droit d`auteur et droit commun des biens, LexisNexis Litec, 2010, p. 30.

for works belonging to this family, on the ground that granting further privileges for booksellers cannot be made without the consent of the heirs of the author's work.

On 30th August 1777 the same Council adopted the suggestion of King Louis XVI, a total of six resolutions, constituting, according to Pouillet, a genuine code of literary property. In the preamble, it reproduces a letter from King Louis XVI of September 6, 1776 and it enshrines the right booksellers and authors, making a clear distinction between the two categories of rights. In this "Code" states the principle that the author is entitled to claim, for himself and his heirs, perpetuity privilege to edit and sell works, or event that privilege was granted to a publisher, this assignment may not exceed life of the author[13]. As for the booksellers, "Code" states that "given their favor must be proportionate to the costs advanced and the importance of the work done."[14]

In 1788, in an "Essay on Privileges," Abbe Sieyes put the issue of crime authors to distinguish between the responsibility which belongs to the authors, printers and booksellers (publishers). But the author stops and intellectual property that needed to limit the privileges and advocates free flow of books.

On August 4th, 1789 French revolutionaries declared freedom of trade and industry in France, which was tantamount to the abolition of privileges. If the abolition of privileges bookstore was a result of the actions creators times due to the political, economic and social that made the French Revolution of 1789 burst, it is hard to say.

4. The duration of copyright in the first adopted regulations

Duration of copyright in the first regulations adopted idea that authors' rights must be limited in time is made in the first draft of copyright made by a French lawyer who in 1586 won the judges in Paris cancel a privilege bookstore for work (annotating the works of Seneca), made by Marc Antoine Muret. At trial, lawyer Simon Marion, Baron Druy a said "people, one another, out of instinct, recognized each of them, the quality of master what they have invented or composed, and after God's example, he belongs heaven and earth, day and night, author of a book is its master and as such may possess and freely dispose of it just as you have a slave, you can emancipate, giving his freedom for a price, or simply just freeing him without reservation, through a kind of patronage under which none but the author cannot reproduce the book only after a certain time"[15]. As you can see, the noble lawyer rule for limited rights since the authors admit that after a certain time, the work may be reproduced by anyone.

In England, in 1662 it adopted a law license, its beneficiaries being publishers organized into "honorable company stationery and newspaper publishers", better known as the "company stationery" effects on but directly and authors of works. England meet privileges licenses role in continental Europe, meaning that publishers were the only ones able to pursue the activity of reproduction and dissemination of works based on licenses granted. Licenses as well as privileges in continental Europe did not enjoy but all publishers, and the authors, they were at the discretion of the editors if they would publish their work because according to the rules of the Company, the authors were denied the publication of books by themselves. Law displeased publishers who had no access to licenses and the authors, so torn by internal disputes and disputes with the authors, the Company ended to address Parliament to demand a new law. In 1695, Parliament abandoned the company, refusing to extend the licensing law, and in 1709 adopted its first modern copyright law, known as the Statute of Queen Anna.[16]

Both the Explanatory Memorandum (preamble to the law) and in the body of law referred to "copy of a book" as a recognizable form of property, equal rights with other tangible property.

As proposed debates, the law did not contain a limitation on the term of protection of the rights of creators, referring to copyright explicitly as a right of authors and provide that printing books without agreement of the authors, who own these books or writings, as a product of lessons and their work, or people whom the authors have transferred these rights is not only a great deterrent to learning in general, learning should receive feedback and encouragement in all civilized nations, but also a violation of the rights of owners the right of these books and writings. As adopted, but the idea was abandoned perpetual, exclusive right of authors on their work and free to print is limited temporal recognized right for authors as having a monopoly nature.

Duration of protection has been set for the books that would be written to 14 years, extendable once for a further period of 14 and for those under 21 years old pattern, the duration of the exclusive right was extended by King George III century, in 1767, at age 28. In 1734 the English painter William Hogarth (painter of the Royal Court) wins a lawsuit against a person who illicitly reproduce his creations,

[13] Colombet Claude op. cit., p. 3.

[14] Lucas Andre, Lucas Henri-Jacques, Lucas Schloetter Agnes Traité de propriété littéraire et artistique, 4ᵉéditions, Litec, 2012, p. 9.

[15] Lucas Andre and staff, op. cit. p. 6.

[16] The name under which it was adopted is "An Act for the Encouragement of Learning, by vesting the Copies of Printed Books in the Authors or purchasers of such Copies, during the Times the already mentioned " title later reduced to that of " Law for the encouragement of learned men to compose and write useful books". The law is known in the literature as the "Queen Anna Statute".

the outcome of the origin of a law judges "l`Engraving Act", also known as the "law of Hogarth ", adopted in 1736, which gave artists a monopoly of exploitation of their engravings for a period of 14 years.

The law also established the formality of deposit protection law as a condition providing that the author could act against those who violated his rights only if the book title was present in the register Stationery Company prior to publication. Also, the law and limiting import prices allowed books and authors' books "classics" originally published in another country. Those who violated the copyright of the authors had to pay one penny for each page of the book. Half of the fine went to the author, the other half in the coffers of the Crown, and the reproduction was destroyed.

Revolutionary France, the laws devoted to literary property that were taken during the period 1791-1793, from the beginning this was all life duration authors and 5 years post mortem auctoris.

In Germany, a special regulation is passed in Prussia until 1837 by the author of a law that enjoys a protection for 10 years since the opera, prolonged duration in 1845 to 30 years.

In the US, where copyright will evolve differently from European law, a law passed in 1780 recognized the author's right to use in his work during 14 years (extended in 1831 to 20 years) with the possibility of extension for another 14, if the author, wife or children were living at the expiration of the first period.

Media law adopted on April 13, 1862 in Romania, on the 11th articles dedicated to property literary provide that authors will "enjoy throughout their lifetime as a property of their exclusive right to reproduce and sell their works in all Principality, or move them to another this property, making it the right recognized by the laws in being "right and transferable to successors over 10 years. Literary and Artistic Property Law of 1923, art. 38 provided, however, that the term of copyright in a literary and artistic works published as the author's lifelong author and shall expire fifty years after the author's death, and in the case of works published anonymously or pseudonym, duration of rights is 50 years from publication.

5. The duration of protection of rights in regulating the Berne Convention of 1886

The object of protection governed by the Convention is "all work in the literary, scientific and artistic, whatever the mode or form of expression such as books, pamphlets and other writings; conferences, speeches, sermons and other works of the same nature; dramatic or dramatic-musical works; cinematographic works and mimed; musical compositions with or without words; cinematographic works, which they are assimilated works expressed by a process analogous to cinematography; works of drawing, painting, architecture, sculpture, engraving, lithography; photographic works to which they are assimilated works expressed by a process analogous to photography; works of applied art; illustrations, maps of location; plans, sketches and works relating to geography, topography, architecture or science ", the list is exhaustive, however.

The purpose of the Berne Convention, as set out in the preamble, is to protect in an effective and as evenly as possible the rights of authors to their works (what means and duration of protection of rights) and the means of achieving that objective are the three rules basic Convention:

1) by applying the rule of national treatment or assimilation, on the basis of which a foreigner must enjoy the same rights that are recognized nationality. This does not mean that foreigners will enjoy exactly the same rights as nationals of their rights depending determine the law applicable to their works. This law is determined by applying the rules of conflict of laws.

2) minimum protection rule, which requires that member countries creators should enjoy at least the rights under the Convention. So Convention affording to authors moral right to authorship and the right to integrity of his work and economic rights of translation, reproduction, broadcasting, recitation, adaptation and distribution of works adapted and sets the minimum duration of moral rights and patrimonial leaving Member States to establish other terms of protection for different categories of works.

3) automatic protection rule, which is supposed to enjoy protection by copyright are required and cannot be imposed formalities.

In duration Rights Convention, art. 7 provides that "the term of protection granted by this Convention contains life of the author and 50 years after his death," which is the general rule for the duration of copyright protection.

In the case of cinematographic works, the term of protection may be established by Member States at 50 years from the date on which it was made accessible to the public or, failing that, 50 years from realization.

For anonymous or pseudonymous works the duration of protection shall expire 50 years after the work was lawfully made available to the public. When the pseudonym adopted by the author leaves no doubt as to his identity, but the duration of protection is applicable for authors identified. If the author of an anonymous or pseudonymous discloses his identity during the period of protection as a work anonymously or under a pseudonym, the patent is jointly applicable. Union countries are not required to protect anonymous or pseudonymous works whose author is presumed dead, in all likelihood, 50 years.

In the cinematographic was booked laws of EU countries the right to regulate the duration of their protection and that of works of applied art, protected as artistic works, establishing however that term may not be less than a period of 25 years, counted from the realization of such works.

The duration of protection subsequent death of the author and other limits begin to run from the author's death or of the event referred to by those paragraphs, but during these periods is calculated only with effect from 1 January of the year following the death or the event had in sight.

6. The duration of related rights protection system of the Rome Convention of 1961 on the Protection of Performers, Producers of Phonograms and Broadcasting Organizations[17] **and the Geneva Convention of 1971 on Protection of Producers of Phonograms against Unauthorized Duplication of their Phonograms.**[18]

The Berne Convention, though it does not limit the scope of protected works in the categories set out therein (illustrative), does not refer to rights related to copyright, i.e. the rights of performers for his own performance, the rights of record producers sound, for its own records, the rights of producers of audiovisual recordings for their own recordings and the rights of the broadcasting organizations of their own broadcasts and service programs. Moreover, the rights of those listed above and their creations are not mentioned in art. 7 and 8 („subject to copyright") of Law no. 8/1996, but only in Title II of the law (Art. 92-122[4]) but their vocation protection was affirmed[19] in our law and under the sway of Decree 321/1956, i.e. before the adoption of the Rome Convention, which lacked any reference thereto.

For the categories of authors and producers envisaged by the Rome Convention (performers, producers of phonograms and broadcasting organizations), duration of protection shall be at least 20 years counted from the end of the year he has been cast for phonograms and Performances attached to them late in the incident execution executions are not fixed in a phonogram and end of the year occurred issuing the broadcasts (art. 14 of the Rome Convention and art. 4 of Geneva Convention).

The duration of protection provided by these Conventions is the minimum length that should be recognized by the Member States of the two conventions, Member having, as in the case of the Berne Convention, the possibility to establish higher limits of protection.

Some EU Member States have introduced a term of fifty years after lawful publication or communication or after legal publication.

7. The term of protection of copyright and certain related rights by Directive (EC) no. 116 of 12th December 2006

The duration of protection provided by the three international conventions is minimal, the states having the possibility of establishing longer periods of time.

The minimum duration of the Berne Convention was intended to protect the author and the first two generations of descendants, but it turned out to be insufficient in terms of extending the average lifespan in the European Union countries.

On the other hand, some EU Member States have given duration's greater time than fifty years after the author's death in order to offset the effects of the world wars on the exploitation of works.

Other countries have introduced, for the minimum period related rights protection was established by the Rome Convention (1961) and Geneva (1971), term of protection of 50 years.

These factual circumstances to which were added goals constantly pursued those not to impede the free movement of goods and freedom to provide services and distort competition in the common market and ensure a high level of protection of copyright and related rights, were the reasons why the European Parliament and Council decided, by Directive (EC) no. 116 of 27 December 2006[20] the term of protection of copyright and related rights.

The law was confined to harmonization and regulation of the term of protection of economic rights, excluding from the scope of its regulatory explicit moral rights (in Recital (20) and Article 9)

In Romania the time of protection of copyright and related rights is in accordance with the rules set out by the Directive, so it does not require their own separate analysis. An observation is yet to be done. In art. 5 provides that "Member States may protect critical and scientific publications of public domain works. Maximum term of protection of such rights shall be 30 years from the time the edition was published legally for the first time ", or such provision is not in Romanian copyright law. But as it is clear from the quoted text of the Directive, it does not create an obligation to protect critical and

[17] Romania joined the Rome Convention by Law no. 76/1998.

[18] Romania has ratified the Geneva Convention by Law no. 78/1998.

[19] Cărpenaru D. Stanciu, Civil Law. Rights to intellectual creation, Bucharest University, 1971, p. 40: "In the absence of a legal text expressly interpretation, to the extent that it is a work of creation, can be protected as an object of copyright by adding them to the enumeration done art. 9 of Decree no. 321/1956".

[20] The Directive 2006/116/EC of the European Parliament and of the Council of 12 December 2006 on the term of protection of copyright and certain related rights is a codified version of Directive 93/98 / EEC of 29 October 1993.

scientific publications of works in the public domain, but a college.

8. How to justify the limited duration of protection of economic rights

Limiting the term of protection of rights of the author seems to be the result of a compromise: the author are recognized exclusive rights, but limited duration to ensure reward his work creative and to ensure access public to his work, which becomes part of the cultural heritage. Some have addressed the issue pragmatically thinking things of general interest to the public of its right to knowledge that could become illusory in the absence of a law limiting the duration of protection.

And one can argue that this realm, Napoleon Bonaparte won a war, because he is the one who opposed the recognition of a property right perpetual and imposed its point of view that has not been abandoned, as a principle.

Nowadays arguments of a practical nature Napoleon exposed when discussing Decree 1810 were: "Perpetuity family ownership authors would have some kind of inconvenience. A literary property is intangible property that, finding the flow of time and after succession divided into a multitude of individuals ends, somehow, by not exist for anybody; For such a large number of owners, often distant from one another, and after a few generations barely know might understand and contribute to reprint their joint work of the author? However, if you fail to understand, and only they have the right to publish the best books will disappear slowly from circulation.[21]

"It is interesting to note, however, that although the majority that time was the authors who stand for extending the term of protection of copyright, there were voices who have advocated the limitations of its most interesting arguments. Thus, in an article devoted to France this problem at the end of the eighteenth century, it was held that "once the author has revealed his opera, entrusting it to the trial to the public occurred in favor of the latter, who supplied a response to the author, a kind of transfusion, the result of which is irreversible."

Nowadays, Adolph Dietz makes two arguments in favor of limiting the duration of the economic rights: the first, deducted from the special nature of copyright, the second for reasons of **social interest**: intellectual works having by nature and function of their tendency dissipation conscience of mankind, people, in turn, tend to regard them as public goods, with meaning that are available to all and may be used freely[22]. Likewise, protecting social interest, expressed and Henri Desbois'[23] exclusive rights shall be exercised at the expense of society as a whole when the spirit works have a natural vocation to free propagation. "

The social interest, preventing a monopoly excessive and harmful culture in general and the special nature of copyright are reasons that imposed rule temporary nature of the rights of the author, and this rule has broadened to recognize the rights for authors of all time their life and in favor of the heirs' timeshare.

If at first this term was 5 years post mortem (in France the years 1791 to 1793[24]), over time it extended to 70 years post mortem. The solution is contained in the Berne Convention, noting that it provides lasting less protection for certain categories of works, but is not yet universally accepted, which is why it was reaffirmed by Directive. 93/98 / EEC of 29 October 1993 harmonizing the term of protection of copyright and certain related rights:

The Explanatory Memorandum to this Directive, which recommends Member States to extend the protection of economic rights, it shows that "Whereas the minimum term of protection laid down in the Berne Convention, namely the life of the author plus fifty years after his death, it was intended to protect the author and the first two generations of his descendants; Whereas the extension of the average life duration in the Community makes the term referred to is no longer sufficient to cover two generations. "

The solutions adopted by our legislature comply with the rules contained in the convention law and the Directive. 93/98 / EEC in 1993.

9. The general rule on the term of protection of economic rights

The duration of economic rights is limited in time, but the time period for which these rights are recognized and protected is, as a rule, variable that consists of two terms: one variable that is given life author (s) and another fixed inside which those rights belong to the heirs of the author (s).

Thus, the work of an author who still lives after its publication 60 years will be protected during its lifetime (60 years) plus 70 years for heirs. If the author lives a year after its publication, the duration of protection of economic rights will be only 71 years.

The main rule is formulated in terms of art. 25 para. 1 of Law no. 8/1996, as amended, which provides that "(1) the economic rights provided for in art. 1:21 p.m. takes the author's lifetime and after death shall be transferred by inheritance, according

[21] Bertrand A., op. cit. p. 289.
[22] Dietz Adolph, by Eminescu în "Copyright", Lumina lex Publishing 1994, p. 46-47p. 82-83.
[23] Desbois Henri, H. Desbois, Le droit d'auteur en France, ed. 3, p. 322.
[24] Bertrand A, op. cit., p. 289.

to civil legislation, for a period of 70 years, whatever the date on which the work was made public legally. If there are no heirs, the exercise of these rights lie with the organization collecting mandated during the life of the author or, in the absence of a mandate, collecting societies with the highest number of members in the respective field of creation. "

This applies to copyright on works published in his lifetime under his name or under a pseudonym that leaves no doubt about the identity of the author and the economic rights in all forms of expression including the right suite. From this rule were imposed exceptions for:

i) unpublished works during the term of protection and made public, legally and for the first time by another person who enjoys the protection of the equivalent rights (Art. 25 al. 2);

ii) works brought to the public under a pseudonym or without mention of the author (art. 26 par. 1);

iii) collaborative works (art. 27 par. 1);

iv) collective works (art. 28 par. 1); At this, under the rule of Law. 8/1996 to update them by Law no. 285/2004, add two exceptions practical interest for those cases which raise issues of law enforcement time. These cases are:

v) in case of arts and crafts works the term of protection is 25 years (art. 29 par. 1 of Law no. 8/1996 prior to the amendment);

vi) for computer programs (art. 30 of Law no. 8/1996, prior to the amendment).

10. The duration of protection equivalent rights and issues raised by its regulation in our law

The patrimonial copyrights equivalent rights are afforded to the person who brings legally for the first time, make public a work that has not been disclosed inside term. What are the conditions for recognition rights equivalent? By law these conditions may be formulated as follows:

1. have expired term of protection work;
2. the work has not been made public inside the term of protection;
3. the work has to be made known after the expiry of the term of protection, legally.

According to the new regulation, the right of disclosure of the work rests solely with the author, but this right is transmitted, after the author's death by inheritance indefinitely. In the absence of heirs, the exercise of the right of disclosure, as well as exercise other moral rights which are transmissible by inheritance, it is collecting societies who administered the rights of the author or, where appropriate, the body with the highest number of members in respective creation. These categories are the only ones that can, at any time after the expiry of the term of protection to bring a work made public, are only entitled to exercise this right.

In other words, a work that was not published during the period of protection can be legally made public for the first time, only the heirs of the author or the collective management organization empowered. Bringing opera to public knowledge by others, makes this disclosure is not legitimate and the person who committed the act does not enjoy rights equivalent to copyright.

The law makes no distinction as one who brings to public knowledge such a work is the owner of the original or a copy of the work fallen into the public domain, the right is recognized, if the disclosure was made by several people, in favor of the He took the first initiative. But in this case it means that the expiry of the term of protection does not cause the fall of the work in the public domain, because it is not likely to be made public only by persons designated by law, so it is free to use by anyone.

11. The duration of protection of economic rights on works published under a pseudonym or without mention of the author

According to art. 26 paragraph. 1 of Law no. 8/1996 manner. Duration of the economic rights in works disclosed to the public, legally, under a pseudonym or without indication of the author is 70 years from the date of notification of their public.

In relation to the previous regulation, to apply the regime's longstanding pseudonymous works, provided that disclosure was required work to be held legally. It noted, however, that if the work was published illegally pseudonymous act is an offense under the provisions of art. 141 of Law no. 8/1996 way.

According to paragraph 2 of the same article, where the author's identity is made public before the expiry of 70 years from the date of work was disclosed to the public, the duration of protection rights shall be calculated according to the rule joint (the author's lifetime and 70 years for heirs). The wording of the law might give the impression that the author's identity may be disclosed to anyone. In fact, the moral right to decide under what name will be brought to public knowledge work belongs to the author, not transmitted by inheritance, and the decision to disclose their identity can only come from the author.

Disclosure author's name after his death, however, is possible if, during life, exercising their right to a name, the author has expressed the wish that his true identity to be disclosed to the public after death (will expressed, for example, through a will).

Also on works published under a pseudonym transparent, ie when the pseudonym adopted by the

author leaves no doubt about the identity of the author, the work is applied, the duration of protection, the legal rules (lifetime of the author plus 70 years for heirs).

12. The duration of protection for economic rights in works made in collaboration

The duration of protection of the economic rights extends the life of the author and for 70 years in favor of the heirs of authors, the term running from the death of the last coauthor. This favorable regime, which makes the survival of an author to take another author's heirs established by art. 27 paragraph 1 of Law no. 8/1996 was dictated by the fact that each contribution was needed in developing definitive work, so it would be unfair deadlines to flow separately, depending on the time of disappearance of each author. But when the authors may be individual contributions, limits shall be calculated separately for each of the authors and heirs, the date of death, according to art. 27 2nd paragraph.

13. The term of protection of economic rights in the case of collective works

According to art. 28, during the economic rights in collective works is 70 years from the date they are made public works. If the work is not disclosed for 70 years after its creation, the duration of rights protection expires on the 70th anniversary of its creation.

14. The exceptions to the term of protection established by art. 29 and 30 of Law no. 8/1996 now repealed but still showing interest

Smoothing the duration of protection for all categories of works was imposed 93/98 / EEC of 29 October 1993 harmonizing the term of protection of copyright and certain related rights, which repealed and art. 8 of the Directive. 91/250 on the legal protection of computer programs that institution lasting less protection for this category of creations of the mind. Therefore, following the recommendations Directive, the legislature eliminated Romanian exceptions which stipulate shorter periods of protection for works of applied art and to programs for computers.

The articles no: 29 and 30 of Law no. 8/1996 introducing the derogatory rules for those categories of works have been repealed or amended by Law no. 285/2004, but the issue of the protection of such works under the rule of the previous law remains neutral among cases where the duration of protection was fulfilled before the entry into force of amendments to the law of copyright and related rights.

15. The duration of protection of economic rights on works of applied art

According to art. 29 of Law no. 8/1996 now repealed during economic rights in works of applied art was 25 years after their creation.

According to the current regulation, and in works of applied art, duration of protection is the common law, i.e. life of the author plus 70 years for heirs.

It is noteworthy, on the type of work that protection under copyright is more favorable than that granted by the special law of designs, because, on the one hand, is not subject to any formality (required special law) and, on the other hand, the duration of protection is greater in the right designs the maximum duration of protection is 15 years).

16. The duration of protection of economic rights to programs for computers

According to art. 30 of Law no. 8/1996 (in the version prior to the amendment), the duration of protection of economic rights in computer programs ran the author's lifetime and after his death shall be transferred by inheritance, for a period of 50 years.

Article 30 of Law no. 8/1996 amended by Law no. 285/2004, and in applying computer programs for common rule, the duration of protection that spans the life of the author plus 70 years for heirs. The exception to the rule established by Art. 30, as previous interest (perhaps only theoretically) to conflicts of laws in time. In practice, the problem is probably present little interest, because under market developments informatics term of protection of computer software is already considered too high.

The law, as previous focused on the idea exclusively on the assumption that the computer program is the creation of a single author, but we believe that he current wording of the law problem arises in the same terms since the term of protection of computer software is governed by -a separate text. What will be then, the duration of protection for computer software developed in collaboration? We believe that we should apply common rule set for works produced by several authors in the sense that protection is afforded throughout the lifetime of the author and the person's heirs at 70 years after the death of the last of the authors. In the current term of protection regulatory programs that require the solution of art. 27 rule of law is Common works are collaborative.

The consequences are more important than the omission that is determining the duration of the economic rights in computer programs for the event, according to Art. 74 of the Act, the economic rights belong to the employer, which is not regulated satisfactorily in the current regulation no. He admits, in this case, the duration of protection is unlimited means to violate a principle of law, that the limited duration of the economic rights. The omission might be considered normal if it were accepted that the employing unit does not exercise the economic rights than the period provided in the agreement or, in the absence of a contractual provision, during the 3 years as art. 44 of the Law for works produced under an individual contract of employment.

17. The calculation of time limits protection to the benefit of the heirs

The duration terms of protection of rights of the author the benefit of the heirs shall be calculated from January 1 of the year following the author's death or bringing work to the public (art. 32 of Law no. 8 / 1996). In the works are collaborative art. 27 provides that: "(1) The duration of the economic rights in works is 70 years from the death of the last surviving author. (2) If the contributions of the co-authors are distinct, lasting economic rights for each of them it is 70 years since the death of the author. "And referring to collective works, art. 28 provides that "The duration of the economic rights in collective works is 70 years from the date they are made public works. If this is not done for 70 years after the creation of works, during the economic rights expire after 70 years from the creation of works. "

Referring to works of fine art, art. 29 (now repealed) provides that "The duration of economic rights in works of applied art shall be 25 years from the date of their creation," and in reference to computer software, art. 30 provides that "economic rights in computer programs lasts for the author's lifetime and after death shall be transferred by inheritance, according to civil legislation, for a period of 70 years."

It follows from the legal provisions cited that the date for calculating the term of protection of rights of the author the benefit of the heirs, as a general rule (including computer programs) is 1 January of the year following the author's death. This rule was applied by law, if in works for which the term starts from the death of the last surviving author (art. 27 al. 1), and where contributions are distinct for each contribution individually will apply general rule (art. 27 al. 2), the logical solution, given that each coauthor has a personal right of its contribution.

It is to be noted, however, that art. 32 refers only to terms that as a starting point the author's death or bringing work to the public; text no longer provides the same calculation also in the works need to the public within 70 years (the works are collaborative and collective works - art. 27 par. 1 and art. 28), which leads to the conclusion that for the latter term protection even after the creation flows and not on 1 January of the year following that in which they were created.

The term of protection does not extend when i work or collection changes are essential, additions, cuts, adjustments or corrections content, necessary for the continuation of the collection, in the way the author intended work.

18. The effects of the expiry term of protection of economic rights

The duration of the rights of the author differ, depending on the nature of the work (individual, collaborative or collective) how the work was made public (in the author's name, pseudonym or anonymously) the fact that the work was made public or not. In relation to these elements, the duration of protection works is different. But in all cases the expiry term of protection, the work falls into the public domain; economic rights are extinguished, intellectual and creative works can be spread in public in more accessible terms, their use not covering the payment of the authors'[25].

The concept of "public domain" may be misleading and in any case should not be confused with the term "public domain" in the sense that it is used in administrative law. The fall of works in the "public domain" means that the monopoly use of the work recognized in favor of rights holders timeshare has ceased and that since then, the work has a different destiny: she has been part of the common heritage of mankind, available all and can be used freely. The authors and their successors cannot invoke any unfair competition rules to get their reconstitution of deprivation which has ceased, unless the use of the work is done by a competitor under conditions that could lead to such liability.

Typically, to the public domain it belongs[26]: -the works that do not benefit from copyright protection because they lack originality; -the works which by their nature or purpose in the public domain; -the works "fallen into the public domain"[27], i.e. works whose term of protection has

[25] Ionaşcu Aurelian, Comşa Nicolae, Mureşan Mircea, „Copyright in R.S.R.", Academic Publishing, Bucharest, 1969, p. 127.
[26] Bertrand André, op. cit., p. 233.
[27] They belong to that special category of official documents, legislative, administrative, legal type of papers etc.

expired. –the works whose authors themselves have publicly available to be freely used. In this regard, it should be noted that increasingly more authors of multimedia works and programs for computers today waive their rights patrimonial putting works freely available to the public. For programs for computers that are subject to freeware, their actual membership in the public domain is questionable, because right holders waive their rights to exercise financial but users require certain conditions, breach of which equals counterfeiting. It is considered that tend to make such works available to the public, freely, to be encouraged, but that these works should be established for proper legal.[28]

In practice, the establishment belonging to the public domain involves research work life of the author and the eventual identification of heirs, the research is even more difficult in collaborative works.

The fall of works in the public domain does not mean that it no longer enjoys any protection; moral rights of disclosure of the work, to respect the integrity of the work and the authorship remain for eternity.

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[28] Bertrand A, op. cit. p. 236.

LEGAL PROTECTION OF COPYRIGHT FOR COMPUTER PROGRAMS

Ramona Anca Denisa DUMITRAŞCU[*]

Abstract

This article referes to the evolution of EEC's reglementation of software judicial protection and its interpretation of the European Court of Justice. The conclusion is that the European judicial system is more precupied to develop a system of interoperability that will steer Europe towards the users interests as well as the economic interests of the market and nearly negligent towards the interests of the authors although it recognizes the moral rights and patrimonial rights which can be used in the limited framework which will permit a better understanding of the value of its creators through interoperability.

Keywords: *Copyright, software, international legislation, legal rights, interoperability.*

1. Introduction

In a society in which creativity is undermined by the use of technology we need to recognize, respect and render homage to the human inventiveness among all computer programs which without would be difficult to imagine a social, professional and even affective normal existence.

In Europe, the necessity to promote the software industry has drawn attention on the lack of harmonization in between the different member state legislations on authors laws regarding the protection of the authors of software programs. In addition, the economic pressures have stimulated the development of legislation in that domain which resulted a first document which regulates these matters with two principal scopes: harmonizing the legislation and the establishment of interoperability.

2.Content

The preoccupation to regulate judicially the author protections for software programs have manifested themselves in a first legislative plan to be implemented by the Directive 91/250/EEC, although before the release of this act the countries national jurisprudence of software authors expressed different opinions on the legal nature of this specific type of creation and the form and extent of legal protection.

Directive no. 92/250/EEC was based on the premises conferring a unitary legal framework for the protection of the computer programs which in a first stage to be limited to establish that member states to agree to offer protection under copyright of computer programs as works of literary works conform protection of literary and artistic works as described in the convention of Bern and further more to establish the beneficiaries and the object of protection, exclusive rights on which protected persons may claim, to authorize or prohibit certain acts and the duration of protection.

In order to develop prolific computer programs and their use in all areas of activities, the European Community has considered it appropriate to legislative intercede in order to ensure a fair, correct, competitive framework which regulates the domain in which human investment, technical and important financials converge towards the realization of products with an important economic value which has become a fundamental resource for the industrial development of the Community.

The first document reflects the preoccupation for informatics, directive 92/250/1991 proposes a definition of "computer program" which "*shall include programs in any form, including those which are incorporated into hardware; whereas this term also includes preparatory design work leading to the development of a computer program provided that the nature of the preparatory work is such that a computer program can result from it at a later stage*".

For the first time, and unlike the US copyright system, the Directive 250/1991 is supported at the legislative level and argued international standardization for the software development and promoted principals of market competition and compatibility of computer programs, is authorized and regulated compilation operations and conditions under which this could be an exception of copyright protection and at the same time a promoter of progress.

The principal of protecting the rights of the author under copyright is placed prior the interoperability arrangement of software products and their interfaces with hardware and other software components of the system thus creating an exclusive compatibility dichotomy dedicated and adaptable to the effects on the software market demonstrated obviously today.

The Directive states that the law does not intend to protect ideas or principles on which the

[*] PhD candidate, Faculty of Law, "Nicolae Titulescu" University of Bucharest (e-mail: **monadumitrascu@yahoo.com**).

software program is based but merely the expression of it, allowing another person to try and find a way similar to that (identical).

The Directive balances the copy writer of a computer program for it to allow coping or modifying its wrights against the author or to obtain necessary information to achieve interoperability of a computer program independently created under certain conditions.

Interoperability has been defined in the following terms "(*function of a computer program is to communicate and work together with other components of a computer system and with users and, for this purpose, a logical and, where appropriate, physical interconnection and interaction to enable all elements of software and hardware to work with other software and hardware and with users. Parts of the program which provide interconnection and interaction between elements of software and hardware are generally known as 'interfaces'; functional interconnection and interaction is generally known as "interoperability"; such interoperability can be defined as the ability to exchange information and mutually to use the information exchanged. only the expression of a computer program is protected and that ideas and principles which underlie the various elements of a program, including those on which underlie its interfaces, are not protected by copyright under this Directive*)"[1].

The European Court of Justice was called upon to determine whether the graphic user interfaces (GUI) of a computer program is a form of expression of that program within the meaning of art 1 (2) of the directive 91/250/EEC and weather they have therefore copyrights protection of computer programs, as reflected in this Directive on the occasion of the case Bezpecnostnii softwarova asociace- Svaz softwarove ochrany vs Ministry of Culture of the Czech Republic (C-393/09).The Court found that the Directive 92/250/EEC does not define the term "any form of expression of a computer program" and as such the phrase must be defined considering the text and the context in which they appear according to art 1 paragraph 2 of the Directive 92/250 which will be interpreted according to the Directives objectives as a whole and in accordance with international law.

According to art 1 paragraph 1 of the Directive 91/250, computer programs are protected by copyright as literary works within the meaning the Bern Convention. The second paragraph of that article extends such protection to all forms of expression of a computer program. The first sentence the seventh consideration of the Directive no. 91/250 states that for the purpose of this directive the notion of a software program includes programs in any form, including those which are incorporated in the hardware. On the other hand, paragraph one of the TRIPS Agreement which states that computer programs weather expressed in source code or in object code, will be protected as literary works under the Bern Convention. Given these legal terms of the European Court of Justice concluded that the source code and abject of the computer programs are forms of expression which require to be protected by copyright in computer programs under the article 1 paragraph 2 of the Directive 91/250. Therefore, the protective scope of this Directive referrers to all forms of expressions of the software allowing its reproduction in different computer languages, such us source code and object code. The seventh consideration of the directive no 91/250 includes that the concept of the computer program also includes preparatory design work leading to the development of a computer program provided that the nature of the preparatory work is such that a computer program can result from it at a later stage.

As such, any form of expression of a computer program has to be protected from the moment when its reproduction would entail reproduction of the computer program itself thus enabling the computer to perform its function.

Consideration ten and eleven of the Directive 91/250, interfaces are part of the computer program which provide which ensure interconnection and interaction of all the elements of the software and hardware with other software and hardware and with users in order to allow them to function. in essence the graphical user interface is an interaction interface which enables communications between the computer program and the user. In those circumstances, the graphic user interface does not allow reproduction of the computer program, but constitutes only one element of this program through which user exploit the functionality of this program, hands this interface is not a form of expression of a computer program within the meaning of article 1 paragraph 2 of the Directive 91/250 and therefore cannot benefit from the specific protection of copyright in computer programs under the terms of the Directive[2].

In view of the rules of the judicial protection as the recognized author of computer programs, the Directive prohibits the permanent or temporary reproduction, translation, adaptation, arrangement, transformation of the program as well as any form of public distribution, including the original or copies of the program[3], regulating specific exceptions of prohibited actions, or necessary documents of the

[1] Directive of The European Parliament and of The Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society (91/250/EEC).

[2] Bezpecnostnii softwarova asociace - Svaz softwarove ochrany vs Ministry of Culture of Czech Republic (C-393/09).

[3] Art. 4 Directive 91/250 EEC.

prohibited actions such as: in the absence of specific contractual provisions, the acts referred to in Article 4 (a) and (b) shall not require authorization by the rightholder where they are necessary for the use of the computer program by the lawful acquirer in accordance with its intended purpose, including for error correction, the making of a back-up copy by a person having a right to use the computer program may not be prevented by contract insofar as it is necessary for that use, the person having a right to use a copy of a computer program shall be entitled, without the authorization of the rightholder, to observe, study or test the functioning of the program in order to determine the ideas and principles which underlie any element of the program if he does so while performing any of the acts of loading, displaying, running, transmitting or storing the program which he is entitled to do[4].

The provisions of the Directive require member states to institute measures to remedy the damage suffered by the author of the software when they are cause by any act of putting into circulation a copy of a computer program while knowing or need to have known that it is an illegal copy; possession for commercial purposes of a copy of a computer program of which the only scope is to facilitate the removal or bypassing any technical means of protection of a software program and requires the national legislations to regulate and adopt specific sanctions for the illicit actions.

The European document does, as the United States Code, makes a difference in between the rental (available for another person for a limited period of time in order to achieve profit a program or a copy of it) and the public landing (offering by a non-profit organization a computer program on which that person has copyright or legal rights to use or to copy for use by a person of another nonprofit organization).

The Directive 91/250/EEC has undergone a number of clarifications. Directive 96/9/EEC of the EUROPEAN Parliament and of the Council d.d.11.03.2006 gives legal protection to the data basis defined as a "collection of works, data or other independent elements arranged in a systematic or methodical individually assed by means of electronic or other means. "The Directive provides the protection of data basis both through copyright for intellectual creation, and by *sui generis* protection right (of the financial, human resources, input and energy investment) in order to obtain verify and or present the content of the data basis. However, section 23 of the explanatory memorandum directive states that since the term "data base" should not apply to computer programs used for the creation or operation o0f a data base, these computer programs are protected by Directive 91/250 /EEC of May 14 1991 on the legal protection of the legal programs.

An important amendment to the regulation length of copyright regulations of computer programs was introduced by Directive 93/98/EEC of the 29th of October 1993 harmonizing the terms of protection of copyright and certain related rights. The document aims to ensure a Unitarian format and uniform in order to eliminate inconsistencies between national laws governing the terms of protection of copyrights and related rights, which are liable to impede the free movement of goods and freedom to provide services and to obstruct competition in the common market so that it is necessary to ensure the proper function of the internal market harmonizing national laws so that the terms of protection are identical throughout the community.

The evolution and promotion an effervescent and competitive market was reflected in the amendment to the terms of protection of the creation of software with regard to the vision of the European Community. If initially the software was recognized in the same legal régime as literary was under the Bern Convention (lifetime of the author plus fifty years after his/her death , calculating of the first day of January of the next year after the realization of the mentioned creation with the possibility for the member states to recognize according to their national legislation which might provide for a longer period of copyright protection in order to maintain this period of harmonization of communities), article 1 paragraph 1 of the Directive 93/93/EEC the protection terms was extended (copyright in a literally or artistic work within the meaning of article 2 of the Bern Convention over the entire lifetime of the author and 70 years after his death irrespective of the date when was lawfully made available to the public).

The provisos on protection on computer programs had been addressed by legislative and directive 2001/29/CE on the harmonization of certain aspects of copyrights and related rights in the IT word.

The preamble of This Directive states that the harmonized legal protection regulated by this act shall not affect the specific provision on protection of the Directive 91/250/EEC and in particular, should not apply to the protection of technological measures used in computer programs, which is exclusively addressed in that directive and should not obstruct nor prevent the development or use of any means of circumventing a measure of technology to enable the deployment of actions according to art 5 paragraph 3 or art 3 of the directive 91/250/EEC. Article 5 and 6 of the directive exclusively determine exceptions to the exclusive rights applicable to computer programs.

[4] Art. 5 Directive 91/250 EEC.

Referring to the applicable domain, the directive leaves the community provisions intact on the legal protection of software programs however introduces notions and principles necessary for copyright protection of software.

This directive is followed by the adoption, in December 19996 by the Word Intellectual Property Organization of new treaties: the WIPO Copyright Treaties (WCT) and the WIPO Treaty on Public Performances and Phonograms.

Even if those two treaties do not explicitly target new directions and do not legislate explicit material on the protection of copyright in the field of computer programs, their adoption together with the explanatory statement content in the preamble of, the Directive 91/250/EEC represents recognition on the level of legislation of the spectacular evolution of the software market and provide specific protection for the authors. The Directive

Recognizes the social implications that reflect the development of informatics and brought visions of the phenomenal that it calls "digital agenda" and that states as a principal the requirement to improve the means to fight piracy worldwide. The Directive insists on the importance of the copyright "because e it stimulates the development of new products and services as well as the creation and exploitation of their creative content" and therefore its protection will "foster substantial investment in creativity and innovation including network infrastructure and will lead to growth and increased competitiveness into European industry both in its content and IT and, on a more general level, a range of divers industrial and cultural sections, providing new jobs and increased in short existing working places"[5].

In the context of the investigation on national legislation which tend to create differences which abstract the free flow of intellectual creations and in particular it's products enforce the idea of protection of intellectual property rights as part of ownership.

The Directive also referees to the services market "on demand" in the field of protection the copyrights which they define as those services requested and received by the recipient at the time and location he desired, which might be different of the time and location offering them to the public by the copyright holder in this domain, which might be included those services or products that can be accessed, run, viewed, downloaded via a computer network. The notion refers today to those complex computer programs which were adopted by the developer (or implementation) to the specific needs of the customer involving most often to be used for an infrastructure developer through a computer network. The Directive excludes expiry of exclusive rights of the copyright holder regarding the distribution of services and in particular online services. Therefore the Directive establishes that the right holder copyright for such services will have to give authorization for distribution of each act (each individual section) in part[6].

The preamble to the Directive states that uses of the license as a way to assign the right to use the software has the character of subsidiary regarding national regulations on extended collative licenses. The Directive also establishes that the rights refer to a likely to be transferred, assigned or licensed, subjects of a conventional subsidiary, maintaining the directive within the legislation of the member states.

Also, the Directive 91/2001 establishes the principle that "the mere rendering of physical facilities to make or making a communication does not mean, by itself, communication within the meaning given by the Directive"[7]. This principle has special significance given that in the absence of a specific statement to the contrary that might give the assumption that providing a space where different users can communicate and exchange files between them will not entail a liability on the part of just offering the space (issue of exchange of peer to peer system).

The Directive 2001 supplements the provisions of the Directive of 1999 with regard to the reproduction of article 2 of the Directive from 2001 which defends the exclusive right of the author of the work to authorize or prohibit "direct or indirect temporary or permanent reproduction by any means or and any form whole or in part"[8] . Article thereof the Directive from 2001 provides that it protects the authors exclusive right to authorize or prohibit any communication to the public as well as enabling communication to the public of their works, by wire or wireless technology including in a manner that the recipients can chose the time and location they chose to be notified of. Furthermore, a first communication to the public or the offer of first communication to the public does not consume this exclusive right.

The Directive no. 98/EEC 2009 amends the legal protection of copyright of computer programs expressing an objective position o0n the criteria of originality and subject protection.

[5] Directive 2001/29 of The European Parliament and of The Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society, document nr. 32001L0029, parag. (3) și (4).

[6] Daniela Marin, *Protecția programelor de calculator în Uniunea Europeană,* http://www.proceedings.univ-danubius.ro/index.php/eirp/article/ viewFile/1065/984.

[7] Directive 2001/29/CE of The European Parliament and of The Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society, document nr. 32001L0029, parag. (27).

[8] Directive 2001/29/CE of The European Parliament and of The Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society, document nr. 32001L0029, art. 2 (a).

The document specifies an objective criteria of the previous definition given by the directive 91/250/EEC namely that the appreciation of originality and susceptible element of protection should not cover an assessment of the quality nor a static merits of the program.

The European Court of Justice established in the interpretation of article 1 paragraph 2 of Directive no. 24/2009 in light of point eight of the preamble that the graphic user interface of a computer program may qualify for protection bay copyright under common-law Directive no. 2001/29. The Court stated that copyright within the meaning of Directive 2001/29 cannot be applied unless a work is original, it is the authors own intellectual creation, therefore the graphical user interface can also benefit from the work of protection by copyright if the author own intellectual creation and its essential criteria establishing this criterion are specific arrangements or configurations of all components of the graphic user interface to determine which meet the condition of originality that cannot be achieved by the graphic user interface components that would characterize only by their technical function. If the expression of those components is dictated by their technical function, the criterion of originality is not met since the different ways of implementing an idea are so limited that the idea and its expression is confused. However such an interface can benefit from copyright protection as a work entitled under directive 2001/29 when that interface its author intellectual creation.[9]

It thus stressed the special character of the concept of creativity in the field of software and hands on how special copyright protection involving substantial limitation derived from the right to use the licensed holders standard.

Pursuant to section fifteen of the explanatory memorandum directive "reproduction, translation, adaptation or transformation of the form of the code was a copy of a computer program constitutes an infringement of the exclusive rights of the author. In certain circumstances, reproduction of the code of a computer program or a translation of its form are indispensable in order to obtain the necessary interoperability information of a program created independently from other programs. Bear in mind that only in these limited circumstances performance of the acts of reproduction and translation by or behalf of a person having the right to use a copy of the program is legitimate and compatible with fare practice and is therefore considered not necessary to obtain authorization from the copyright owner. One objective of this exception is to allow to connect all components of the computer system, including those of different manufactures so that they can work together. Such an exception to the authors exclusive rights may not be applied so as to prejudice the legitimate interests of the right holder or a normal exploitation of the program.

So, logic, algorithms and programs in languages that are behind a component (or all) software is not covered by that prevision of the Council, the expression of those ideas and principals is a matter for copyright as is required by the laws of the member states.

Perception about the element of novelty, the subject of creativity and therefore subject matter of protection of copyright software is reflected in the recent practice of the of court that the decision in case SAS [C- *406/10*] shows that in accordance with directive 91/250/EEC only the expression of a computer program is protected by copyright, however, the ideas and principles underling logic algorithms and program languages are not protected by the Directive. The court emphasizes that neither the functionality of a computer program not the programming language and the format of data files used in a computer program to exploit certain functions does not constitute a form of expression of that program within the meaning of art 1 paragraph 2 of the Directive 91/2250 EEC.

The protective scope of the Directive 91/250 targeting the software in all its forms of expression such as source code and object code and its enabling reproduction in different computer languages. By the same judgment, the European court of European Union ruled that the graphic users interface does not allow reproduction of the computer program, but constitutes only one element of this program through which users exploit the functionality if the program. In conclusions, the Court Justice of European Union has determined that neither the functionality of a computer program nor the program in language or format of data files used in a program to exploit certain functions of it will not constitute a form of expression of the program and are not protected by copyright in computer programs according to directive 91/250.

However, with regard to the language and the format of data files they can still qualify as works of copyright protection under directive 2009/29 EEC regarding on the harmonization on certain aspect of copyright and related rights in the information world, as if the creation is the authors own intellectual creation.

By the same decision, the court expressed its interpretation of article five paragraph three of the directive 91/250 that in case a person has obtained a copy of a licensed computer program may, without the authorization of the copyright holder of this program analyze, study or test the functionality of the program in order to determine the ideas and principles underline , based on any element of the

[9] Bezpecnostnii softwarova asociace - Svaz softwarove ochrany vs Ministry of Culure of the Czech Republic (C-393/09).

program when performing acts covered by this license, a purpose that goes beyond the framework of this, the owner of the computer program cannot prevent, by invoking the license agreement the person who obtained a license to identify ideas and principles which underline any element of a computer program when it (i) carries out acts the license allows to perform and acts of loading and running necessary for the use of the computer program and (ii) does not infringe the exclusive rights of the holder of the program . Decision argues that it cannot infringe copyright in the computer program when the acquiring of the legal license was limited to analysis , study and test the computer program by the licensee to reproduce its functionality and did not have access to the source code thereof.[10]

Article two, letter e of the Directive 2009/29 recognizes the exclusive rights of authors with regard to their works to authorize or prohibit. In connection with this provision the Justice Court of the EEC had to establish whether the reproduction in a computer program or a user manual of this manual of certain elements described in the user manual pc protected by copyright constitutes a copyright infringement on the letter manual. According to previous jurisprudence of the European Union the various part of a work enjoy protection under directive 2001/29 provided that they contain elements which are the expression of the intellectual creation of the author of this work. In this case, the key words, syntax, commands and combination of commands options, defaults and iterations consisting of words, figures of mathematical concept which, taking separately, are not in themselves an intellectual creation of the author of the computer program.

3. Conclusions

The way that the protection of the author rights was legalized is very specific due to the fact that an explosion of such products (stimulated by the urge of using these creations in all domains) and due to the short lifespan of such products and special character as well as the innovation in the creation of the software product.

Observe that protection by way of copyright and the protection by way of Bern Convention are based on different values of protection. It appears that the system of interoperability will steer Europe towards the users interests as well as the economic interests of the market a nearly negligent towards the interests of the authors although it recognizes the moral rights and patrimonial rights which can be used in the limited framework which will permit a better understanding of the value of its creators through interoperability.

This is why the legal measures in place in the European Community are rather orientated on the basis of repairing measures on eventual prejudice rather than a sure and precise way to block the illegal commercialization of these creations.

By default, the author of the software is limited in his/she s prerogatives to take legal actions against uses who explicitly use the creation against the authors interest but not against any acts of the legitimate use that are focused on watching normal use of the program or a copy of it, debugging program, observing, studying and testing the functionalities or reproduction and translation software code to achieve interoperability with other software.

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[10] **SAS Institute Inc./World Programming Ltd (**C–406/10).

THE IMPACT OF THE EUROPEAN TRADE MARK LAW REFORM ON THE ROMANIAN LEGISLATION

Sonia FLOREA*

Abstract

The Study analyses the necessary changes of the Romanian legislation as a result of the recently adopted and published Directive (EU) 2015/2436 of the European Parliament and of the Council of 16 December 2015 to approximate the laws of the Member States relating to trade marks (hereinafter called the Directive 2015/2436) and of the Regulation No 2015/2424 of the European Parliament and of the Council of 16 December 2015 amending Council Regulation (EC) No 207/2009 on the Community trade mark and Commission Regulation (EC) No 2868/95 implementing Council Regulation (EC) No 40/94 on the Community trade mark, and repealing Commission Regulation (EC) No 2869/95 on the fees payable to the Office for Harmonization in the Internal Market (Trade Marks and Designs) (hereinafter called the Regulation No 2015/2424).

Keywords: *trade mark law reform, Directive (EU) 2015/2436, approximation of national trade mark laws, Regulation No 2015/2424, the European Union trade mark.*

1. Introduction

The new Directive No 2015/2436 to approximate the laws of the Member States relating to trade marks was adopted and published very recently in the Official Journal of the European Union No L 336 of 23rd December 2015 and entered into force on the 13th of January 2016.

This Directive was adopted as part of a legal package, toghether with the Regulation No 2015/2424 introducing the European Union trade mark, published in the Official Journal of the European Union No L 341 of 24rd December 2015 and entered in force on the 23rd of March 2016.

The new Directive No 2015/2436 and the new Regulation No 2015/2424 are drafted toghether and they comprise many identical legal provisions, with the aim to ''reduce the areas of divergence within the trade mark system in Europe as a whole, while maintaining national trade mark protection as an attractive option for applicants''[1] and to ensure the ''coexistence and balance of trade mark systems at national and Union level''[2].

The Study analyses in detail the content of these legal provisions insofar as they constitute a reform of the European trade mark law and entail changes of the Romanian trade mark legislation, contained in the Romanian Law No 84/1998 regarding trade marks and geographical indications, republished in the Official Journal No 337 of 8 May 2014 (hereinafter called Law No 84/1998) and in the Rules for the application of the Law No 84/1998 published in the Official Journal No 809 of 3 December 2010 (hereinafter called the Implementing Rules).

According to the provisions of Article 54 of the Directive, by 14 January 2019, Romania has the legal obligation to make all the necessary changes of its national laws, regulations and administrative provisions covered by this Directive in order to comply with most of the provisions of the Directive[3]. As an exception to this term, legal provisions of Article 45 of the Directive, which refer to procedural rules, shall be transposed into the national legislation by 14 January 2023.

The Study identifies the area of divergencies and the necessary steps to be taken by the Romanian legislator, in order to attain the objective stated in paragraph (12) of the Directive's Preamble, namely that the conditions for obtaining and continuing to hold a Romanian registered trade mark are consistent with the conditions set up for the European Union trade mark and are, in general, identical in all Member States.

Some of the divergencies identified in the Study refer to the necessary transposition of new procedural rules, aligned with these stipulated in the new European Union trade mark Regulation, wich would be applicable only in the field of trade mark law.

In the filed of intellectual property rights, the tendency to create European Union procedural law, via the adoption of Regulations or Directives is more evident[4]. What constitutes a novelty for the

* PhD, Faculty of Laws, University of Bucharest (2013); lawyer, member of the Bucharest Bar (e-mail: **sonia.florea@avfloreagheorghe.ro**).

[1] Preamble of the Directive, par. (5).

[2] Preamble of the Directive, par. (3).

[3] Articles 3 to 6, Articles 8 to 14, Articles 16, 17 and 18, Articles 22 to 39, Article 41, Articles 43 to 50.

[4] The Regulation (EU) No 608/2013 of the European Parliament and of the Council of 12 June 2013 concerning customs enforcement of intellectual property rights which provides procedural rules for customs authorities to enforce intellectual property rights with regard to goods liable to customs supervision or customs control and the Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the enforcement of intellectual property rights entailed adequate changes of national rules of civil procedure

legislative process is the adoption by a Directive of procedural rules which have an impact on national laws of civil procedure, in order to harmonise these national rules with the rules of procedure contained in the Regulation on the European Union trade mark.

We shall further identify and examine in detail the necessary changes of the Romanian substantive trade mark law, followed by the necessary reform of the Romanian trade mark procedural law. Next, the main new legal provisions of the European Union Regulation which may have an important impact on the Romanian legislation and on the previously registered Community trade marks are identified.

To our knowledge, up to date, in the Romanian doctrine there is no published study related to the impact on the Romanian legislation of the legal substantive and procedural provisions of the trade mark legislative package, as adopted and published in the Official Journal of the European Union.

2. Content

Signs capable of constituting a trade mark are, according to Article 3 of the Directive, any signs, including sounds, provided that they are capable of distinguishing the goods or services of one undertaking from those of other undertakings and of being represented on the register in a manner which enables the competent authorities and the public to determine the clear and precise subject matter of the protection afforded to its proprietor.

The requirement of graphic representation is no longer stipulated by the law. According to paragraph 13 of the Preamble a sign should be permitted to be represented ‘‘in any appropriate form using generally available technology, and thus not necessarily by graphic means’’, as long as the representation satisfies the criteria established by the Sieckmann Judgment of the Court of Justice of the European Union (C-273/00): that is the sign is ‘‘capable of being represented in a manner which is clear, precise, self-contained, easily accessible, intelligible, durable and objective’’, even if the sign is not graphically represented.

The legal provision requires the change of Article 2 of the Law No 84/1998 and of Article 3 of the Implementing Rules.

As a new compulsory absolute grounds for refusal of registration or for invalidity, Article 4 paragraph 1 (k) of the Directive No 2015/2436 adds signs ‘‘which are excluded from registration pursuant to Union legislation or international agreements to which the Union is party, providing for protection of traditional specialties guaranteed’’.

The ground is compulsory for Member States. There is no option whether to introduce or not such absolute ground in the national legislation.

Paragraph (15) of the Preamble gives no further clarification on what is understood by ‘‘protected traditional specialties’’. Art. 4 paragraph 1 (i) and (j) allows us to understand that protected designations of origin, geographical indications and traditional terms for wine differ from ‘‘protected traditional specialties’’.

Another new compulsory absolute ground for refusal of registration or for invalidity is provided in Article 4 paragraph 1 (l): ‘‘trade marks which consist of, or reproduce in their essential elements, an earlier plant variety denomination registered in accordance with Union legislation or the national law of the Member State concerned, or international agreements to which the Union or the Member State concerned is party, providing protection for plant variety rights, and which are in respect of plant varieties of the same or closely related species’’.

According to Article 4 paragraph 2 of the Directive 2015/2436, bad faith remains a ground for invalidity of the registered trade mark and is an optional absolute ground for refusal of registration.

Bad faith remains regulated as an optional relative ground for refusal of registration in Article 5 paragraph 4 (c) of the Directive 2015/2436 and so is also in Article 6 paragraph (4) g) the Romanian Law No 84/1998.

The Romanian legislator may decide to provide for the absolute ground of refusal of the bad faith applications of trade marks in obvious cases (for example, one applies, with no justification, for registration of a trade mark which is an insignificant alteration of a well-known or reputed trade mark, or of the personal name of a famous person).

The Directive changes legal provisions on the effect on registration and invalidity of the required distinctiveness following use. A trade mark shall not be declared invalid, according to Article 4 of the Directive, if it is devoid of any distinctive character [Article 4 paragraph 1 (b)], or if it consists exclusively of signs or indications which may serve, in trade, to designate the kind, quality, quantity, intended purpose, value, geographical origin, or the time of production of the goods or of rendering of the service, or other characteristics of the goods or services [Article 4 paragraph 1 (c)], or if it consists exclusively of signs or indications which have become customary in the current language or in the bona fide and established practices of the trade [Article 4 paragraph 1 (d)], in case it has acquired distinctiveness following use before the date of application for a declaration of invalidity. The rule is applicable even if before the date of application for registration the trade mark did not aquire distinctiveness following use.

The rule is mandatory for Member States. The rule is in compliance with the general principles of nullity of a legal act, such as the registration of a trade mark, according to which the sanction shall be waived when the cause of cancellation no longer exists at the time the sanction may be pronounced.

Mamber States have the option to transpose the legal provisions of Article 4 paragraph 5, according to which a trade mark shall not be refused registration if it acquired distinctive character after the date of application for registration, but before the date of registration.

Regarding the relative grounds for refusal or invalidity Article 5 paragraph 3 (a) of the Directive is redrafted in order to comply with the Decision of the Court of Justice of the European Union in the Davidoff & Cie SA, Zino Davidoff SA v. Gofkid Ltd case (C-292/00). A conflict with an earlier registered trade mark with a reputation is established irrespective of whether the goods or services for which a later trade mark is applied or registered are identical with, similar to or not similar to those for which the earlier trade mark with a reputation is registered.

The legal provision requires a rewriting of Article 6 paragraph (4) a) of the Law No 84/1998, which was already interpreted and applied by Romanian Courts in compliance with the above-mentioned jurisprudence.

A new mandatory relative ground for refusal or invalidity is stipulated in Article 5 paragraph 3 (c) of the Directive in relation to conflicts with earlier rights granted by an application for a designation of origin or a geographical indication already submitted in accordance with Union or national legislation prior to the date of application for registration of the trade mark, if that designation of origin or geographical indication confers the right to prohibit the use of a subsequent trade mark.

The new rule ensures that ‘‘the levels of protection afforded to geographical indications by Union legislation and national law are applied in a uniform and exhaustive manner’’[5].

The new rule implies for the Romanian legislator a clarification of the issue if and under what circumstances the right to a registered or to a submitted designation of origin or geographical indication gives the right to prohibit the use of a subsequent trade mark.

Article 5 paragraph 4 contains optional relative grounds for refusal of registration or for invalidity of a trade mark. They are already stipulated in the Romanian legislation, but the Romanian legislator has to clarify if prior rights to a non-registered trade mark, or to a name confer on its proprietor the right to prohibit the use of a subsequent trade mark.

Contrary to the corresponding provisions of Article 8 paragraph 4 (a) of the Regulation No 207/2009 (which were not ammended by the Regulation 2015/2424 on the European Union trade mark), Article 5 paragraph 4 (a) the Directive does not condition the right to prohibit the use of a subsequent trade mark to the use in the course of trade of a non-registered trade mark or a sign of ,,more than mere local significance’’.

As regards the right to a name, Article 5 paragraph 4 (b) (i) of the Directive makes no limitation as to the right to a company name or to a personal name.

In our opinion, having in view paragraph (27) of the Preamble, the conflict with such prior rights needs to be solved by the Romanian legislator on the basis of the priority principle. That leads to the necessary provision of the legal solution according to which signs such as prior rights to a non-registered trade mark, or to a name (personal name or company name) give the owner the right to prohibit the use of a subsequent trade mark. That means that an earlier right to a personal or to a company name used in commerce may be invoked in order to preclude the registration of a trade mark or as an invalidity ground. Also, an earlier right to a registered trade mark may be invoked against the use of a subsequent company name. As a result of limitations of the effects of a trade mark, an earlier right to a registered trade mark can not be used against the use of a personal name in the course of trade, where such use is in accordance with honest practices in industrial or commercial matters, as provides Article 14 paragraph 1 (a) and paragraph 2 of the Directive.

The absolute grounds for refusal or invalidity may be invoked by observation by any interested party, according to legal solutions adopted both by Article 40 of the Directive 2015/2436 and by Article 18 of the Law No 84/1998.

According to the provisions of Article 37 of the Romanian Code of Civil Procedure, the Romanian Law No 84/1998 must expressly recognise the legal standing to submit observations for any group or body representing manufacturers, producers, suppliers of services, traders or consumers.

Relative grounds for refusal or invalidity may be invoked by opposition, by any interested party, on the ground of existing earlier rights, as already stipulated in the Romanian Law No 84/1998.

The redrafting of Article 18 paragraph (1) of the Implementation Rules is necessary in order to clarify, as stated in Article 43 paragraph 2 of the Directive 2015/2436, that ‘‘a notice of opposition may be filed on the basis of one or more earlier rights, provided that they all belong to the same proprietor’’.

As to the legal option regarding ex-officio examination of only absolute grounds or of absolute and relative grounds, the Study on the Overall Functioning of the European Trade Mark System, presented by Max Planck Institute for Intellectual Property and Competition Law (hereinafter reffered

[5] Preamble of the Directive, par. (15).

to as ‘‘the Study’’[6]), reveals that 12 Member States do not perform any ex officio examination of relative grounds, leaving them only for opposition and invalidity proceedings, while other 12 Member States provide for the ex officio examination of relative grounds.

Arguments in favour of such ex officio examination of relative grounds are stated in paragraph 2.49, page 232 of the Study, which emphasizes that a great number of trade mark owners support such examinations and see them as helpful and important for a well-functioning system, even if user associations and trade mark agents endorse the view that the system should leave such monitorisation to the trade mark owners themselves.

The new Regulation No 2015/2424 on the European Union trade mark stipulates, in its Article 38, that at the request of the applicant for the EU trade mark when filing the application, the Office shall draw up a European Union search report citing earlier EU trade marks or EU trade mark applications which may be invoked against the registration of the EU trade mark. The applicant may request, at the time of filing an EU trade mark application, that a search report be prepared by the central industrial property offices of each of the Member States. Upon publication of the EU trade mark application, the Office shall inform the proprietors of any earlier EU trade marks, or EU trade mark applications cited in the EU search report of the publication of the EU trade mark application.

In our opinion, the procedure insures a balanced and fair functioning of the registration system, for all interested parties that act in good faith. There are strong arguments in favour of the adoption of such rules in the Romanian legislation, because the procedure of is carried only at the request of the applicant and not ex officio and because the proprietors of any earlier rights cited in the search report receive information of the application’s publication.

Articles 10 – 14 of the Directive 2015/2436 clarify and reform legal provisions concerning the exclusive rights conferred by a registered trade mark and the limitation os such rights. The transposition of these legal provisions imply an adequate modification of the Romanian Law 84/1998, as explained below.

The proprietor has exclusive rights in relation to the sign registered as a trade mark for certain goods and services, which enable him to prevent third parties from using any sign in the course of trade, in relation to goods or services, under certain limited circumstances.

An important clarification is brought by paragraph 6 of Article 10 of the Directive, namely that trade mark protection is mandatory for Member States only in case of use of a sign by a third party for the purposes of distinguishing goods or services. That means that legal provisions stipulated in paragraphs 1, 2, 3 and 5 of Article 10 of the Directive give the prorieto the rght to prohibit uses of sighn which jeopardize the essential function of the trade mark to guarantee the consumers the origin of the goods or services is protected and not other trade mark functions.

In this regard, paragraph 18 of the Preamble expressly states that ‘‘It is appropriate to provide that an infringement of a trade mark can only be established if there is a finding that the infringing mark or sign is used in the course of trade for the purposes of distinguishing goods or services. Use of the sign for purposes other than for distinguishing goods or services should be subject to the provisions of national law’’.

Article 10, paragraph 6 of the Directive 2015/2436 gives Member States the option to protect trade marks against other types of uses, which are not made for the purpose of distinguishing goods and services, where the use of that sign without due cause takes unfair advantage of, or is detrimental to, the distinctive character or the repute of the trade mark.

Without prejudice to the rights of proprietors acquired before the filing date or the priority date of the registered trade mark, paragraph 3 of Article 10 (d) adds the right of the trade mark owner to prohibit the use of a later sign as a trade or company name or part of a trade or company name, in line with the Decision of the Court of Justice of the European Union in case C-17/06, *Celine*[7].

The rationale of the rule results from paragraph (13) of the Regulation 2015/2424: because ‘‘confusion as to the commercial source from which the goods or services emanate may occur when a company uses the same or a similar sign as a trade name in a way such that a link is established between the company bearing the name and the goods or services coming from that company’’, ‘‘the concept of infringement of a trade mark should also comprise the use of the sign as a trade name or similar

[6] Paragraph 2.43 and 2.44, page 231 of the Study on the Overall Functioning of the European Trade Mark System, presented by Max Planck Institute for Intellectual Property and Competition Law, available at http://www.ip.mpg.de/fileadmin/ipmpg/content/forschung_aktuell/03_studie_und_synopsen/mpi_final_report.pdf and Roland Knaak, Annette Kur, Alexander von Mühlendahl, ‘‘The Study on the Functioning of the European Trade Mark System’’, Max Planck Institute for Intellectual Property and Competition Law Research Paper, No 12-13, available at: www.ssrn.com

[7] The unauthorised use by a third party of a company name, trade name or shop name which is identical to an earlier mark in connection with the marketing of goods which are identical to those in relation to which that mark was registered constitutes use which the proprietor of that mark is entitled to prevent in accordance with Article 5(1)(a) of First Council Directive 89/104/EEC of 21 December 1988 to approximate the laws of the Member States relating to trade marks, where the use is in relation to goods in such a way as to affect or to be liable to affect the functions of the mark.

designation, as long as such use is made for the purposes of distinguishing goods or services'' (paragraph 19 of the Directive's Preamble).

According to the Directive 2015/2436 and contrary to the previous legislation reflected in the *Celine* case, article 14 paragraph 1 (a) on limitation of the effects of a trade mark, third parties have the right to use only personal names: ''1. A trade mark shall not entitle the proprietor to prohibit a third party from using, in the course of trade: (a) the name or address of the third party, where that third party is a natural person''. Consequently, the trade mark owner may prevent the use of a subsequent trade name or company name, even if such use is in accordance with honest practices in industrial or commercial matters. Paragraph (27) of the Preamble clarifies that ''The exclusive rights conferred by a trade mark should not entitle the proprietor to prohibit the use of signs or indications by third parties which are used fairly and thus in accordance with honest practices in industrial and commercial matters [...] such use should only be considered to include the use of the personal name of the third party.''

Article 10 paragraph 3 (f) provides for the right of the trade mark owner to prevent the use of a subsequent sign in comparative advertising if that use is made in a manner contrary to Directive 2006/114/EC. The Directive implies a shift from the Decision of the Court of Justice of the European Union in case C-533/06 *O2*[8].

A new right of the trade mark owner is stipulated in Article 10 paragraph 4 of the Directive, namely the right "to prevent all third parties from bringing goods, in the course of trade, into the Member State where the trade mark is registered, without being released for free circulation there, where such goods, including the packaging thereof, come from third countries and bear without authorisation a trade mark which is identical with the trade mark registered in respect of such goods, or which cannot be distinguished in its essential aspects from that trade mark".

This right should lapse if, during the subsequent proceedings initiated before the judicial or other authority competent to take a substantive decision on whether the registered trade mark has been infringed evidence is provided by the declarant or the holder of the goods that the proprietor of the registered trade mark is not entitled to prohibit the placing of the goods on the market in the country of final destination.

According to paragraph (22) of the Preamble, this right may be exercised "to prevent the entry of infringing goods and their placement in all customs situations, including, in particular transit, transhipment, warehousing, free zones, temporary storage, inward processing or temporary admission, also when such goods are not intended to be placed on the market of the Member State concerned."

An analytical approach reveals six cumulative requirements for the exercise of this right: 1. the goods are in the course of trade; 2. the goods are brought into a Member State where an identical/similar trade mark is registered for such goods; 3. the goods are not being released for free circulation in that Member State; 4. the goods, including the packaging thereof, come from third countries; 5. the goods, including the packaging thereof, bear without authorisation a trade mark which is identical with or similar to the trade mark registered in the Member State in respect of such goods; 6. the proprietor of the registered trade mark is entitled to prohibit the placing of the goods on the market in the country of final destination.

In case during the judicial proceedings it is found that the registered trade mark has been infringed or that ''the goods in question are found not to infringe an intellectual property right'' [in the wording of paragraph (24) of the Preamble], according to article 28 of Regulation (EU) No 608/2013, the trade mark proprietor is to be liable for damages towards the holder of the goods.

The legislative solution reverses the controversial decision in Philips and Nokia (C-446/09 and C-495/09), pronounced in the application of former Regulations (EC) No 3295/94 and No 1383/2003[9], according to which goods could only infringe trade mark rights if they were released into free circulation in the European Union, were intended for the European Union market or were the subject of a commercial act directed to European Union consumers.

In line with the "Declaration on the TRIPS Agreement and public health"[10] and in order to insure the smooth transit of generic medicines, paragraph (25) of the preamble stipulates that the proprietor of a trade mark should have the right to prevent a third party from bringing goods into a Member State where the trade mark is registered without being released for free circulation there

[8] Where is was judged that ''Article 5(1)(b) of (the former – n.ns.) Directive 89/104 is to be interpreted as meaning that the proprietor of a registered trade mark is not entitled to prevent the use by a third party, in a comparative advertisement, of a sign similar to that mark in relation to goods or services identical with, or similar to, those for which that mark was registered where such use does not give rise to a likelihood of confusion on the part of the public, and that is so irrespective of whether or not the comparative advertisement satisfies all the conditions laid down in Article 3a of (the former – n.ns.) Directive 84/450, as amended by Directive 97/55, under which comparative advertising is permitted''.

[9] Concerning customs action against goods suspected of infringing certain intellectual property rights and the measures to be taken against goods found to have infringed such rights.

[10] Adopted by the Doha WTO Ministerial Conference on 14 November 2001, available at www.wto.org/english/thewto_e/minist_e/min01_e/mindecl_trips_e.htm

based upon similarities between his registered trade mark and an international non-proprietary names (INN)[11] as globally recognised generic names for active substances in pharmaceutical preparations for the active ingredient in medicines.

Article 11 of the Directive No 2015/2436 stipulates a new right of the trade mark proprietor to prohibit preparatory acts, carried out in the course of trade, where the risk exists that the packaging, labels, tags, security or authenticity features or devices, or any other means to which the trade mark is affixed, could be used in relation to goods or services and that use would constitute an infringement of the rights of the proprietor of a trade mark under Article 10(2) and (3).

Such acts may consist of: (a) affixing a sign identical with, or similar to, the trade mark on packaging, labels, tags, security or authenticity features or devices, or any other means to which the mark may be affixed; (b) offering or placing on the market, or stocking for those purposes, or importing or exporting, packaging, labels, tags, security or authenticity features or devices, or any other means to which the mark is affixed.

An analytical approach reveals the cumulative requirements for the exercise of this right: 1. a third party commits, in the course of trade, preparatory acts in relation with a sign identical with, or similar to, a trade mark; 2. the preparatory acts relate to any means to which the trade mark is affixed on goods or services, such as: the packaging, labels, tags, security, authenticity features or devices; 3. the use of the means to which the identical/similar trade mark is affixed on the good/services would constitute an infringement of the rights of the proprietor of a trade mark under Article 10 (2) and (3).

This provision protects the trade mark proprietor against the use of a sign for the purpose of distinguishing goods or services and, if provided by the national law, against other uses of the sign, where it would without due cause take unfair advantage of, or would be detrimental to the distinctive character or the repute of the trade mark.

The right to prohibit preparatory acts in relation to the use of packaging or other means may not be exercised in cases where such use would constitute an infringement of the rights of the proprietor of a trade mark under Article 10 paragraph 4, that is in transit situations.

Article 12 of the Directive No 2015/2436 gives the trade mark proprietor the right to request the publisher of a dictionary, encyclopaedia or similar reference work, in print or electronic form in which the trade mark is reproduced, to ensure that the reproduction of the trade mark is accompanied by an indication that it is a registered trade mark. This was under the previous legal regime a regular measure taken by the proprietor in order to avoid that a registered trade mark becomes a generic term of the usual language, which further attracts the revocation of the trade mark [Article 20 (a) of the Directive].

New rights of trade mark proprietor are stipulated in Article 13 of the Directive No 2015/2436, applicable in cases where, without the proprietor's consent, his agent or representative registers a trade mark in his own name, without a justification. The trade mark proprietor ‘‘shall be entitled to do either or both of the following: (a) oppose the use of the trade mark by his agent or representative; (b) demand the assignment of the trade mark in his favour.

The transposition of these legal provisions implies changes of the Romanian legislation.

In such cases, the trade mark proprietor may also exercise the right to oppose the registration of the trade mark, or to file an action for invalidation of the trade mark registration, as stipulated by Article 5 paragraph 3 (b) of the Directive and by the actual Romanian legislation.

Limitations of the effects of a trade mark stipulated in Article 14 paragraph 3 are novel: ‘‘A trade mark shall not entitle the proprietor to prohibit a third party from using, in the course of trade, an earlier right which only applies in a particular locality, if that right is recognised by the law of the Member State in question and the use of that right is within the limits of the territory in which it is recognised’’.

Such an earlier right may be also an earlier trade name or company name, or to an emblem or to any sign used in the course of trade in a particular locality.

The Romanian legislation does not have any provision related to rights used in the course of trade on a limited territory and, in particular related to the issue if such earlier rights give the owners the right to oppose to the registration of a subsequent trade mark, valid across the entire Romanian territory or to the use of such a subsequent national trade mark on that particular territory.

Innovative are also the provisions contained in paragraph (27) of the Preamble, relating to other uses of a trade mark by third parties that the trade mark proprietor may nor prohibit and the application of the Directive in a way that ensures the full respect for fundamental rights and freedoms. Reference is made to the use of the trade mark by third parties for the purpose of artistic expression and in the ambit of the

[11] For more information, see http://www.who.int/medicines/services/inn/en/, according to which ‘‘International Nonproprietary Names (INN) facilitate the identification of pharmaceutical substances or active pharmaceutical ingredients. Each INN is a unique name that is globally recognized and is public property. A nonproprietary name is also known as a generic name’’. ‘‘Trade-marks should neither be derived from INNs nor contain common stems used in INNs.’’

freedom of expression. The ‘‘fair use’’ defence[12], provided for in the copyright legislation may constitute a defence in infringement proceedings under trade mark legislation only in cases where the use made is one ‘‘in accordance with honest practices in industrial and commercial matters’’.

The European Union legislation states the fundamental rights and freedoms such as the freedom of expression and information, freedom of the arts and sciences, the right to education etc. in the The Charter of Fundamental Rights of the European Union[13], amended and proclaimed a second time in December 2007, which has a binding legal effect equal to the Treaties. Article 17 of the Charter of Fundamental Rights provides for the right to property[14], in the ambit of which ‘‘Intellectual property shall be protected’’.

In our opinion, the transposition process has to be made in such a way that the Romanian legislation clearly states that the interpretation and application of the trade mark law, especially in cases of alleged trade mark infringements, should ensure the full respect of other equally fundamental rights and freedoms.

Trade marks are registered and rights are granted in so far as they are actually used on the market in the course of trade, in relation to goods and services for which they are registered and so fulfil their function of distinguishing goods or services of an undertaking from those of another undertaking.

If the requirement of use is not fulfilled within five years of the date of the completion of the registration procedure, trade marks are liable to be revoked, unless there are proper reasons for non-use.

What needs to be further clarified by the Romanian law, in accordance with the provisions of Article 16 of the Directive is the legal term ‘‘date of the completion of the registration procedure’’. Such provisions already exist in the Romania legislation, which provides for an opposition pocedure prior registration, so that the date of the completion of the registration procedure is the day the term for lodging an opposition lapsed or the opposition was rejected [Article 21 of the Implementing Rules].

Lack of genuine use of a registered trade mark on the Romanian territory may be invoked as a defence in opposition and invalidity proceedings [Article 47 paragraph (4) of Law No 84/1998].

As a novelty, Article 17 of the Directive No 2015/2436 stipulates that lack of genuine use of the registered trade mark within a period of five years following the date of the completion of the registration procedure may constitute a defence in infringement proceedings. The Romanian legislation needs to be modified accordingly.

Regarding the right of the proprietor of an earlier registered trade mark to file an action for infringement in order to prohibit the use of a later registered trade mark, Article 18 of the Directive states that the action for infringement shall be rejected and the use of the later registered trade mark may not be prevented where that later trade mark would not be declared invalid because: (i) the earlier trade mark lacks distinctive character or reputation; (ii) there is acquiescence; or (iii) the proprietor of the earlier trade mark did not furnish proof of its genuine use.

In all other cases not expressly mentioned in Article 18, the action for infringement may be brought by the proprietor of an earlier registered trade mark against the proprietor of a subsequent registered trade mark, without the need for that latter mark to have been declared invalid beforehand.

This new rule adopted by the Directive is consistent with the Decision of the European Court of Justice in the case Fédération Cynologique Internationale C-561/11, given in the interpretation of Article 9 (1) of Council Regulation (EC) No 207/2009.

The transposition of Article 18 of the Directive in accordance with the jurisprudence of the Court of Justice in the Romanian legislation will ensure a common approach under the national and EU system, to what was a controvesial issue, namely if under the Romanian legislation, the action for infringement may also be brought against a later registered trade mark or if the later registered trade mark needs to be first invalidated[15].

Section 5 of the Directive is entitled ‘‘Trade marks as objects of property’’. As explained in paragraph (34), the rules of this Section are adopted ‘‘for reasons of coherence and in order to facilitate the commercial exploitation of trade marks in the

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[12] See Martin Senftleben, ‘‘Overprotection and Protection Overlaps in Intellectual Property Law - the Need for Horizontal Fair Use Defences’’, The Structure of Intellectual Property Law: Can One Size Fit All?, A. Kur/V. Mizaras, eds., Cheltenham: Edward Elgar Publishing 2011, available at www.ssrn.com

[13] Published in the Official Journal of the European Union of 26.10.2012.

[14] Article 17 ‘‘Right to property

1.Everyone has the right to own, use, dispose of and bequeath his or her lawfully acquired possessions. No one may be deprived of his or her possessions, except in the public interest and in the cases and under the conditions provided for by law, subject to fair compensation being paid in good time for their loss. The use of property may be regulated by law in so far as is necessary for the general interest.

2.Intellectual property shall be protected.’’

[15] Romanian readers may read the written arguments on the site www.juridice.ro: Andreea Micu, Dragoș Bogdan, ‘‘Contrafacerea unei mărci printr-o marcă înregistrată ulterior. Soluție CJUE contrară jurisprudenței din România’’ and Octavia Spineanu-Matei, Andreia Constanda, ‘‘Despre inadmisibilitatea acțiunii în contrafacere împotriva unei mărci înregistrate. Este necesară reconsiderarea practicii judiciare?’’. Article 18 of the Directive No 2015/2436 clarifies that an action for infringement may be brought, under the stated circumstances, also against a later registered trade mark.

Union, the rules applicable to trade marks as objects of property should be aligned to the extent appropriate with those already in place for EU trade marks''.

In our opinion, the use of the term ''property'' in the Directive also provide legal certainty and full consistency with specific Union legislation, in particular with the provisions of Article 17 of the Charter of Fundamental Rights of the European Union, which protects intellectual property rights in the ambit of the right to property.

As objects of property, trade marks and applications for trade marks, may be transferred, licensed, levied in execution. The Romanian legislation already stipulates these rights.

A novelty for the existing Romanian law is that a trade mark may ''be given as security or be the subject of rights *in rem*'', as stated in Article 23 of the Directive. Because in the Romanian legislative system the rights in rem are only those expressly designated as such by the law, a trade mark subject to rights in rem has to be subject to one of the rights specified in Article 551 of the Civil Code. Intellectual property rights are not mentioned by Article 551 of the Civil Code, however, paragraph 11 leaves the possibility of adding other rights to the list. The right to property is, of course, specified in Article 551 of the Civil Code, but the issue of qualifying intellectual property rights as property rights, that give the right holder ''the right to own, use, dispose of and bequeath his or her lawfully acquired possessions'', is controversial in the Romanian doctrine[16], despite of the jurisprudence of the Romanian Constitutional Court stating that Article 44 of the Romanian Constitution regarding the private property right applies to intellectual property rights and of the jurisprudence of the European Court of Human Rights, according to which Article 1 of the First Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms, regarding the protection of property, is applicable to intellectual property rights[17].

It remains to be seen how the Romanian legislator will decide to transpose the provisions of Article 23 of the Directive, according to which a trade mark ''may be the subject of rights in rem.''

The provisions of Article 39 paragraph 5 on the ''Designation and classification of goods and services'' are already interpreted by the Romanian Office for Inventions and Trade Marks in consistence with the Decision of the Court of Justice of the European Union in the IP Translator case C-307/10[18]. Before the ruling in the IP Translator case, a class heading was interpreted as covering all possible goods and services in that class. The new provisions require trade mark owners to ensure sufficient clarity and precision in relation to the goods and services for which protection is sought. General indications in class headings may be used, provided they comply with the requisite standards of clarity and precision, and will include all goods or services clearly covered by the literal meaning of the indication or term.

Innovative for the current Romanian Law are the provisions of Article 45 of the Directive, providing a mandatory efficient and expeditious administrative procedure before their offices for revocation or declaration of invalidity of a trade mark. The transposition of this article which is due by 14 January 2023 entails changes of competences of the Romanian State Office for Inventions and Trade Marks.

Novel for the Romanian legislation are the provisions of Article 45 paragraph 6 of the Directive, which state that ''an application for a declaration of invalidity may be filed on the basis of one or more earlier rights, provided they all belong to the same proprietor'' and the provisions of Article 47 paragraph 1, according to which: ''An earlier date, on which one of the grounds for revocation occurred, may be fixed in the decision on the application for revocation, at the request of one of the parties''.

The Regulation 2015/2424 is part of the adopted legislative package. The Regulation entered into force on the 23rd of March 2016.

The terminology of Regulation (EC) No 207/2009 is updated, as a consequence of the entry into force of the Lisbon Treaty. The Community trade mark is called the European Union trade mark and the Office for Harmonization in the Internal Market (OHIM) is called the European Union Intellectual Property Office (EUIPO).

Some of the changes that impact on the national legislation are indicated next.

According to provisions of Article 25 of the Regulation, there is no longer possible to file for an European Union trade mark through national offices. The application must be made directly to the European Union Intellectual Property Office. As explained in paragraph (24) of the Preamble, the measure was adopted ''in view of the gradual decline and insignificant number of EU trade mark applications filed at the central industrial property offices of the Member States and the Benelux Office for Intellectual Property''.

[16] See the various possible interpretations in Sonia Florea, ''Proceduri civile în materia drepturilor de proprietate intelectuală'', Universul Juridic, Bucharest, 2013, pages 112 – 132.

[17] See the Decision of the Grand Chamber of the European Court of Human Rights in Anheuser-Busch v. Portugal case (No 73049/2001);

[18] See also the ''Common Communication on the Interpretation of the 'IP Translator'' and the ''Common Communication on the Common Practice on the General Indications of the Nice Class Headings'', made in the ambit of the European Trademark and Design Network, available at https://www.tmdn.org/network/converging-practices.

As regards the classification of goods and services, Article 28 of the European Union trade mark Regulation mirrors the Directive in stating that the goods and services for which trade mark protection is sought should be identified by the applicant with sufficient clarity and precision to enable the competent authorities and economic operators, on the basis of the application alone, to determine the extent of the protection applied for. The use of general terms, including the general indications of the class headings of the Nice Classification, shall be interpreted as including all the goods or services clearly covered by the literal meaning of the indication or term.

In order to ensure that the content of the Register meets the requisite standard of clarity and precision in accordance with the case-law of the Court of Justice of the European Union, paragraph 8 of Article 28 gives the proprietors of European Union trade marks, applied for before 22 June 2012 which are registered in respect of the entire heading of a Nice class, the possibility to declare that their intention on the date of filing had been to seek protection in respect of goods or services beyond those covered by the literal meaning of the heading of that class, provided that the goods or services so designated are included in the alphabetical list for that class in the edition of the Nice Classification in force at the date of filing. Such a declaration should be filed between 23 March 2016 and 24 September 2016 inclusive. The trade marks for which no declaration is filed within that period shall be deemed to extend only to those goods or services clearly covered by the literal meaning of the indications.

Paragraph 9 provides protection to existing trade mark owners who might be prejudiced by the expansion of trade mark rights resulting from such declarations. Where the register is amended, the European Union trade marks cannot be used to prevent third parties from continuing to use a trade mark where that use commenced before the register was amended and the use did not infringe on the literal meaning of the goods and services at that time. Any amendment to the classification does not give the owner the right to oppose or apply for invalidity of a later trade mark where that later mark was in use or an application for registration had been made before the amendment and the use would not have infringed on the literal meaning of the goods and services on the register at the time.

An impact on the national legislation have the provisions of Article 123 c on the ‘‘Cooperation to promote convergence of practices and tools’’, which puts in place a mechanism of continuous cooperation between the European Union Intellectual Property Office and the national Intellectual Property Offices of the Member States in order to promote convergence of practices and tools in the field of trade marks and designs, in particular in the following areas of activity:

‘‘(a) the development of common examination standards;

(b) the creation of common or connected databases and portals for Union-wide consultation, search and classification purposes;

(c) the continuous provision and exchange of data and information, including for the purposes of feeding of the databases and portals referred to in point (b);

(d) the establishment of common standards and practices, with a view to ensuring interoperability between procedures and systems throughout the Union and enhancing their consistency, efficiency and effectiveness;

(e) the sharing of information on industrial property rights and procedures, including mutual support to helpdesks and information centres;

(f) the exchange of technical expertise and assistance in relation to the areas referred.’’

3. Conclusions

The transposition of the Directive in the Romanian legislation would not entail radical changes, but a fine tuning that allows the coherent functioning of the Internal Market, simplifies and clarifies the ground rules applicable in the field of trade mark rights in all European Member States.

The procedural rules relating to mandatory administrative procedure for revocation or declaration of invalidity of a national registered trade mark, in line with the the legal provisions of the European Union trade mark Regulation, to be implemented until 14 January 2013, ensure a better functioning of cross-border business activities and make easier the registration, administration and protection of trade marks in more than one European jurisdiction.

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COPYRIGHT – OVERVIEW; COPYRIGHT CONTENTS – PARTICULARITIES

Ovidia IONESCU[*]

Abstract

Art, under its various forms, including writings, drawings, inventions, represents the material externalization of the human intellect. The creator, i.e. the author, must benefit from all the rights resulting from his/her creation and protect it, so that the latter is recognized to belong to them, throughout time. The property right over the creation is different, depending on who has created it, its importance, if the creation has been produced in collaboration with others or by exclusivity, the type thereof. Once acknowledging and registering the property right over the creation, the author shall benefit also from all the other related rights, respectively the right to reproduce, distribute, import, lend, broadcast the creation on television, respectively any right aiding in bringing it to the knowledge of third parties in a controlled fashion and with the appropriate pay due for it.

Keywords: *copyright, moral rights, patrimonial rights, case law, rules.*

1. Introduction

The field covered by this study's theme refers to intellectual property, i.e. copyrights. The author is the creator, and it is still him/her the one who benefits from patrimonial and non-patrimonial rights in relation therewith. The importance of the study consists in the fact that it shows the value of the creation and the fact that this only helps us in our daily life and therefore it should be appropriately protected. Its protection is ensured by adopting and maintaining a relevant legislative framework, which, considering the evolution of society – evolution based on creation – it should keep the pace with it and be appropriately updated, in such a way that the negative elements are correspondingly eliminated or penalized, and the positive is propagated and encouraged appropriately. Without an optimum domestic and international legislative system, the creative spirit and implicitly the creation may stagnate, respectively the lack of protection would no longer aid the individual in publicizing its creation (results of his/her mind's work). The contemplated objectives are represented by an identification of the rights and a detailing thereof. In this sense, in order to respond to the undertaken objectives, details will be presented at length with regard to the patrimonial and non-patrimonial copyrights, based on the detailed presentation provided by Law no. 8/1996. By reference to the stage of knowledge in the field, I may state that both me and each and every one of us, are aware of the importance of creation and the need to protect it, since this helps us manifest the creative spirit, and our effort may be rewarded appropriately, since there is a supportive legislative system. Specialized literature largely discusses this theme, intellectual property rights being given an importance in line with the ideas in this chapter.

2.Content

The creative capacity of each of us may turn us into an author, this creative capacity representing a way of externalizing our personality and implicitly, our intellect. We can become creative in any field, even if it does or does not have a correspondent in the profession of each of us, some creations not being related in any way whatsoever with professional experience. As far as creation is concerned, its author may decide whether to bring it or not to the public's knowledge, and when, and if deciding to do so, then, automatically, it undertakes the moral and patrimonial liability in relation thereto.

Thus, Article 1, point 1 of Law no. 8/1996 on copyrights and other related rights, stipulates that: "*The copyright over a literary, artistic or scientific work, as well as over other intellectual creations, is acknowledged and guaranteed in the conditions of this law. This right is connected with the author's person and implies moral and patrimonial features"* [1]

Moral features refers to the fact that only the person who created the work or the one who has the legal right over it, may disclose it to the public and decide on whether he/she wishes to enjoy all patrimonial rights, i.e. material and/or moral benefits, as the case may be.

Thus, we can deduce that, when the creator, i.e. the author of some work, decides to publish his/her creation, then the decision must also be made on the related patrimonial rights: at that precise moment, patrimonial rights also arise automatically.

[*] PhD candidate, Faculty of Law, "Nicolae Titulescu" University of Bucharest (e-mail: **ovidiaionescu@yahoo.com**).

[1] Law no. 8/1996 on copyrights and other related rights, Article 1.

The publication of the work that arose automatically therefrom, is also, practically, a system aimed at ensuring the protection of the work's author and implicitly, of the work, i.e. it is a system ensuring him/her that his/her rights over the work shall always be recognized, the fact that the latter shall be made public as it was created and that it shall not be appropriated by any third parties or that others shall make use of that creation, without recognizing his/her rights, both moral and patrimonial.

In this sense, it was necessary to pass laws aimed at protecting intellectual property, both at national and international level, such that the work, its author, as well as all the rights and obligations arising out of and referring to this matter, be appropriately protected.

Recently, considering the evolution and needs of society, many of us rely on this creative spirit in order to obtain patrimonial advantages, respectively the need for material benefits, or their contemplation as main purpose thereof, automatically determines a development of the creation, especially in the IT system, which represents a creation that is "a little far-fetched" I might add. In the IT system, the "new" has monopolized everything and we have started to become ever more addicted to everything that is being created in this field, without paying any attention to the substance thereof, respectively to the human values and principles which underlie our society. Precisely for this reason, the legislative system is frequently amended, so as to be able to cope with so many changes – which must be controlled and allowed to develop, yet within the framework of legislative enactments.

Creation is one of the basic components of evolution, respectively an element of society and a factor of its development.

Moral (non-patrimonial) copyrights

Law no. 8/1996, in Article 10, identifies moral (respectively non-patrimonial) copyrights pertaining to the creation's author, i.e.:

"Art. 10. *– The author of a work has the following moral copyrights:*

a) *the right to decide whether, how and when the work shall be made public;*

b) *the right to claim the recognition of his/her capacity as the work's author;*

c) *the right to decide under what name the work will be made public;*

d) *the right to claim the observance of the work's integrity and to oppose any changes that might be attempted onto it, as well as to any infringement that might be committed in relation thereto, if prejudicing his/her honour or reputation;*

e) *the right to retract the work, indemnifying, if need be, the owners of the rights of use, who have been prejudiced further to the retraction. "*[2]

The right to decide whether, how and when the work shall be made public, respectively the right to disclose the creation.

The lawmaker showed the rights of the author of a work over his/her creation, ever since deciding to bring it to the attention of the public.

The first right is to decide whether the work shall be or not brought to the attention of the public, the time when the work shall be brought to the attention of the public, as well as the manner in which this shall be publicized.

Everyone's creative spirit and the originality of each individual's work, make us be different in society and give value to the creative individual, respectively our capacity to express our thoughts and their efficacy that help us stand out. At the same time, the person also has the right to decide when to publicize his/her work. Thus, professor Stanciu D. Carpenaru was saying that "*only the author who is aware of the moral responsibility and sometimes even legal responsibility that he/she undertakes, may discretionally appreciate if the work reached the level required when it can be brought to the attention of the public. Being one of the most personal rights, the right to bring the work to the attention of the public pertains to the author exclusively"*[3]

From my point of view, the moment when an author decides to publicize their work, takes place when the latter is published, whereas the work's dissemination represents a material fact whereby the work is actually made public, i.e. concrete. Thus, it would be difficult to prove the subjective opinion on the work's disclosure which states that the right to disclose the work is the right to decide on its publication and not its actual publication. I thus embrace the opinion according to which *"what is relevant is the time when the decision is externalized in one way or the other, the mere internal resolution not being likely to produce legal consequences."* [4]

The right over the capacity of author, respectively the paternity right

In doctrine, this right is called "the right to the paternity of the work" and shows the direct and implicit connection between the author and the result of his/her intellectual creation – namely the work. The right to the capacity of author is one of the basic components of intellectual rights, in general, and *consists in acknowledging the right of the actual*

[2] Law no. 8/1996 on copyrights and other related rights, Article 10.

[3] Stanciu D. Carpenaru, *Drept Civil. Drepturile de creatie intelectuala. Succesiunile (Civil Law. Intellectual Property Rights. Successions),* Editura Didactica si Pedagogica Bucuresti (Bucharest, Didactical and Pedagogical Publishing House), 1971, p. 43.

[4] Viorel Ros, Dragos Bogdan, Octavia Spineanu – Matei, *Dreptul de autor si drepturile conexe. Tratat*. (*The copyright and other related rights. Treatise*), All Beck Publishing House, 2005, p. 203.

author of a scientific, literary or artistic work. We can distinguish two characteristics here, *i.e.* a positive one which is given by the fact that the author has the right to claim, at any time, the capacity of author over the creation, and a negative one, which is given by the fact that he/she has the right to oppose to any act of challenge against his/her capacity as author brought by a third party. The right to the paternity of the work gives the author the right to decide under what name his/her creative work shall be made public. Once the copyright arises, this is imprescriptible. The transmission of the property right over the paternity of the work is done by succession, according to common law, and, if no heirs exist, such rights shall be transmitted to the collective management body who has administered the copyrights or to the body with the highest number of members in the respective creative field.

The right to decide under what name the work will be brought to the attention of the public, respectively the right to a name

According to doctrine, this right is deemed to be *"a component of the capacity of author"*[5]*"the positive aspect of the right to the paternity of the work involves also the right of the author to a name, i.e. the right to decide whether the work shall be brought to the knowledge of the public under his/her name, under a pseudonym or without specifying an author's name"*. Thus, this right is limited, it does not mean that the author has the right to decide any name he/she wishes, in fact he/she has the right to decide whether the work shall go public under his/her name or under a pseudonym. The author shall keep the right to waive, at any time, anonymity, and disclose his/her identity – right pertaining to him/her exclusively, his/her heirs not being able to waive the pseudonym, respectively the exercise of the right to a name is not transmissible via succession.

The right to having the integrity of the work observed (work inviolability)

A creative work must be respected in its integrity, as it has been published, third parties not having the right to intervene thereon. The Romanian law prohibits the acts and facts that may prejudice the honour and reputation of the author – clause which takes into account also the provisions of the Bern Convention, respectively Article 6 bis, point 1, which provides that *"Independently from patrimonial copyrights and even after assigning such rights, the author shall preserve the right to claim paternity over the work and oppose any deformation, mutilation or other modifications of the work or of any other infringements thereof, prejudicing his/her honour or reputation"*.

The right to the inviolability of the work entails the prohibition of any modifications thereof (regardless of whether they are additions, changes of content or of expression) applicable to the whole content of the work, namely, title, chapters, everything that makes up the work.

The right to retract

The right to retract is defined by specialized literature as *"counter-weight of the right to disclose the work and the direct consequence of the absolute and discretionary character thereof"*. Thus, the author has the right to withdraw his/her work previously published, irrespective of the reasons leading him/her to the taking of such decision and without needing to present any explanations in relation thereto. Also, if this retraction presupposes the indemnification of the legal users of the work, by contrast to the prejudices caused to them because of retracting the work, they shall be compensated by the author. Professor Stancu D. Carpenaru explained that *"the right to decide on bringing the work to the knowledge of the public implies the right of the author to revise the taken decision, despite having concluded an agreement (for example, for the editing of the work)"*, while Yolanda Eminescu deems that *"The right of retraction represents the counter-weight of the disclosure right and the direct consequence of the absolute and discretionary character thereof. It nevertheless constitutes a distinct right, the fate of which is not indissolubly connected to the disclosure right, which becomes evident in the case of posthumous works."* [6]The opinion has not been unitary across Romanian doctrine, which means that certain authors have interpreted this right as a limited one, i.e. this right might be invoked and might be applied only until the conclusion of the agreement, and after disclosing the work, this could no longer be done except on serious grounds, and others, such as Yolanda Eminescu, have claimed that this right pertains to the author, who may exercise it at any time.

Patrimonial copyrights

The copyright gives its titleholder several rights arising out of the exclusive right to exploit the work. Despite the fact that the law, in principle, allows the author to exploit the work by himself/herself, usually there is another person intervening to limit his/her benefits in economic terms.

According to Article 12 of Law no. 8/1996, patrimonial rights contained by copyrights are the following:

"The author of some work has the exclusive patrimonial right to decide on whether, how and

[5] Yolanda Eminescu, *The copyright*, p. 155, respectively.
[6] Yolanda Eminescu, *Dreptul de autor (The copyright)*, p. 149.

when his/her work will be used, inclusively to consent to the use of the work by other persons."[7]

Article 13 provides that:

"The use of a work gives rise to patrimonial rights that are separate and exclusive, of *the author to authorize or forbid:*

a) *the reproduction of the work;*

b) *the distribution of the work;*

c) *the import of the work with a view to selling copies thereof on the domestic market, with the author's consent;*

d) *the lease of the work;*

e) *the lending of the work;*

f) *public communication of the work, directly or indirectly, by any means, inclusively by putting the work at the disposal of the public, such that it can be accessed at any place and at any time chosen individually by the public;*

g) *radiobroadcasting of the work;*

h) *retransmission of the work via cable TV;*

i) *creation of derived works out of the main work."*[8]

Patrimonial copyrights are subjective rights deriving from the decision of the author to bring them or not to the attention of the public and to use them to his/her own interest or to the interest of his/her legal successors in rights. Further to the decision to publish the work, he/she will benefit also from the resulting patrimonial rights, i.e. he/she will obtain uses further to its publication. Bringing the work to public attention is distinct from the begetting of uses, respectively, an author, when publishing a work, does not obtain only uses, whereas the effect of publishing a work is represented by the obtaining of patrimonial rights.

The reproduction of the work.

"In the sense of this law, reproduction shall mean the full or partial realization of one or several copies of some work, directly or indirectly, temporarily or permanently, by any means and under any form, inclusively by performing any audio or audiovisual recording of the work, as well as the permanent or temporary storage thereof by electronic means."[9]

Thus, starting from this definition, the object of the reproduction is based on and regards the work achieved by the author. The latter, before making it public, has printed it out in a form that is "ready for printing" reflecting its creation, following that, in order to be brought to the attention of the public, it shall be multiplied. A reproduction is also considered when the work, after having been represented and executed, has an interpretation thereof set, multiplied and broadcast. In this case, the object of the reproduction may be represented both by the work, printed out in a format that is "ready for printing" and the interpretation which is a separate creation from the main work. Thus, every interpretation of the initial work is a protected work, inclusively against unauthorized reproduction. By reproduction we understand the manner of making the work public, by means of printing, photocopying, in cinemas, via the internet, etc.

The unauthorized reproduction is sanctioned by the law, providing appropriate sanctions depending on the seriousness of the deed, mentioning that the unauthorized reproduction to commercial purposes of the works actually is an act of piracy.

The distribution right.

"In the sense of this law, distribution refers to the sale or any other kind of transmission, onerous or free of charge, of the original or copies of a work, as well as their public dissemination.

The distribution right is exhausted after the first sale or transfer of the property right over the original or the copies of some work, on the domestic market, by the holder of the rights or with his/her consent." [10]

Distribution shall mean the transmission, under any form, onerously or free of charge, of the original or copies of the work, as well as their publicizing. Making them public is carried out by any method, respectively: sale, assignment, lease, loan, mentioning that the author shall enjoy all the rights regarding the protection of his/her work, and the benefits related to their publicizing, with special focus on the material side.

The right to import the work.

"In the sense of this law, import shall mean the introduction on the internal market, with a view to their sale, of the original and copies legally made of a work present on any kind of support."[11]

Thus, the use of a work automatically denotes the right of the author to authorize or prohibit its import with a view to selling, on the internal market, the copies of his/her work, realized abroad, with the author's consent.

The right to lease the work.

"In the sense of this law, lease shall refer to the provision for use, for a limited period of time, and for a direct or indirect economic or commercial advantage, of a certain work."[12]

[7] Law no. 8/1996 on copyrights and other related rights, Article 12.
[8] Law no. 8/1996 on copyrights and other related rights, Article 13.
[9] Law no. 8/1996 on copyrights and other related rights, Article 14.
[10] Law no. 8/1996 on copyrights and other related rights, Article 14^1.
[11] Law no. 8/1996 on copyrights and other related rights, Article 14^2.
[12] Law no. 8/1996 on copyrights and other related rights, Article 14^3.

Thus, the use of a certain work gives rise to the patrimonial right of the author to authorize or forbid the lease, i.e. placement at the disposal of third parties, for a limited period of time, for a fee, of a work or of protected copies thereof.

The right to lend the work

"(1) In the sense of this law, loan shall mean the provision for use, for a limited time and without a direct or indirect commercial or economic advantage, of a piece of work via an institution allowing the access of the public to this purpose.

(2) A library loan does not require the authorization of the author and entitles the latter to a fair remuneration. This right cannot be waived.

(3) The fair remuneration as provided for at para. (2) is not due when the loan has been done via libraries attached to higher education institutions and via public libraries with free access.

(4) Borrowing works that are recorded on audio or audiovisual support can only take place after 6 months as of the first distribution of the work.

(5) The loan right does not exhaust after the first sale or transfer of property right over the original or copies of a piece of work, on the market, carried out or consented to by the rights' owner."[13]

The use of a piece of work gives rise, for the author, to his/her patrimonial right to authorize or forbid the loan of the work. The legislative article details the possibilities available for the author in this sense, as well as the legal effects, leverages aiding in propagating knowledge of the creations, yet with the author's guarantee that his/her work is protected and his/her labour remunerated pro rata with the effort made.

Other means of communicating the work

The work may be brought to the knowledge of the public also by public communication, radiobroadcasting and retransmission via cable TV, currently the latter being the quickest and most common communication method, adopted especially by young people.

3. Conclusions

The directions approached in this article mainly concern discussions regarding the creation and its protection, respectively the work's author. The result consists in the fact that a detailed identification of copyrights helps us develop our creative spirit and we understand how we are protected by the legislative framework adopted in this field. Therefore, the creative individual is free to decide on whether it shall publish or not his/her work, when to do so, he/she having the right to decide on the limits of the publication, as well as on the benefits the creation will bring about for him/her. My suggestion for future research on the subject is to deal with a theme related with the impact of IT evolution on society, especially on individuals' personality and on human values.

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[13] Law no. 8/1996 on copyrights and other related rights, Article 14^4

THE INDIVIDUAL CHARACTER FOR DESIGN'S PROTECTION ACCORDING TO ROMANIAN LAW

Andreea LIVĂDARIU[*]

Abstract

The design means the appearance of the whole or a part of a product resulting from the features of, in particular, the lines, contours, colours, shape, texture and/or materials of the product itself and/or its ornamentation. A design shall be protected to the extent that it is new and has individual character.

How should be examined the individual character, who is the person to whom may be related the overall impression it produces a product, what are the features of the informed user? This are the topics of the paper below, according to Romanian designs law, European regulation and case laws.

Keywords: *designs, condition of protection, overall impression, experienced/informed user.*

1. Introduction

According to Law no. 129/1992 (art.2 letter d)) – hereinafter referred to as the Legal Protection of Designs and Models Law, a design or a model means the appearance of the whole or a part of a product, shown in two or three dimensions, resulting from the main features of, in particular, the lines, contours, colours, shape, texture and/or materials of the product irself and/or its ornamentation. Considering the definition and the whole regulation of designs, we may ask ourselves why are so important the designs? How could influence our lives the registration the appearance of a product? Why would an entrepreneur chose to registrate the appearance of a product made by itself or by a person who concedes the copyright? Are such important the designs for everyday life, for our evolution?

The answer may be find in the decision of European Union to bring into force the Directive no. 98/71/EC on the legal protection of designs. The named directive had the purpose of cancelling the differences in the legal protection of designs offered by the legislation of the Member States, which were regarded as directly affecting the establishment and functioning of the internal market as regards goods embodying designs. According to Preamble, an uniform legislation was necessary to cancel the differences which could distort competition within the internal market.

Does Romania give the same importance to designs (and models)? From the point of view of the regulation, the answer may be „yes". But not from the point of view of the awareness, too. The OSIM statistics[1] available for the period between 2003-2014 highlight that in 2003 were registrated in Romania 1.496 applications for 6616 designs/models (791 by non-residents and 705 by residents), whereas în 2014 were registrated only 381 applications for 1171 designs/models (35 by non-residents and 346 by residents).

The alarmingly decline of the number of registrations should be an important and worrying sign which should have as result a strategy aimed to rise the awareness of the importance and the advantages of intellectual property in our lives.

2. The conditions of protection the designs and models according to Legal Protection of Designs and Models Law. The individual character.

The protection of a design or a model is given only if the object of application (registration) answers to the following requirements provided by law: **i)** the object of the registration, as appearance of the whole or a part of a product, is shown in two or three dimensions and results from the main features of, in particular, the lines, contours, colours, shape, texture and/or materials of the product irself and/or its ornamentations new; **ii)** the object of the registration is new; **iii)** the object of the registration has an individual character; **iv)** the object of the registration should not be exclusively determined by a technical function; v) the object of the registration must not be contrary to public order and good manners.

Our intention is to examine the condition consisting in the individual character, according to art.6 para (4) and (5) of Legal Protection of Designs and Models Law, to art.24 para.(4) of the Regulation no.211/27.02.2008 for implementing the Legal Protection of Designs and Models Law, to European Court of Justice and Romanian courts case laws.

But first of all, we want to make an observation regarding the condition of not be contrary to public order and good manners. The national and European

[*] PhD Candidate, Faculty of Law, "Nicolae Titulescu" University of Bucharest (e-mail: **andreea.livadariu@rvsa.ro**).

[1] http://www.osim.ro/despre_noi/capitolul_statistici.php#

rulement didn't define the notions, but the European Court did when analysing trademarks contrary to public order and good manners. The **good manners** have been defined by the Court as being subjective values, which must be applied as objectively as possible by the examiner. Examples of contrary to the good manner designs or models would be the blasphemous, racist or discriminatory ones, but only if the meaning is clearly conveyed by the design or model in an unambiguous manner and the standard to be applied is that of an informed user with average sensitivity and tolerance thresholds.[2]

Coming back to the condition regarding the individual character of a design or a model, considering the interpretation of art.6 para (4) and (5) of Legal Protection of Designs and Models Law, to art.24 para.(4) of the Regulation no.211/27.02.2008 for implementing the Legal Protection of Designs and Models Law, we may see the following:

- the individual character exists only if the overall impression it produces on the experienced/informed user viewing the design/model clearely differes from the overall impression produced on such a user by any design/model which has been made available to the public before the date of filing of the application for registration or, if priority is claimed, the date of priority;

- when analysing the individual character, it must be taken into consideration the degree of freedom of the designer in developing the design/model;

- the analysis of the individual character is made by comparing the overall impresion produced by the lines, contours, colours, shape, texture and/or materials of the product irself and/or its ornamentation which define the aesthetic appearance.

In fact, what the law protects is not the product itself, but the the appearance , the aesthetic feature made in two or three dimension. That is because the protection offered by law is a visual one, a protection of the exterior ornamentation which is attached to the product[3].

3. The examination, in practice, of individual character. European Court of Justice Case-laws regarding the individual character. The Case T-68/11 Kastenholz – Qwatchme - OHIM

As we have seen, the examination of individual character is made by detecting the overall impression produced on the experienced/informed user, and not by analysing each feature which creates the appearance of the product. But in practice, a different overall impression on the informed user can be based only on the existence of objective differences between the designs at issue, differences which must therefore be sufficient to satisfy the requirement of novelty.

We must also, consider the directions given by the European Regulation on Community Design, according to which *the assessment as to whether a design has individual character should be based on whether the overall impression produced on an informed user viewing the design* ***clearly differs from that produced on him by the existing design corpus****, taking into consideration the nature of the product to which the design is applied or in which it is incorporated, and in particular the industrial sector to which it belongs and the degree of freedom of the designer in developing the design*[4].

We may say that in practice, at this point, the individual character and the novelty are interacting. In fact, the European Court of Justice decided that the evaluation of the individual character of an European design or model shall be made in four steps (Case T-666/11, Budziewska/OHMI - Puma – Félin bondissant; Case T-9/07, Grupo Promer Mon Graphic v OHMI - PepsiCo – Représentation d'un support promotionnel circulaire):

Firstly, it is determined the field of the product (their nature) in which it is incorporated the design or the model;

Secondly, it is defined the informed user of the products determined in the first step, according to the nature, the field and the purpose of the product. Then it is determined, on the one hand, the level of knowledge in the field from which ihe products belong and, on the other hand, the level of attention when directly comparing the designs and models.

Thirdly, it is determined the degree of freedom of the designer in developing the design/model;

Forthly, it is determined the result of comparing the design/models, taking account the field in which are commercialized the products, the degree of the freedom of the designer in developing the design/model and the overall impression produced by the designs/models.

In the Case T-68/11 Kastenholz, having to decide „the conflict" between a dial that changes continuously with the movement of the hands and in which each hand was fixed to a coloured, semi-transparent disc that generated different colours each time the hands were superposed and another one, claimed to not answer the novelty and individual character conditions, European Court of Justice decided as follows:

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[2] Case T-417/10 form 09.03.2012 – "Que buenu ye! Hijoputa", para 21 in *Guidelines for Examination in the Office for Harmonization in the Internal Market (Trademarks and Designs) on Community Trademarks*, version dated 01.08.2015, page 7.

[3] Denis COHEN, Le droit des dessins et modèles, Editura Economica, Paris, 2009, p.2.

[4] Council Regulation (EC) No. 6/2002 of 12 December 2001 on Community designs.

„Contrary to what the applicant claims, the Board of Appeal did not take account of the difference in colour between the designs at issue for the purpose of assessing the individual character of the contested design. As stated in paragraph 49 above, the Board of Appeal based its assessment on the fact that, ***in the case of the earlier designs, the graded sequence of the discs that compose [those designs] was able to produce a wide spectrum of colours, the combination and intensity of which changed with the time****, whereas* ***in the case of the contested design, only two uniform colours were displayed in the 12 o'clock and 6 o'clock positions or four colours in the positions for other hours with no variation in intensity.*** *The Board of Appeal's reasoning is thus based on the ability of the designs at issue to produce a more or less wide spectrum of colours, and a permanent change in tones, and not on the difference in colour between them.*

Even if, as the applicant claims, the differences between the designs at issue could be regarded as slight, ***they will easily be perceived by the informed user****. Further, when assessing whether a design has individual character,* ***account should be taken of the nature of the product to which the design is applied or in which it is incorporated, and, in particular, the industrial sector to which it belongs*** *(Communications Equipment, paragraph 43). In the present case, concerning watch dials, parts of watch dials and hands of dials,* ***the view must be taken that they are intended to be worn visibly on the wrist and that the informed user will pay particular attention to their appearance.*** *Indeed, he will examine them closely and will therefore be able to see, as was stated in paragraph 56 above, that* ***the earlier designs produce a larger combination of colours than the contested design and, unlike the latter, a variation in the intensity of the colours.*** *Given the importance of the appearance of those products to the informed user, the differences, even if assumed to be slight, will not be regarded by him as being insignificant."*[5]

The Court decided, hence, that the differences mentioned above *„had a significant impact on the overall impression produced by the designs at issue, so that they produce a different overall impression from the point of view of an informed user."*[6]

The European Court of Justice also defined the most important concepts used when observing the individual character of a design or model, which are the „informed user" and „freedom of the designer in developing the design/model".

We won't find in Law no. 129/1992 a definition for the **informed user**, but we will find one by examining the judgements of European Court of Justice according to which an informed user is a combination between the "average consumer" related to trademarks (meaning the consumer who is deemed to be reasonably well informed and reasonably circumspect and observant, but who rarely has the chance to make direct comparison between marks and must instead rely upon the imperfect picture of them) and that of an expert, a specialist who has thorough technical knowledge. So, the informed user may be understood as being an user who has not an average attention, but a specific awareness due to either his personal experience or knowledge in the field.[7]

So, the informed user, as defined above, will make a direct comparison of the designs or models whith a special attention, even though he does not have specific technical background.

At the same time, the informed user with the meaning of article no. 6 (2) from Legal Protection of Designs and Models Law and with the meaning of article 6 of Regulation No 6/2002, *„**does not refer to either a manufacturer or a seller of the product in which the design concerned is intended to be incorporated** or to which it is intended to be applied. The informed user is a person **who is particularly observant and has some awareness of the state of the prior art**, that is to say, the previous designs relating to the product in question that had been disclosed on the date of filing of the design concerned*"[8].

The **freedom of the designer in developing the design/model** is defined by referring to the technical function of the product or to the technical function of a part of the product or to the instructions of the product. Reffering to the freedom of the designer, The European Court of Justice said that, in fact, the limits of the freedom prone to standardize some characteristics which become common to the designs and the models belonging to a field.[9]

In the same Case T-68/11 Kastenholz, the European Court said that *„the degree of freedom of the designer was limited only by the need to track and display the changing hours."*

Therefore, European Court decided in the Case Antrax It Srl against OHIM and The Heating Company **relative to designs for thermosiphons which were intended to be applied to 'radiators for heating'** (Class 23.03 of the LocarNo Agreement Establishing an International Classification for Industrial Designs of 8 October

[5] Case T-68/11 from 6.06.2013 Kastenholz – Qwatchme - OHIM, points 61-62.
[6] Case T-68/11 from 6.06.2013 Kastenholz – Qwatchme - OHIM, point 63.
[7] Case T-9/07 from 20.10.2011, Grupo Promer Mon Graphic v OHMI - PepsiCo – Représentation d'un support promotionnel circulaire, point 53.
[8] Cases T-83/11 and T-84/11 from 13.11.2012, Antrax It Srl – OHIM - The Heating Company (THC), point no. 36.
[9] Case T-11/08 from 9.09.2011, Kwang Yang Motor v OHMI - Honda Giken Kogyo – Moteur à combustion interne avec ventilateur sur le dessus, point 32.

1968) that *„the greater the designer's freedom in developing a design, the less likely it is that minor differences between the designs being compared will be sufficient to produce a different overall impression on an informed user. Conversely, the more the designer's freedom in developing a design is restricted, the more likely it is that minor differences between the designs being compared will be sufficient to produce a different overall impression on an informed user. Therefore, if the designer enjoys a high degree of freedom in developing a design, that reinforces the conclusion that the designs being compared which do not have significant differences produce the same overall impression on an informed user".*[10]

4. Conclusions

We all agree that, as it is said in the Preamble of Council Regulation (EC) no. 6/2002 on Community designs, the protection of a design or a model should not be extended "*to those component parts which are not visible during normal use of a product, nor to those features of such part which are not visible when the part is mounted, or which would not, in themselves, fulfil the requirements as to novelty and individual character. Therefore, those features of design which are excluded from protection for these reasons should not be taken into consideration for the purpose of assessing whether other features of the design fulfil the requirements for protection".*

That is why the protection of a design or a model is given only if the appearance of the whole or a part of a product, is shown in two or three dimensions and results from the main features of, in particular, the lines, contours, colours, shape, texture and/or materials of the product itself and/or its ornamentations; if it is new, has an individual character, is not exclusively determined by a technical function and is not contrary to public order and good manners.

And when the conditions for protection are satisfied, there is no reason not to protect the design or the model, because an enhanced protection for this field of intellectual property not only promotes the contribution of individual designers to the intellectual patrimony, but also encourages innovation, excellence, development of new products, investment in production and, finally, in the economy.

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- www.osim.ro

[10] Cases T-83/11 and T-84/11 from 13.11.2012, Antrax It Srl – OHIM - The Heating Company (THC), point no. 45.

LEGAL IMPLICATIONS OF OPEN LICENSES

Monica Adriana LUPAȘCU[*]

Abstract

This paper studies the Creative Commons and GPL open licenses from the perspective of some of their legal implications. The social interest that has lead to the creation of these types of licenses is being studied, as well as their relationship with the public domain. The scope of the paper is to find out to what extent appertaining to the Creative Commons or GPL licensing system can assure the protection necessary for the social interest of accessibility.

Keywords: *Creative Commons, General Public License, copyright, open licenses, public interest, public domain.*

1. Introduction

The field covered by this study is intellectual property, respectively, the field of copyright. The study is focused on the analysis of accessibility as an extremely important form of social interest in the current society, which justifies the reconfirmation of the right of access to works belonging to rights holders. From this perspective, the model of the open licenses whose analysis allows the identification of the forms of protection meant to support the public interest corresponding to accessibility is relevant. Also mentioned, are some of the legal implications of belonging to open licenses, including from the perspective of the common points that these contracts with the public domain present. The relationship with the public domain is important because, in the case of this sphere of works, the existence of the right of access is the most obvious, but the arguments retained in this paper are valid in regards to any other context in which the right of access may be found, therefore including in the case of copyright limitations and exceptions conferred by the current legislation.

The public interest that justified the appearance of open licenses

James Boyle[1], one of the members if the Creative Commons council, identifies what could be a short history of CC licenses and of what justified the development of this open licensing system.

"*Once copyrighted, the work is protected by the full might of the legal system. And the legal system's default setting is that all rights are reserved to the author, which means effectively that anyone but the author is forbidden to copy, adapt or publicly perform the work. This might have been a fine rule for a world in which there were high barriers to publication. The material that was not published was theoretically under an all rights reserved, but who cared? It was practically inaccessible anyway. After the development of the World Wide Web, all that had changed. Suddenly people and institutions, millions of them, were putting content online – blogs, photo series, videologs, podcasts, course materials. But what could you do with it? You could read it or look at it, but could you copy it? Put it on your own site? Of course, if you really wanted the work, you could try to contact the author. And one by one, we could all contact each other and ask for particular types of permissions for use. All of this would be fine if the author wished to retain all the rights that copyright gives and grant them only individually. But, what about the authors, the millions upon millions of writers, and photographers and musicians, and bloggers and scholars, who very much want to share their work? Creative Commons was conceived as a private "hack" to produce more fine-tuned copyright structure, to replace "all rights reserved" with "some rights" reserved for those who wished to do so.*"

In James Boyle's vision, CC licenses tried to support an obvious necessity in a society with a great online exposure. Practically, there was a need for freedom, sharing and copying in order for the entire content to be capitalized. Without access to the huge informational mass, the interconnectivity required by the network could not even be ensured. And this new public interest could not be satisfied under the old system of copyright law enforcement. Indeed, the law is not just a set of rules but has to be a reflection of society's need in a certain stage of its evolution; in other words, the law and its interpretation has to completely follow the public interest affirmed by society at a given moment. The right of access, copying, sharing were to be reconfirmed and especially guaranteed by the public interest itself, as revealed by the new social reality.

[*] Intellectual Property Phd Student, Faculty of Law, "Nicolae Titulescu" University of Bucharest (e-mail: **monica.lupascu@cyberlaw.ro**).

[1] James Boyle, "The Public Domain – Enclosing the Commons of the Mind", 2008, p.182.

"Technological development has multiplied and diversified the vectors for creation, production and exploitation. While no new concepts for the protection of intellectual property are needed, the current law on copyright and related rights ***should be adapted and supplemented to respond adequately to economic realities […] in order to respond to the technological challenges.*** (EUCD[2] European Union Copyright Directive)."

The concepts are not really new. The (law) institutions can remain unchanged so long as the applicability of the copyright law is performed by balanced coordinates that value accessibility as a social interest of paramount importance.

To not recognise the existence of the public's rights, practically of the right of access (in certain limits and conditions) in this domain is equivalent to denying the process preceding any regulation and the fact that any provision, regardless of field, has as primary purpose social order, which is achieved by trying to create balance between the holders of conflicting interests (tension relationship). In the field of copyright, the norm is the expression of an attempt to maintain in order the interests of the rights holders/authors, on one hand, with the general public's interest of accessing culture, on the other.

The tension relationship preceding regulation is transposed into the legal relationship regulated by the current norm, the subjects remaining the same, regardless of whether or not they are expressly highlighted. There is, without question, a relationship between holders and the object being protected, namely, 'protectable' or protected works, but the regulation itself is the expression, with priority, of the relationship between authors and the rest of the population, categorized as being the general public (the community, and every single individual), whose interest to access information/culture is contrary (in a certain measure and to a certain degree) to the author's interest of protecting that work and of restricting/limiting access to his work without his consent.

Guaranteeing certain rights to a category of subjects, such as owners, will always correspond to the existence of certain obligations borne by the other subject category, the obligation to not reproduce protected works for commercial purposes, without the consent of their owners, actually being the expression of the owners right to authorize or forbid the reproduction of said work. Exceptions and limitations that exist in the field of copyright are practically the expression of the existence of the public's right of access to works belonging to other creators. The right of access is, therefore, intrinsic to the current norm and can fluctuate only in regards to its extent and level of protection, as it is conferred by the state, but its existence cannot be denied because denying it would be equal to the negation of the very legal relationship that keeps together all subjects, and not just some of them.

It's what the doctrine considers to be an indissoluble bond[3] between the subjects of the legal relationship, manifested throughout the entire development of the legal relationship. That is why the owner and his rights cannot be seen as (and implicitly protected) on their own, taken out of the legal relationship in which they are developed. It has been considered that *"this indissoluble, organic bond, that keeps together subjects throughout the legal relationship's development (bond owed to the existence of reciprocal rights and obligations), constitutes one of the objective legalities essential in the field of legal reality, and the absence in a social phenomenon of a judicial form means the impossibility to use law-specific tools to achieve and protect the interests of the participants."*[4]

The new technological era, a title that has been confirmed for the current century, has imposed new values, new needs, other interests of the citizen have been affirmed. The ease of access to any information has lead man to a new step, the computer and the network slowly becoming a way of life. It's especially in this context that one should interpret every citizen and everyone's interest, as well as those of the entire community, with greater needs, stimulated by a growing need for knowledge, specific to an era in which a scientific study doesn't need to be researched in specialized libraries for days on end, but is available online, in each and everyone's house, through a simple "search".

Needs and interests of people contemporary with the first copyright law in France 1957, for example, are different from the ones of today's individuals from the current society, whom are hard to identify as not pertaining to the internet users' category. The user of works protected by copyright is, in fact, an internet user, the right of the user, of the consumer, being in fact the right of the internet user, with the specifics related to him, the interest that's at the base of this right being coordinated directly by knowledge requirements specific to the age of information, of the internet, of the network. The society that has developed has created the

[2] Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society.

[3] Saleilles, "Le personnalite juridique", p.487.

[4] N. Popa, "Le rapport juridique (Notion et traits)", p.24-34.

possibility of some new personal needs, the internet bringing with it a multitude of information (most of which protected) at everyone's disposal, the interest for each one of them, increasing more and more, has also had an impact on every individual's need, and subsequently on society as a whole.

A society accustomed to a certain level of knowledge, of culture, will refuse a limitation of this level of access to information, limitation that could not be felt as anything but an involution, a regression.

A new and emergent public interest has therefore justified the creation of this open licensing system, in which the leading place is occupied by the right of access, respectively, free use and not the restrictions specific to copyright. Without abandoning the coordinates and principles of the copyright law, the "all rights reserved" system has been substituted with "some right reserved".

Open licenses, whether they pertain to computer programs (GPL) or any other literary-artistic expression (Creative Commons), are practically contractual formulas made available to authors or owners, in different versions, so as to cover the most frequent licensing cases.

Exactly as with the Creative Commons licenses, the fundamental idea behind General Public Licences is that of protecting the free use of computer programs. *"The GPL specifies that anyone may copy the software, provided the license remain attached and the source code for the software always remains available. Users may add to or modify the code, may build on it or incorporate it into their own work, but if they do so, then the new program created is also covered by the GPL. Some people refer to this as the viral nature of the license. The point is that the open quality of the creative enterprise spreads. It is not simply a donation of a program or a work to the public domain, but a continual accretion in which all gain the benefits of the program on pain of agreeing their additions and innovations back to the communal project."*[5]

The most common types of Creative Commons licensing (the ShareAlike ones) function on the same system as the GPL ones, through which the user is required to preserve the same contractual terms for future licenses. Using the work exclusively within the CC licensing system and maintaining the cycle of usage and retransmissions, represents practical methods of protection of the right of subsequent access to the work, avoiding forms of abusive/exclusive appropriation.

The "ShareAlike" mention compels that any derived work, created on the basis of a material licensed in this manner, be distributed solely within the "ShareAlike" terms applicable to the original/initial work. "*If you remix, transform, or build upon the material, you must distribute your contributions under the same license as the original.*" A similar method of protecting the right of accces is also used in the more recent forms of Creative Commons International licensing, which requires any user to not apply any other contractual terms or technological means of protection that would limit others' access to the work. "*You may not apply legal terms or technological measures that legally restrict others from doing anything the license permits.*" Practically, in the exchange of receiving unrestricted right of access to a certain work, the user conforms to a behaviour identical to that of the original author, undertaking to not change the open nature of the work. One might consider that we are dealing with an implicit guarantee of the right of access, that each user assumes towards future users, at the moment of accepting the contractual terms, a moment considered to be that of the use of said work.

As can be observed, the freedom of use needed by the current society to exploit the existing online content has justified the development of the open licensing system, through which the protection of the right of access itself is attempted, exploiting, more precisely, the accessibility on the owner's desired coordinates, since any work will enter this system of licensing only through the expressly manifested intention of contracting of its owner. This manifestation will be considered express at the moment in which the owner has opted for one of the open licensing forms for a work that belongs to him and is available to the public.

In continuation of the discussion related to the legal relationship that exists in the copyright field, and relevant for this study, although implied in the relationship between owner and public (considered to be the community and each individual), the relationship between the primary user of a work, on one hand, and the subsequent user, on the other, must also be mentioned. An affirmation of this relationship is also made through the GPL and CC ShareAlike licenses, as the obligation of maintaining (keeping) the work in the open licensing system ensures exactly the continuation (transmission/retransmission chain) through which the interest of accessibility is protected, because any blocking, such as an exclusive use, would practically break the work out of the transmission and retransmission chain, by making it no longer

[5] http://www.gnu.org/licenses/gpl-3.0.en.html

available to the entire community, and practically, there being no way of exploiting any right of non-exclusive use. These are principles of protection of an informational mass that must be available to everyone (to the public, as I've mentioned, exactly as in the case of the public domain), the guarantee of accessibility actually meaning the guarantee of the right of access of each individual to the work in question.

The existence of these types of licenses opens new perspectives of defining the notion of "freedom of use", since from the perspective of these new contractual approaches, freedom no longer means non-protection because it doesn't contravene this notion, but it supports it through other methods. In the same way, it becomes easier to understand that freedom can manifest itself not only outside of the remuneration system, but being perfectly compatible with it and, last but not least, that freedom does not contravene the notion of ownership/belonging. Maintaining a work within the CC or GPL system would ensure every person non-exclusive rights over some works. This is, truly, the principle on which the public domain functions, as the works pertaining to this sector can be used by each person on the basis of owning a right of access that must be guaranteed to remain non-exclusive, so as to adequately exploit the public domain and to avoid abusive acquisition.

3. Relationship with the public domain. The confusion between CC-licensed works, on one hand, and unprotected/unprotectable works or works that belong to the public domain, on the other.

As far as the public domain is concerned, we recall the common characteristic of all works in this sphere as being, mainly, the freedom of use, this being, in turn, an effect of the impossibility of exercising copyright. The work can be used, basically, without restriction, without the need for payment of a fee or soliciting permission from its owner. Another common characteristic is accessibility, which places value on the freedom of use, because a work that is free, but cannot be accessed, is, in fact, a restricted work. Concretely, freedom of use and accessibility are not just characteristics taken from the definition of the public domain, but mark the existence of certain rights automatically born in each individual's patrimony, namely, the right of free use and the right of access.

Exactly as with the works pertaining to the public domain, CC or GPL-licensed works have, specific to them, the freedom of use and the right of access, but their existence is not the effect of the impossibility of exercising the rights of the owners, but the exercising of these rights in certain conditions, through which, practically, two apparently contradictory interests are balanced, that of the owner and that of the user, respectively. We will also consider relevant for this paper, taking the arguments presented in "Public Domain Protection. Uses and Reuses of Public Domain Work"[6], according to which, it is important to not consider freedom of use as just an expression of the right of access, these concepts having to be separated as they correspond to different exercising possibilities. The right of access is not just an expression of the freedom of use, but a separate right.

In the same measure we will also take and accept the arguments according to which works from the public domain are not considered unprotected, but on the contrary, needing special, particular, protection, one that, as it will be shown, tries to also be ensured by belonging to open licenses.

As far as the public domain protection is concerned, it's specified that the protection that I am talking about is in fact a form of safeguarding the rights that every person holds over public domain materials, which belong to everyone *and over which we all have rights.* It doesn't mean that this protection is different from the one granted to authors and owners and, in fact, is necessary to emphasize the fact that there is no legal ground for which a work that belongs to everyone shouldn't be protected as one belonging to one or some of us.

In this context, it is very important to notice that free use must not be confused with the right of appropriation. Private appropriation of public domain materials threatens individual creative expression because it limits the possibility of further acts of access. No form of use of public domain works should lead to a way of appropriation, damaging other users or in the detriment of other types of uses. In this sense, protection of the works that belong to the public domain practically mean the right to impose the moral non-alteration of the public domain work and the right to forbid any form of exclusive appropriation.

Considering all these arguments, works that are unprotected/unprotectable can be considered those which, in explicit terms, are made available to the public to be used in any way, including for exclusive appropriation, as well as works that contain information and data that cannot be protected, through their normative and jurisprudential exclusion, such as ideas, theories,

[6] Monica Adriana Lupaşcu, "Public Domain Protection. Uses and Reuses of Public Domain Work", CKS 2015 – Challenges of the Knowledge Society, 9th Edition, p. 559-605.

mathematical concepts (art. 9 from Law no. 8/1996 regarding copyright and related rights).

Most of the times marking a work as being under a Creative Commons or GPL license leads to the idea of an absolute freedom to use it, the work being considered as lacking any protection or pertaining to the public domain. For the public less accustomed to what it means to correctly use works that have been uploaded on the internet, CC (Creative Commons) means FREE, or OPEN, the latter word bringing with it another cluster of interpretation (freedom of use, reuse, unlimited access, etc.).

In reality, Creative Commons contracts clearly identify rights that are enjoyed by every user (the licensee) of the work, as well as the limits in exercising these rights, the permission of use being accompanied, usually, by express restrictions. As I mentioned, the right of access is conferred by the owner and can be exercised in certain conditions agreed and imposed by him to any user. An example used frequently to prove "the distance" that exists between the concept of "open&free" and what an open license can offer in reality, is granted by the model "Attribution-NoCommercial-NoDerivatives", which forbids the commercial use as well as the possibility of creating derivative works. It's true, the aforementioned license is one of the most restrictive ones and its usage is fairly narrow, especially due to the fact that it does not belong to the "open" culture, but its existence proves the fact that choosing this licensing system can also have as an effect a limited usage of the work.

Moreover, and so as to prove the variety of the types of licensing, at the level of CC licenses, there are certain models dedicated to the public domain, or through which, at least, there is an attempt to place certain works closer to the public domain, and maybe their existence could represent one of the reasons for which the entire system is perceived, most of the times, as being exclusively dedicated to freedoms.

Creative Commons' specific Public Domain Licenses

The CC licensing system makes available two models dedicated to the public domain, out of which one is identified as being "CC0 – *No rights reserved*", which allows authors to waive any right over the works and placing them in the public domain sphere. Outside of this instrument, which is awarded especially to authors and thought out as being used only by them, CC licenses also allow that certain works carry marks similar to the public domain. The "Public Domain" symbol (Public Domain Mark), represents another licensing model that "enables works that are no longer restricted by copyright to be marked as such in a standard and simple way, making them easily discoverable and available to others". This licensing has become known under its shortened version - "No known copyright", which is found as an express declaration right as part of the explanation terms of this permission: "*This work has been identified as being free of known restrictions under copyright law, including all related and neighboring rights. You can copy, modify, distribute and perform the work, even for commercial purposes, all without asking permission*."[7]

In addition to the exposed terms, the Public Domain license also makes available to its potential users the following information, of which, even without being expressly mentioned, all users should take note (there have been three identified as being relevant to this study):

"- The work may not be free of known copyright restrictions in all jurisdictions.

- Persons may have other rights in or related to the work, such as patent or trademark rights, and others may have rights in how the work is used, such as publicity or privacy rights.

- Unless expressly stated otherwise, the person who identified the work makes no warranties about the work, and disclaims liability for all uses of the work, to the fullest extent permitted by applicable law."

The following aspects thus become evident: (i) the fact that the work, although marked as being part of the public domain, can still be protected in certain jurisdictions; (ii) that, in addition to the corresponding protection of these jurisdictions, there could be other rights corresponding to the work, aside from copyright, such as the trademark right, and this could be just an example; and, last but not least, that (iii) the person that marked the work as pertaining to the public domain cannot be held accountable in regards to the work or its uses. This last information, that we consider to be extremely important, actually represents an express declaration of non-liability of the person who uses the Public Domain symbol for works made available to the public. Keeping in mind this last declaration, one could wrongly reach the conclusion that other information ((i) and (ii)) previously exposed would practically be the only concrete examples in which non-liability would materialize - the user of the Public Domain symbol would not be held

[7] https://creativecommons.org/publicdomain/zero/1.0/

accountable for any conflict with jurisdictions that do not recognize the work's passage into public domain, nor for the case in which, outside of copyright, the work would carry other rights. In reality, the terms of the declaration include a much larger sphere than the information exposed by the license, which remain to be considered simple examples and, as it is also terminologically evident, the sphere of non-liability reaches "*to the fullest extent permitted by applicable law"* and includes *"all uses"*, which, in a stricto sensu interpretation, means that the user of the work cannot even be held liable for the correct/legal use of the Public Domain symbol. It's to be discussed whether or not this sphere has as a limit that which the person in question reasonably should or could have known so as to consider the work to be part of the public domain, if you take into account the fact that the licensing terms warn from the beginning, as shown above, of the fact that the Public Domain symbol is attributed to a work *"free of known restrictions under copyright law."* Therefore, in an interpretation, the person who uses the Public Domain symbol for certain works, can be completely absolved of any responsibility, with a single exception, that in which, knowing those restrictions or those existing and valid rights over a work, still exposes the work as being part of the Public Domain. In another interpretation, the declaration of non-liability would come as a contradiction with the declaration through which the work is communicated as being free of copyright restrictions and with the "No copyright" syntax, being present right before the terms of licensing exactly like a summarized text of the license or its effects.

It's fairly difficult to correctly and completely interpret this license if you take into account at least these three phrases, which, opposing each other at a certain level, manage to also contradict the concept of public domain.

"No copyright" would truly be the syntax that, at a first impression, would coincide best with the effects of a public domain work, but despite all that, the lack of copyright (lato sensu) could also mean the failure to recognise an adequate protection and usage (legal) of works pertaining to the public domain, because arguments for the existence of such a protection are based on the principles of copyright themselves, which, protecting the rights of some owners and authors, must protect the rights of the general public, which concretely means public domain. Taking into account these aspects, it would have been better to use the "No restriction under copyright law" syntax, which would have identified more clearly that the freedom of use implied represents a right that may be exercised în the limits of copyright, and not outside it.

The *"free of known restrictions under copyright law"* syntax and the declaration of non-liability contradict the very notion of public domain, as they question that which should be certain and lacking interpretation. The public domain cannot depend on the sphere of knowledge of one person or institution, the latter having to answer for marking a work with this symbol because such a guarantee could be a concrete example of an incentive for the reuse of public domain works. The lack of such a guarantee can only lead to inadequate and illegal uses of the symbol, especially if we also take into account the terminological deficiencies of the license, exposed above. In the lack of such a guarantee, it would be recommendable that the Public Domain symbol only be used by authors, the only people able to place a work in the public domain, with all the legal consequences derived from this placement. The people who would want to use a work marked this way, would be able to do so without risk of a contradictory interpretation and with the real possibility of being able to hold accountable the person who wrongly used this symbol. The lack of such guarantees open the possibility of inadequate use of the Public Domain symbols even more and, implicitly, of the works supposedly pertaining to the public domain, which might have repercussions especially on the public domain sphere, since there is a risk of creating a false public domain, whose usage would create a lot of legal issues.

The existing confusions regarding CC licenses could be caused, as I've tried to argue above, not only by a lack of knowledge of the types of licenses, but also of the very possible interpretations that open licenses bear.

4. Conclusions

The confusion with the public domain really must be avoided, but, highlighting the common characteristics has shown the fact that the model of protection offered through the Creative Commons and GPL licenses can also be successfully used for the protection of public domain works because, in this case as well, a right of access for subsequent use must also be protected, failure to protect it or the lack of guarantees leading, most certainly, to exclusive uses that will break the chain of reuses and will affect the public domain patrimony.

Protecting the right of access means, as I've shown, the protection of non-exclusive use, and in the case of works pertaining to the public domain, this is born on the date on which the copyright protection period expires, different from the moment in which the same right is born in the patrimony of

users of a CC/GPL-licensed work, considered as being the moment in which the owner chose to make the work available though an open license. Identifying said moment is important because legal use of the work exists only from that date, a breach of copyright being brought into discussion at any point previous to this moment. Along with the newer versions[8] of the Creative Commons licenses, express mention of their irrevocable nature has also appeared, and this mention at the level of contractual terms of the CC International license represents another form of guaranteeing the right of access to the work, as without this express mention one could sustain the possibility of retraction of the conferred rights, especially in the context of the much-disputed discussions regarding the nature of these terms, as being licenses or contracts[9].

"*Subject to the terms and conditions of this Public License, the Licensor hereby grants You a worldwide, royalty-free, non-sublicensable, non-exclusive, irrevocable license to exercise the Licensed Rights in the Licensed Material.*"

Open licenses are practically a model that could be taken to the level of subsequent regulation reffering the correct guarantee that the right of access must benefit from in the legislation of any state. Subsequent to this step of the research, there must be an analysis made on what level of protection is currently ensured in the main legislations in regards to the right of access to works, as well as the issues connected with the validity of open licenses.

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- Creative Commons' official website - *https://creativecommons.org/*
- General Public Licenses' official website - *http://www.gnu.org/licenses/gpl-3.0.en.html*

[8] https://creativecommons.org/licenses/by-sa/4.0/legalcode

[9] Melanie Dulong de Rosnay: "Creative Commons Licenses Legal Pitfalls: Incompatibilities and Solutions", http://www.creativecommons.nl/downloads/101220cc_incompatibilityfinal.pdf

THE PUBLISHING CONTRACT FOR WRITTEN WORKS

Ana-Maria MARINESCU*

Abstract

The article analyses the main clauses of a publishing contract for written works and aims to be a guide for authors, including the students and the participants of CKS, if they want to publish their works. It will offer the main aspects that every author should know, when is concluding a publishing contract. Also, the article will present the authors economic rights transferred to the publisher, the legal characteristics of the contract, the notions of author, written works and publisher, the obligations of the parties.

The article will underline the importance of the publishing contract as the most common way to exploit the rights of the written works authors, hence the rules of this contract offer solutions that can be applied by similarity to other contracts that assert the rights of the authors.

Keywords: *author, written works, publisher, publishing contract, clauses.*

1. Introduction

The contract is the most important institution of civil law, the legal instrument used in both economic activity (exchange of activities and commodities) and in relations between individuals (sale, lease, rent, loan, etc.)[2]. As is known, the contract is the agreement between two or more persons with the intention to establish, modify or extinguish a legal relationship[3]. In this regard, the contract is concluded through negotiation by the parties or through unreserved acceptance of an offer to contract[4], therefore it is only necessary the agreement between the parties on the essential elements of the contract, secondary elements can be agreed or determined by another person[5].

As was pointed out in the literature on special contracts of civil law[6], contract law to exploit the rights of the author, as an integral part of copyright and related rights, covers regulatory legal instruments by means of which the work is published, used, rented and also the conditions of using the work. Therefore, the legal regime to exploit the rights of the author are an important part both theoretically and practically of the private law in general and copyright in particular[7].

From this point of view, the publishing contract is the most important legal instrument through which written works in all areas are made public, becoming as doctrine said[8], "the most common way to exploit the patrimonial copyright", therefore "the rules from this field offer solutions that can be applied by resemblance to other contracts valuing the patrimonial copyright".

Although the state of knowledge in the concerned field is high enough, the article aims to be a guide for any written works author, that wish to conclude a publishing contract, and provides the most important elements that it should be consider at the conclusion of such an agreement in order to avoid, on the one hand, any confusion as to the legal terminology used because not all authors have legal knowledge, and, secondly, to limit the possible abuses done by the publishers. To achieve these objectives, the article will present the applicable statutory provisions, will analyze the most important clauses of the publishing contract, the obligations of the parties, and the legal characteristics of the contract and will provide practical solutions to problems encountered in practice.

* Director General PERGAM, PhD Candidate, Faculty of Law, "Nicolae Titulescu" University of Bucharest (e-mail: **amm_marinescu@yahoo.com**).

[1] See in detail Ana-Maria Marinescu, "*Cesiunea și licențierea în materia drepturilor de proprietate intelectuală (II)* (*Assignment and licensing in the field of intellectual property rights (II).) Contractele de valorificare a drepturilor patrimoniale de autor: contractual de comandă a unei opera viitoare și contractual de editare" (Contracts for the exploiting patrimonial copyright: contract for ordering a future work and publishing contract)*, Revista Română de Dreptul Proprietății Intelectuale nr. 4/2015, p. 134-135. (Romanian Magazine for the Intellectual Property Law no. 4/2015, p. 134-135).

[2] See in detail Constantin Stătescu, Corneliu Bîrsan, "*Drept civil. Teoria generală a obligațiilor"*, 3rd edition, All Beck Publishing House 2000, Bucharest, p. 21.

[3] Art. 1.166 the New Civil Code.

[4] Art. 1.182 par. (1) the New Civil Code.

[5] Art. 1.182 par. (2) the New Civil Code.

[6] Francisc Deak, *"Tratat de drept civil. Contractele speciale"*, 2nd edition, updated and supplemented, Actami Publishing House, Bucharest, 1999, p. 5.

[7] *Idem*.

[8] Viorel Roș, Dragoș Bogdan, Octavia Spineanu-Matei, *"Dreptul de autor și drepturile conexe – Tratat"*, All Beck Publishing House, Bucharest, 2005, p. 372.

2. Content

According to art. 1 para. (1) of Law no. 8/1996 on copyright and related rights, as amended and supplemented (hereinafter Law no. 8/1996), the copyright in a literary, artistic or scientific work, as well as other works of intellectual creation is recognized and guaranteed under the law, being related to the author and embodies attributes of moral and patrimonial character. Characteristic of the copyright system is that creative intellectual work is recognized and protected, independent of the public disclosure, by the mere fact of its creation, even in unfinished form. This is the foundation of the copyright protection system therefore the work is recognized and protected by the mere fact of its creation, even if it was or not made public, without further formality, for example concerning the registration of the works, unlike industrial property, where the recognition of the rights over trademarks, patents, inventions, etc. requires a registration system.

Law no. 8/1996 regulates **three ways for proving the existence and the content of a work.**

The first is governed by art. 148(1) on the registration, as evidence, of the works made in Romania, in the National Register of Works (RNO), administered by the Romanian Copyright Office. Registration is optional and is chargeable[9], according to the methodological rules and tariffs set by Government decision. The registration is made on the applicant's own responsibility.

It follows that a work of intellectual creation recorded in the National Register of Works managed by ORDA: is not constitutive of copyright, is optional, is chargeable and is based on an affidavit of the applicant. Applicants shall declare on their own responsibility that the works submitted for registration are original, belong to a natural or legal person and that are observing the provisions of Law no. 8/1996.

We mention that in the National Register of Works are recorded the works of intellectual creation and not the copyright on the works. As a result, ORDA is not registering, is not according and is not certifying in any way the copyright in a work of intellectual creation. The registration of the work in the National Register of Works is only a proof / evidence about the title of the work, its content and the date when it was submitted to ORDA.

The second is referred to art. 148 (2), namely any evidence. In this regard, I mention that the notion of "any evidence" must take into account the evidences provided by the Civil Procedure Code in order to demonstrate the existence and the content of a work. The last way is included in the notion of "evidence", respectively "by including the work in the repertoire of a collecting society"[10]. Therefore, the author becoming a member of the collective management society, declaring the work that he created in the repertoire of the collective management society, this will be an evidence of the existence and content of the work. Moreover, Law no. 8/1996 shows that[11] *"the authors of works and the owners of rights may, at the same time as their works are entered the repertoire of the collective management organization also may register the name under which they write, perform or create registered, for the sole purpose of making it known to the public"*. Thus, by entering the work in the repertoire of the collective management organization, it is acknowledge to the copyright owner also the moral right to decide under what name the work will be brought to public knowledge, respectively the right to a nickname (the literally name).

Author - According to art. 3 paragraph (1) of Law no. 8/1996 is the author the individual or the individuals who created the work; are presumed to be the author, until proved otherwise, the person under whose name the work was first brought to public knowledge. When the work was made public in anonymous form or under a pseudonym that does not identify the author, the copyright shall be exercised by the natural or legal person who makes it public with the author's consent, as long as it does not reveal his identity. For example, in the case a written work (novel), which was made public in the form anonymously or under a pseudonym that does not identify the author, copyright is exercised either by the editor, the legal entity which brings the novel to the public by editing, with the consent of the author, either by the author's agent, natural or legal person, representing the author, working on its behalf and concluding legal agreements, including publishing contracts of the work.

A **work of joint authorship** shall be a work created by several co-authors in collaboration[12], The copyright in a work of joint authorship shall belong to the co-authors thereof, one of whom may be the main author. Unless otherwise agreed, the co-authors may only use the work jointly[13], and if the contribution of each co-author is separate, it can be used separately, provided that it does not prejudice the use of the joint work or the rights of the other coauthors[14]. For example, in the case of written works can be any work created by several co-authors

[9] Registration is made based on filling in the form F24 and the fee is RON 100/work.
[10] Art. 148 par. (2) Law no. 8/1996.
[11] Art. 148 par. (7) Law no. 8/1996.
[12] Art. 5 par. (1) Law no. 8/1996.
[13] Art. 5 par. (3) Law no. 8/1996.
[14] Art. 5 par. (4) Law no. 8/1996.

in collaboration, each of the authors elaborating certain chapters of the book. If the authors have written chapters in the book, they can be used separately by each of the authors, for example by publishing the chapter in the form of an article in a professional journal.

A **collective work** shall be a work in which the personal contributions of the co-authors form a whole, without it being possible, in view of the nature of the work, to ascribe a distinct right to any one of the co-authors in the whole work so created[15]. Unless agreed otherwise, the copyright in a collective work shall belong to the person, whether natural person or legal entity, on whose initiative and responsibility and under whose name the work was created[16]. For example, in the case of written works, a dictionary, atlas or encyclopedia, collective works where the copyright belongs to the editor legal entity, on whose initiative, responsibility and under whose name the collective work created.

The subject matter of copyright - Also, specific for the copyright system is its subject, namely: the original works of intellectual creation in the literary, artistic, or scientific field. Therefore constitutes copyright object the original works of intellectual creation in the literary, artistic, or scientific field[17]. Thus, **originality** is required as a prerequisite for the copyright object, regardless of manner of creation, mode or form of expression and regardless of their value and destination[18]. In the case of written works, are the object of copyright the original written works, whether they were written by hand or typed on the computer, regardless of the writing style, the economic value of work and whether they were intended for the general public or only for a community of specialists

Law no. 8/1996 lists as the object of copyright the written works: literary and journalistic writings, lectures, sermons, pleadings, addresses and any other written or oral works[19], and the scientific works, written or oral, such as such as presentations, studies, university textbooks, and school textbooks and scientific projects and documentation[20]. Therefore, are written works both literal and scientific works, each of them are only genres, categories of written works, between them and the notion of "written works" there is a linkage part-whole. In the France doctrine[21], it was shown that copyright protects all written works, subject to respect the condition of originality, the law protects all texts in all languages and dialects, regardless of their support.

Derived works - It is also an object of copyright derived works were created based on one or more pre-existing works, namely[22]: (a) translations, adaptations, annotations, documentary works, arrangements of music and any other transformation of a literary, artistic or scientific work that themselves entail creative intellectual work; (b) collections of literary, artistic or scientific works, such as encyclopedias, anthologies and collections and compilations of protected or unprotected material or data, including databases, which, by reason of the selection or arrangement of their subject matter constitute intellectual creations. Therefore, in the case of written works, constitute derivative works: the translation of a university course from French to Romanian, an encyclopedia or a collection of intellectual property laws.

The third principle applicable to copyright in this matter is referring to the the elements that do not fall under the legal protection of copyright, including in the case of written works, ideas, theories, concepts, scientific discoveries, procedures, methods of operation or mathematical concepts as such and inventions contained in a work, whatever the mode of adoption, writing, explanation or expression[23]. Therefore, ideas, theories, concepts, scientific discoveries, procedures, methods of operation or mathematical concepts as such and inventions contained in a work are not the subject of copyright, which is recognized and protected only to the written work itself.

Given the context described above of the written works, in what follows I will analyze the best used way in which the written works are made public, namely the publishing activity, and the most frequently used in practice legal document in order to fulfill the publishing activity: **publishing contract**[24], regulated by the Law no. 8/1996 to art. 48-57.

Definition - According to art. 48 para. (1) of Law no. 8/1996 by publishing contract, the owner of the copyright assigns to the publisher, in exchange

[15] Art. 6 par. (1) Law no. 8/1996.
[16] Art. 6 par. (2) Law no. 8/1996.
[17] Art. 7 par. (1) Law no. 8/1996.
[18] Art. 7 par. (1) Law no. 8/1996.
[19] Art. 7 par. (1) letter a) Law no. 8/1996.
[20] Art. 7 par. (1) letter b) Law no. 8/1996.
[21] André Bertrand, *"Le droit d'auteur et les droits voisins"*, 2e édition, Dalloz, Paris, 1999, p. 169.
[22] Art. 8 Law no. 8/1996.
[23] Art. 9 letter a) Law no. 8/1996.
[24] See in detail Ana-Maria Marinescu, "*Cesiunea și licențierea în materia drepturilor de proprietate intelectuală (II)* (*Assignment and licensing in the field of intellectual property rights (II). Contractele de valorificare a drepturilor patrimoniale de autor: contractual de comandă a unei opera viitoare și contractual de editare" (Contracts for the exploiting patrimonial copyright: contract for ordering a future work and publishing contract)*, Revista Română de Dreptul Proprietății Intelectuale nr. 4/2015, p. 140-152. (Romanian Magazine for the Intellectual Property Law no. 4/2015, p. 134-135).

for remuneration, the right to reproduce and distribute the work. Therefore, does not constitute a publishing contract the agreement by which the owner of the copyright in a work empowers a publisher to reproduce and possibly also to distribute the work at the former's expense (art. 48 par. 2).

From the definition of the publishing contract, results the following characteristics:

- The assignment is the nature of the publishing contract, otherwise the simple mandate given by the author to the editor represents enterprise contract (art. 48 par. 3);

- The assignment usually is made for a remuneration;

- Reproduction and distribution of the work assignment involves both assignment and license[25], because under art. 51 para. (1) b) the publishing contract must contain, under the penalty of cancellation, the exclusive or non-exclusive nature of the assignment.

The **scope** of the publishing contract involves the following elements:

- The importance of the publishing contract results, among others, from its scope[26], as any type of intellectual creation works that could be reproduced may be published[27]: literary, graphical, musical works etc. Concurrently, a work can be published in may ways[28], depending on the carrier on which it is fixed, e.g. a musical work can be published on paper, as a score, then in the form of CDs. Considering these issues, the fact results that the publishing contract is a complex one.

- it does not include the adaptation of the work and the specialized literature[29], stresses the fact that the assignment of the translation or adaptation right does not represent a publishing contract. And that is considering that according to art. 13(i) the author is entitled to authorize or forbid the development of derived works and, according to art. 16, derived works comprise the translation, publication in compendia, adaptation, as well as any and all transformations of a preexisting work, if the same is an intellectual creation. To this end, by Decision no. 963/2007[30], the High Court of Cassation and Justice – Civil and Intellectual Property Division regarded the action for counterfeit lodged by the translation author's heir against the printing house that had published the work (in this case a novel), translated by the claimant's father, without her consent, as grounded.

The aforementioned articles should be correlated with the special provisions concerning the publishing contract, i.e.: *"Art. 49. - The holder of the copyright may assign to the editor the right to authorize the translation and to adapt the work."* and *"Art. 50. - The assignment of the right to authorize other parties to adapt the work or to make use of the same in any way whatsoever to the publisher must be the subject of an explicit contractual provision",* in that the author may assign to the publisher, just as they may assign to other parties according to art. 13, the translation and adaptation of the work, and such a mandatory clause must be expressly stipulated in the contract (art. 50).

Hence, through the publishing contract of a novel or a legal treaty, the author may assign to the publisher the right to authorize the translation and adaptation of the work, and these provisions must be the subject of express contractual provisions.

Considering the provisions in art. 48-50 of Law no. 8/1996, the publishing agreement was defined by the specialized literature[31] as *the means of the author patrimony right assignment agreement based on which the holder of the copyright commits, within the limits of the law on public order and good morals, to assign to another person, referred to as publisher, for a determined period of time, in exchange for a remuneration, the right to reproduce, to distribute, and, possibly, authorize the translation and adaptation of the work on their own expense*.

The parties to the publishing contract are the holder of the rights and the publisher.

The holder of the rights - The notion of holder of the rights includes the **author**, as well as **other natural or legal persons that, according to Law no. 8/1996, acquire patrimony copyright**:

- legal or testament heirs of the author (art. 25(1) thesis 2, art. 26);

- the collective management body authorized by the author during his life, if there are no heirs (art. 25(1) thesis 3, art. 26(2));

- the collective management body holding the largest number of members in the respective creation field, if there are no heirs, and if the author did not authorize a collective management body during his life (art. 25(1) thesis 4, art. 26(2));

- the natural or legal person that makes a work public, with the author's consent, publicly communicated anonymously or under a pseudonym, which prevents the identification of the author, as long as the latter does not disclose his identity (art. 4(2));

[25] Viorel Roș, Dragoș Bogdan, Octavia Spineanu-Matei, *op.cit.*, p. 373.
[26] *Idem.*
[27] *Idem.*
[28] *Idem.*
[29] *Idem*; André Lucas, Henri-Jacques Lucas, *"Traité de la propriété littéraire et artistique"*, 3e édition, Litec, Paris, p. 490.
[30] Published in Revista Română de Dreptul Proprietății Intelectuale (Romanian Magazine for Intellectual Property Law) issue 2(11)/2007, p. 186 (selection and processing by Octavia Spineanu-Matei).
[31] Teodor Bodoașcă, *"Dreptul proprietății intelectuale"*, Universul Juridic Printing House, Bucharest, 2010, p. 114.

- the natural or legal person upon whose initiative, under whose name, and responsibility a collective work was created (art. 6(2)).

Publisher - The definition of the publishing contract[32], also provides the definition of the publisher, respectively the person committing to reproduce and distribute the work made available by the holder of the rights. The French specialized literature[33] highlighted the evolution of the publisher's right: they have always been the professionals reproducing and distributing the work, but the conditions under which they carry out their activity have drastically changed in time: the technical advances have allowed for the improvement of the activity, but the competition requirements determined them, without waiving their cultural right, to grant prevalence to the economic logic within their activity.

The capacity of the parties[34] - In so far as the **capacity of the parties is concerned**, the generally applicable rules for assignments apply[35], in general, editors are legal persons, companies.

In the case of natural person authors:

- minors under the age of 14 (art. 41 of the New Civil Code), do not hold the exercise capacity, hence, they cannot conclude legal documents (contracts) for the assignment of patrimony copyright other than through their legal representatives (e.g. parents). By way of consequence, minors under the age of 14 cannot conclude publishing contracts on their own, they must be concluded by their legal representatives.

- minors aged 14 to 18 (art. 41 of the New Civil Code), hold the exercise capacity, i.e. they can conclude legal documents (contracts) for the assignment of patrimony copyright with the prior consent of their legal representatives (e.g. parents). Thus minors aged 14 to 18 may conclude contracts for the publishing of written documents with the prior consent of their parents only.

- people above the age of 18 (art. 38 of the New Civil Code) hold full exercise capacity, hence, they can conclude legal documents (contracts) for the assignment of patrimony copyright without any limitations.

By way of exception, minors do acquire, by marriage, the full exercise capacity, and for grounded reasons, for minors above the age of 16, the custody court may acknowledge the full exercise capacity (to this end, the parents or the custodian of the minor shall also be heard, the approval of the family council also being requested if needed). Hence, married minors may conclude legal documents (contracts) for the assignment of patrimony copyright by themselves.

According to art. 42 of the New Civil Code, the minor may conclude legal documents concerning work, artistic or sports activities concerning their profession with the parents' or tutor's consent, as well as in compliance with the special law, if applicable. In this case, the minor enforces the rights and performs the obligations resulting from such acts in the same way, and may individually dispose of the income acquired. This legal provision clearly also concerns the author or the performer, which may conclude, with the prior consent of the parents, contracts concerning the assignment of their patrimony rights and, very importantly, may individually use the income acquired pursuant to the conclusion of such assignment agreements. Hence, the minor may conclude publishing agreements with the consent of the legal representatives and, to this end, they can conclude publishing contracts with the consent of the legal representatives and, in this case, they individually carry out the obligations resulting under the agreement, e.g. deadlines, form requirements, etc., but also individually dispose of the rights obtained, i.e. the remuneration cashed in for the publishing of the work.

Legal persons (publishers) may be, in the cases expressly stipulated under the law, holders of the copyright and may assign or acquire such rights[36].

Legal persons acquire the exercise capacity, so they may conclude legal documents, generally as of the establishment date (art. 209 New Civil Code), respectively as of the date of registration with the Trade Register, the specialty principle being applicable in this case, which is why they can only hold the rights corresponding to their purpose, established by the law, the incorporation deed or the state.

Subject-matter[37] - The common assignment rules also apply for the **subject-matter** of the agreement[38], but:

a) it must exist - Law no. 8/1996 institutes under art. 41(2) the interdiction to assign patrimony rights concerning all author's future works, whether specified or not, stricken by full nullity. Hence, a

[32] Art. 48(1) of Law no. 8/1996, as subsequently amended and supplemented.

[33] André Lucas, Henri-Jacques Lucas, *op.cit.*, p. 482.

[34] See in detail Ana-Maria Marinescu, *"Cesiunea și licențierea în materia drepturilor de proprietate intelectuală (II)* (*Assignment and licensing in the field of intellectual property rights (I). Teoria generală a contractelor de valorificare a drepturilor patrimoniale de autor"*, Revista Română de Dreptul Proprietății Intelectuale (Romanian Magazine for Intellectual Property Law) issue 3/2015, p. 89-91.

[35] For developers, see Ana-Maria Marinescu, *op.cit.*, p. 89-91.

[36] Viorel Roș, Dragoș Bogdan, Octavia Spineanu-Matei, *op.cit.*, p. 356.

[37] See in detail Ana-Maria Marinescu, *"Cesiunea și licențierea în materia drepturilor de proprietate intelectuală (II)* (*Assignment and licensing in the field of intellectual property rights (I). Teoria generală a contractelor de valorificare a drepturilor patrimoniale de autor"*, Revista Română de Dreptul Proprietății Intelectuale (Romanian Magazine for Intellectual Property Law) issue 3/2015, p. 93-98.

[38] For developers, see Ana-Maria Marinescu, *op.cit.*, p. 93-98.

publishing contract that concerns all the future written works of an author and not a concrete, determined work, is stricken by full nullity. However, according to art. 1.228 of the New Civil Code *"unless otherwise stipulated under the law, contracts may also concern future goods"*. I believe that this provision applies to order contracts and that it may be applicable to publishing contracts for collective works n the case whereof the copyright rests with the publisher, i.e. with the person upon whose initiative, under whose responsibility and name the work was created.

b) it must be identified or identifiable – it supposes, for the publishing contract, that the work is individually determined through means that best suit its nature (e.g., number of pages, number of issues, etc.), the remuneration that the editor must pay to the author, as well as the determination of assigned patrimony rights.

c) it must be feasible, legal, and moral - The requirement that the subject-matter must be legal and moral is very debatable, because, in the copyright field, the appreciation of a work is relative, considering the author's and the public's perception. What is not legal and moral to the author, may be so for the public and vice versa[39]. Moreover, this condition comes into contradiction with the author's freedom of expression right. Due to the lack of plausible criteria that determine the legal and moral nature, we shall take into account art. 1.225(3) of the New Civil Code, which shows that *"the subject-matter is illicit if prohibited by the law or contrary to public order or good morals"*.

d) it must be part of the civil circuit - according to art. 1.229 of the New Civil Code, *"only assets that are part of the civil circuit may be the subject of a contractual provision"*, thus for the publishing contracts, works are in the civil circuit because the author manifested its will to make the same public by disclosure.

Cause - At the same time, the general provisions concerning the conclusion of a contract impose the observance of a licit and moral **cause**[40].

Form - From the point of view of the form, the publishing contract relies on mutual agreement, i.e. it is concluded through the mere willful consent of the parties, the written form being stipulated *ad probationem only*[41]. Hence, the mere willful consent of the parties is enough for its valid conclusion and does not require the submission of the manuscript of the work. Concerning the written form *ad probationem*, I claim the need to conclude assignment contracts in written form *ad validitatem* in the copyright field, including the publishing contract, because the written form *ad probationem* will represent means of defense both for the authors against the possible abuses on behalf of the publishers and for the publishers who must protect their investment in the publishing of the work.

The clauses a publishing contract must comprise are regulated by art. 51 of Law no. 8/1996, i.e.:

a) assignment term – generally, in practice, in the case of the publishing contract, it is expressed under the form of a preset term. To this end, the negotiations between the parties on the content of the contract shall also determine the assignment term.

b) the exclusive or non-exclusive nature and the territorial scope of the assignment;

We distinguish between the **exclusive assignment** in which case "the very holder of the copyright may no longer use the work in the ways, on the term, and for the territory agreed upon with the assignee and may no longer transfer the respective right to a third party The exclusive nature of the assignment must be expressly stipulated in the contract"[42], as well as the **non-exclusive assignment,** in which case "the holder of the copyright may individually use the work and assign the non-exclusive right to other parties"[43], and the"Non-exclusive assignee may not transfer its right to another party other than with the express consent of the assignor"[44]. Thus, in the case of the exclusive assignment for a publishing contract, the author assigns its right to the publisher, and can no longer assign the same rights to another publisher, for the same work, whereas, in the case of the non-exclusive assignment, which actually is a license, the publisher may assign the rights transferred by the author, for example, to another publisher, subject to the author's express consent.

As highlighted in the specialized literature[45], the territorial scope of the assignment practically considers the fact that patrimony rights are assigned for Romania and the rest of the world. At the same time, in practice, there are situations in which rights are only assigned for Romania, and the use of the same rights internationally or for a certain territory is possible based on a different publishing contract,

[39] To this end, the recent scandals concerning the Romanian Cultural Institute in New York, which promoted a series of works regarded as illicit and immoral:
http://www.activenews.ro/prima-pagina/Romania-promovata-pornografic-de-catre-ICR-New-York-111150
http://www.antena3.ro/actualitate/sinteza-zilei-romania-promovata-vulgar-la-new-york-292877.html
[40] Bujorel Florea, "*Contracte de valorificare a drepturilor patrimoniale de autor"*, Pro Universitaria Printing House, Bucharest, 2013, p. 17.
[41] Art. 42 Law no. 8/1996.
[42] Art. 39(4)(a) of the Law no. 8/1996.
[43] Art. 39(5)(a) of the Law no. 8/1996.
[44] Art. 39(6)(a) of the Law no. 8/1996.
[45] Viorel Roș, Dragoș Bogdan, Octavia Spineanu-Matei, *op.cit.*, p. 360.

concluded with a publisher that carries out its activity on the respective territory.

c) maximum and minimum number of copies – clause concerning the number of copies.

Pursuant to the practice of the relations between the author and the publisher, the clause concerning the number of copies raised numerous suspicions between authors and editors, because it is not the essence of the agreement, its absence being sanctioned[46]. Hence, if such clause is not available, the author has no control over the number of copies that the publisher prints. Moreover, this clause must be mentioned in the contract, especially in the cases in which the author's remuneration is pro rata with the number of copies sold.

d) author's remuneration established according to the law;

The means for the determination of the remuneration due to the holder of the rights are regulated under art. 43(1) which stipulates that "Remuneration due pursuant to a patrimony right assignment agreement is established through the consent of the parties. The amount of the remuneration is calculated either pro rata with the amounts cashed in pursuant to the use of the work, or in a fixed amount or in any other way". Thus, the lawmaker left it to the parties to establish both the amount of the remuneration, and the concrete means for the calculation thereof, indicating 3 possible situations: pro rata with the amounts collected pursuant to the use of the work, fixed amount, or in any other way whatsoever. In practice, the phrase "in any other way whatsoever" is generally transposed as follows: fixed amount plus a percentage or percentage plus fixed amount. Remuneration is similarly regulated in France[47]. In fact, the payment of royalty due by the subcontractor to the assignee is also established, considering their capacity as privileged creditors of the author.

Out of the need to protect the authors' interests, the lawmaker regulated under art. 43(2) the situation in which the remuneration was not established under the contract, in which case "the author may request competent bodies to establish the remuneration, according to the law. This shall be performed taking into account the amounts usually paid for the same category of works, the destination and duration of use, as well as other circumstances of the case", and under para (3) the situation of the obvious discrepancy between the amount of the remuneration and the benefits obtained by the assignee, for which "the author may request the competent bodies to review the contract or adequately increase the remuneration".

Moreover, these provisions must be correlated with the ones in art. 1.233 of the New Civil Code, concerning the determination of the price between professionals, in which case, if the price is not established or the concrete method for the calculation of the price is not indicated, it is assumed that the parties took into account the price customarily charged in the respective field for the same services carried out under similar conditions or, in the absence of such a rate, a reasonable price.

e) number of copies reserved to the author free of charge;

This clause has not led to any issues in the contractual relation between the author and the publisher, but I do however believe that the number of copies reserved to the author free of charge must take into account the number of copies of the work; hence, it must not be disproportionately high as compared to the overall number of published copies.

f) the term for the publishing and distribution of the copies of each edition or, as applicable, of each run;

If the clause concerning the number of editions, respectively the number of copies in each run was not included in the publishing contract, the specialized literature is unanimous[48], in that the publisher will be entitled to publish as many editions as it desires without requiring the author's consent, but in compliance with the related obligations: to inform the author on the published editions, to remunerate the author, and to observe their moral rights.

g) the term for the handover of the original work to the author – in this case as well, the negotiations between the parties concerning the content of the contract shall determine the establishing of the term for the handover of the original of the work by the author, considering that the author holds the sovereign right to decide as to when the work is completed, but also to protect the publisher's investments.

h) procedure for the control of the number of copies produced by the publisher.

If the publishing contract does not include any clauses concerning the duration of the assignment, the exclusive or non-exclusive nature or the territorial scope of the assignment and the author's remuneration, the interested party holds the right to claim the termination of the contract[49], respectively the relative nullity of the contract, which can be invoked by the author.

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[46] Viorel Roș, Dragoș Bogdan, Octavia Spineanu-Matei, *op.cit.*, p. 384.
[47] Claude Colombet, *"Propriété littéraire et artistique et droits voisins"*, Dalloz, Paris, 1999, p. 244-253.
[48] *Idem*; André Lucas, Henri-Jacques Lucas, *op.cit.*, p. 502.
[49] Art. 51 par. (2) Law no. 8/1996.

Obligations of the parties[50] – in relation to the same:

The author has the following main obligations:

a) The obligation to make available to the publisher the subject-matter of the publishing contract

This obligation results from the very nature of the publishing contract, regardless of the form under which the work is made available to the publisher, of course, with the exception of imitative art works, and it is reinforced, inter alia, by the clause concerning the establishing of the term for the handover of the work to the publisher (art. 51(1)(g).

The situation in which the work is not made available to the editor by the author equals the enforcement by the author of the withdrawal right, because the withdrawal right may only be enforced by the author, and by its heirs. The withdrawal situation also applies if the author, through the contract, holds the right to pass the work for press and refuses to do the same after the contract with the publisher was signed[51]. I believe it is in the interest of both parties the fact that the author's right to pass for press must be expressly mentioned in the publishing contracts.

In the case of a refusal to make available[52], if it comes from the author, then the author may be bound to pay damages to the publisher, and if it comes from the author's heirs, the editor cannot claim the forced execution of the contract or the termination thereof with damages.

According to art. 55, the publisher is bound to return the original of the work to the author, the originals of the works of art, the pictures, and any and all other documents received for publication, unless agreed otherwise. Hence, the holder of the rights maintains the property right over the material media. The solution adopted by the Romanian lawmaker in the case of other categories of works, i.e. the photographic ones, is different; art. 86(3) stipulates that"the alienation of the negative of a work of art triggers the transmission of the copyright holder's patrimony rights over the same, unless otherwise stipulated in the contract".

b) Guarantee obligation

Considering that Law no. 8/1996 does not regulate this obligation of the right holder, the common law provisions in the field are applied, and we distinguish between the guarantee for the personal deed and for a third party's deed.

Amongst the obligations, the doctrine lists[53]: the author is liable for previous or subsequent assignments made, even if they concern a different work, but which only is different from the first one by insignificant details; the assignor must refrain from any acts or actions that disturb the normal use of the work; if the assignor transferred to the publisher the right of reproduction and distribution for one edition only, they may not conclude another contract before the first print is exhausted, respectively they may not include the work in a complete edition of their works before the previous print is exhausted; the assignor guarantees the publisher against the vices of the edition subject and that make the work improper for reproduction and distribution.

The guarantee for a third party's deed only includes the rightful nuisance, hence the holder of rights guarantees the publisher both against counterfeit that it could perform itself, and against the counterfeiting of the work by third parties. Against the latter, both the publisher and the holder of rights may initiate the action in counterfeit against the latter.

The publisher holds the following obligations:

a) The obligation to publish the work (art. 48 (1) and art. 56(3))

By the nature of the publishing contract, the obligation to publish the work is both a right, and an obligation of the publisher, but Law no. 8/1996 regulates this obligation indirectly[54], by sanctioning the publisher's failure to observe the work publication term. To this end, art. 56(3)-(4) stipulates as follows: "(3) If the publisher does not publish the work within the agreed term, the author may request the termination of the contract and non-performance damages. In this case, the author maintains the remuneration received, or, as the case may be, can request the payment of the full compensation stipulated in the contract.

(4) If the term for the publication of the work is not stipulated in the contract, the publisher is bound to publish the same within no more than one year as of the acceptance thereof."

In so far as the term for the publication of the work is concerned, in the absence of an express contractual clause, it follows that it is of 1 year as of the acceptance of the work.

The obligation to publish the work is a result obligation resting with the publisher, as publication

[50] See in detail Ana-Maria Marinescu, "*Cesiunea și licențierea în materia drepturilor de proprietate intelectuală (II)* (*Assignment and licensing in the field of intellectual property rights (II). Contractele de valorificare a drepturilor patrimoniale de autor: contractul de comandă a unei opera viitoare și contractual de editare" (Contracts for the exploiting patrimonial copyright: contract for ordering a future work and publishing contract)*, Revista Română de Dreptul Proprietății Intelectuale nr. 4/2015, p. 144-151. (Romanian Magazine for the Intellectual Property Law no. 4/2015, p. 134-135).

[51] Viorel Roș, Dragoș Bogdan, Octavia Spineanu-Matei, *op.cit.*, p. 381.

[52] Viorel Roș, Dragoș Bogdan, Octavia Spineanu-Matei, *op.cit.*, p. 380.

[53] Viorel Roș, Dragoș Bogdan, Octavia Spineanu-Matei, *op.cit.*, p. 381-382.

[54] Viorel Roș, Dragoș Bogdan, Octavia Spineanu-Matei, *op.cit.*, p. 383.

supposes the communication and distribution of the work to the public, mainly, **the reproduction and distribution of the work**.

According to art. 14 of Law no. 8/1996, **reproduction** means the full or partial performance of several copies of a work, either directly or indirectly, temporarily or permanently, by all means and under any form, including the performance of any and all sound or audiovisual recording of a work, as well as the permanent or temporary storage thereof using electronic means.

In the case of the publishing contract, reproduction considers:

- **a minimum and a maximum number of copies** (art. 51(c)), hence **the clause concerning the number of copies**;

- **the number of editions** (art. 51(f));

- **the number of copies reserved to the author free of charge** (art. 51(e));

- **the conditions of use**, for example, the edition type (luxury, pocket, volume, etc.), the distribution channel, the number of volumes, the format, quality, media, run, sale price, etc.

Considering the definition of the reproduction notion, I hereby stress the focus that should be laid on the "means" and the "form" of the reproduction. Hence, the electronic reproduction of the works must be expressly stipulated in the contract. According to the past years' practice, in the case of written works, authors assign to publishers both the physical, print or hardcopy reproduction, and the digital reproduction, regardless of the means through which it is achieved (scanning, audio book etc). I see digital reproduction as associated to works already published in print format and for which a publishing contract was already concluded, but it only stipulates the print reproduction, it is carried out without the consent of the holder of rights and normally the publisher must authorize this type of reproduction as well, with the correlated payment of a remuneration.

To this end, art. 52 of Law no. 8/1996 stipulates that the publisher acquiring the right to publish the work under the form of a volume holds, towards other similar offerers, with an equal price, the priority right to publish the work in electronic format. The publisher must communicate its option in writing, within no more than 30 days as of the receipt of the author's written request. This priority right of the publisher is valid for 3 years as of the publication of the work.

Thus, it follows that the publisher who concluded a publishing contract with the author concerning the publication of the work under the form of a volume, holds the priority right to publish the work in electronic format. This right may be enforced by formulating a written offer on behalf of the author, submitted with the publisher, to which the latter must respond within 30 days as of the receipt of the offer.

reproduction term;

As shown above (art. 48(1) and art. 56(3)), the law only makes reference to the work publication term, i.e. 1 year as of the acceptance of the work, not the one for the performance of the copies. I believe that, through the application in extenso of the work publication term, it also affects the copy performance term and, by way of consequence, if the copies are not performed within 1 year, the work cannot be published, under the sanction of the termination of the contract and payment of damages to the author.

The second part of the obligation to publish the work is the **distribution** one. According to art. 14^1 of Law no. 8/1996, distribution means the sale or the transmission under any form whatsoever, in exchange for a price or free of charge, of the original or of the copies of a work, as well as the public offering thereof. Thus, the distribution of the work depending on its type supposes the sale, lease, or borrowing thereof.

The specialized literature in our country[55] brings into discussion a very important aspect from the economic perspective of the distribution of the work, i.e. the **publicity** thereof, and which consists of the operations through which the work is promoted, communicated, in order to attract clients. Moreover, the specialized French literature[56] shows that the publicity of the work for the promotion thereof is an actual obligation of the publisher. This obligation is a means and not a result obligation, and, hence, it shall be fulfilled according to the general practices, depending on the nature of the work and according to the publisher's financial resources, e.g., by: posters, the inclusion in work catalogues, the offering free of charge, etc.

The work distribution activity will of course be carried out by the publisher, but it can also be performed by a third party with whom the latter concluded a distribution contract. In general, the publishing contract must also stipulate the distribution price, but if no reference is made to the same, then it is presumed that the assignor agreed it being established by the publisher. Of course the publisher cannot establish an exaggerated distribution price, because it would prevent the sale of the work, and would make its own activity more difficult.

b) The obligation to use the work (art. 47 (1)-(3))

The obligation to use the work is not specifically regulated under the legal provisions on the publishing contract, but under the general assignment contracts. Thus, art. 47(1)-(3) stipulates:

[55] Viorel Roș, Dragoș Bogdan, Octavia Spineanu-Matei, *op.cit.*, p. 385.
[56] André Lucas, Henri-Jacques Lucas, *op.cit.*, p. 501.

"(1) The author may request the termination of the contract for the assignment of the patrimony right if the assignor does not use it or insufficiently uses it and if, through the same, the justified interests of the author are considerably affected.

(2) The author cannot request the termination of the assignment contract, if the reasons for the non-use or insufficient use are due to its own fault, to a third party's act, an Act of God, or a force majeure event.

(3) The termination of the assignment contract, mentioned under para (1), cannot be requested before the expiry of a two-year term as of the assignment of the patrimony right over a work. In the case of the works assigned for daily publications, this term shall be of three months, whereas in the case of periodicals, it shall be of one year."

At the same time, the obligation to use the work follows from the publisher's obligation to publish the work, thus turning the publishing contract, as all other assignment contracts, in fact, into a successive performance contract[57]. In the light of the same, the doctrine[58] has identified the following obligations for the publisher: to hold a sufficient number of copies, both on stock, and for sale, and to reprint the work, if exhausted. According to art. 53 of the law, the publisher is bound to allow the author to make improvements or other changes to the work in the case of a new edition, provided that the same do not essentially increase the publisher's costs and that they do not change the nature of the work, unless otherwise stipulated in the contract. Hence, in the case of a new edition, the publisher is bound to allow the author to make improvements to the work, and such improvements must cumulatively observe two conditions: not to essentially increase the publisher's costs and not to change the nature of the work.

c) The obligation to pay the remuneration due to the holder of the rights (art. 48)

On the one hand, the obligation to pay the remuneration due to the holder of the rights is subjected to the general assignment rules: it shall be paid to the author, but also to its successors in rights; it is established by mutual consent: in a fixed amount, or pro rata with the amounts collected from the use of the work, or in another way, for example fixed amount plus percentage; if the remuneration was not established under the contract, the author can request the courts to cancel the publishing contract; in the case of an obvious discrepancy between the amount of the remuneration and the benefits obtained by the assignee, for which the author may request the competent bodies to review the contract or adequately increase the remuneration.

On the other hand, in the case of the obligation to pay the remuneration due to the holder of the rights, Law no. 8/1996 also regulates certain specific aspects concerning the destruction of the work by force majeure, the author being entitled to a remuneration, which shall only be paid if the work is published. The law distinguishes between full and partial destruction of an edition. Thus, according to art. 57(2) of Law no. 8/1996, if a prepared edition is fully destroyed, as a consequence of force majeure, before it is published, the publisher is entitled to prepare a new edition, and the author shall hold the right to receive a remuneration for one of these editions only, and according to art. 57(3) of Law no. 8/1996, if a prepared edition is fully destroyed as a consequence of force majeure, before it is published, the publisher is entitled to reproduce, without paying a remuneration to the author, the number of copies destroyed.

d) Obligation to return the original of the work (art. 55)

This obligation is specific to the publishing contract, pursuant to art. 55 of Law no. 8/1996, the publisher being bound to return the original of the work, the originals of the works of art, the illustrations, and any other documents received for publication, unless agreed otherwise.

e) The obligation to offer the copies available on stock (art. 56(5))

This obligation also is specific to the publishing contract, pursuant to art. 56(3) of Law no. 8/1996, the publisher being bound to first offer to the author the copies of the work, which the publisher intends to destroy, if the same are on stock over a period of 2 years as of the publication date, and unless a different term is stipulated in the contract. Under the current wording of Law no. 8/1996, the offering of the works on stock to the operator is free of charge, because the non-altered wording of the work stated that the publisher was to first make an offer to the author, according to the price it would have obtained by selling the same to be destroyed.

Concerning the publisher's obligations, I stress the **relevance of the observance by the publisher of all author's moral rights**. Even if this aspect is not regulated as an express contract clause, I believe that they should be observed beyond all doubt, because they concern the most important intrinsic features of the author's personality:

- the right to decide if, ho9w, and when the work is to be made public – the author is the only one entitled to decide in which way the work is going to be made public, for example, a written work, published as audio book, and when the work is to be made public, for example, when the author is certain that the work will be completed.

- the right to claim the acknowledgement of the capacity as author of the work – i.e. to be mentioned as author of the work, e.g., on the cover of a book;

[57] Viorel Roș, Dragoș Bogdan, Octavia Spineanu-Matei, *op.cit.*, p. 386.
[58] *Idem.*

- the right to decide on the name under which the work is to be made public – if the work is to be made public under a pseudonym, the publisher must observe the author's will and not to disclose to third parties and to the public the actual identity of the author. This moral right of the author becomes even more important in the relation with the author from the perspective of the plagiarism offence. Without insisting on the plagiarism notion, I hereby stress that according to the provisions in art. 141 thesis 2, the deed of a person that makes a work public under a different title than the one chosen by the author is an offence. Hence, publishers must strictly observe the author's moral right to decide on the name under which the work is to be made public; if not, of it makes the work public under a different name than then one chosen by the author, the deed may be regarded as plagiarism.

- the right to claim the observance of the integrity of the work and to oppose all amendments, as well as any and all prejudice caused to the work, if it affects their honor or reputation – the publisher is bound to observe the integrity of the work, and may only publish it in the form decided upon by the author. The publisher can only eliminate fragments of the work with the consent of the author, i.e. in the form agreed upon by the author. The publisher may only request the author to bring certain changes to the work, if it believes it beneficial for the publication of the work. If the author refuses to bring the changes requested by the publisher, the latter is entitled not to publish the work. It goes without saying that the publisher may correct spelling, punctuation, and syntax mistakes, but not the author's style[59] or add notes, annotations, or comments to the work.

For the very purpose of protecting the author's moral rights, as stipulated above, in the case of a new edition (art. 53), the publisher is bound to allow the author to make improvements or other changes to the work, with the cumulative observation of two conditions: not to essentially increase the publisher's cost and not to change the nature of the work.

- the right to withdraw the work, compensating, if applicable, the holders of the rights of use, prejudiced by the withdrawal – if the work was published and then withdrawn by the author, the latter is bound to compensate the publisher.

Contract assignment - In so far as the **assignment of the publishing contract is concerned**, art. 54 of Law no. 8/1996, stipulates that the publisher may assign the publishing contract with the author's consent only. This legal provision is in compliance with the intuitu personae nature of the publishing contract, determined by the publisher, by the capacity it holds, and by the relations established with the author. Deriving from the intuitu personae nature of the publishing contract, the author's consent must be indicated in writing, even though the law does not stipulate the same, unlike the theatre and musical performance contract, in the case whereof it is stipulated[60] that "The beneficiary of a theatre or musical performance contract may not assign the same to a third party show organizer, without the written consent of the author or of the representative thereof, apart from the case of the simultaneous full or partial assignment of this activity".

The publishing contract may terminate both under the common law provisions (mutual consent of the parties, expiry of the term), and for specific cases (exertion by the author of the right to withdraw the work, the last agreed edition is exhausted, the work is not published within the set term, the original work is destroyed).

Edition means[61] all the copies of a printed work, of one or several runs, for which the same squabble is used, and run[62] means the number of copies a book or a periodical is printed in. Hence, an edition may have one or several runs.

To this end, art. 56(1) of Law no. 8/1996 stipulates that, in the absence of a clause to the contrary, the publishing contract terminates after the expiry of the term agreed upon or after the last edition agreed upon is exhausted. At the same time, para 2 of the same article defines the notion of "exhausted edition", respectively the one for which the number of copies not sold is below 5% of the overall number of copies and, by all means, it is below 100 copies. I believe that this legal provision, especially in the case of books, no longer resonates with the commercial realities, since a run of 100 copies currently is regarded as a large one.

If the work is not published within the set term, the author may claim the termination of the contract and damages.

If the work is destroyed pursuant to the fault of one of the parties, then the entitled party may claim damages. If the work is destroyed pursuant to an Act of God or to force majeure, the contract shall be terminated and no damages may be claimed.

Legal features[63] - Considering all the aspects above, the following **legal features** of the printing

[59] Yolanda Eminescu, *"Dreptul de autor – Legea nr. 8 din 14 martie 1996 comentată"*, Lumina Lex Printing House, Bucharest, 1997, p. 161.
[60] Art. 59(4) of Law no. 8/1996, as subsequently amended and supplemented.
[61] https://dexonline.ro/definitie/ediție
[62] https://dexonline.ro/definitie/tiraj
[63] See in detail Ana-Maria Marinescu, *"Cesiunea şi licenţierea în materia drepturilor de proprietate intelectuală (II)* (*Assignment and licensing in the field of intellectual property rights (I). Teoria generală a contractelor de valorificare a drepturilor patrimoniale de autor"*, Revista Română de Dreptul Proprietății Intelectuale (Romanian Magazine for Intellectual Property Law) issue 3/2015, p. 101-102.

contract may be identified, which determine a proprietary physiognomy[64]:

- it is a **bilateral contract**, because both parties hold mutual obligations: the publisher to reproduce and distribute the work, and the author to make the work available to the publisher;

- it is **an onerous and commutative contract**, because both parties desire to obtain patrimonial advantages, and mutual obligations are known ever since the conclusion of the contract, even if the author's remuneration is established pro rata with the gains obtains from the distribution of the work, because in this case the scope of the publisher's obligation is determined. I believe that the parties cannot agree upon the conclusion of the publishing contract free of charge[65], because it would void one of the contract elements, i.e. the author's remuneration. To this end, the Romanian lawmaker stresses the onerous nature of the publishing contract (art. 51(1)(d)), because it sanctions the lack of the clause concerning the author's remuneration with the possibility of the interested party to request the termination of the contract (art. 51(2)).

The specialized literature[66] has shown that a publishing contract is free of charge when, for instance, the author assigns to the editor the rights to reproduce and distribute the work without any material claims in exchange.

- it is a **consensual** contract, i.e. it is concluded through the mere willful consent of the parties, the written form being stipulated ad probationem only.

- it is a contract that **translates rights** in the case o the exclusive assignment, because it supposes the transfer of an actual right, whereas, in the case of the non-exclusive assignment, it concerns the establishment of a personal right with the correlative obligations, and the non-exclusive assignor cannot lodge the counterfeit action[67].

- it is a **designated contract**[68] – because it is distinctly appointed as a legal institution by Law no. 8/1996;

- it is a **negotiated contract**[69] – because it is concluded after the negotiation of the contractual clauses between the parties.

Comparative Law - From the point of view of the comparative law, we shall analyze the provisions in the publishing contract in the French law, highlighting certain aspects that I believe to be important for the understanding of the contract, because national regulations are similar. The French Intellectual Property Code regulates the publishing contract under art. 132-1 – art. 132-16 and defines it as the contract through which the author of an intellectual creation work or the holders of rights assign, under predetermined conditions, to a certain party referred to as editor, the right to reproduce the work in exchange for a remuneration, so as to ensure the publication and distribution of the work.

French court orders highlighted the intuitu personae[70] nature of the publishing contract in that it supposes mutual trust between the author and the editor; hence, the deed of the editor that does not admit as to the fact that it presented the author as racist ”precursor of contemporary genocide”, infringes this specificity of the contract. It is the same with the deed of the publisher indicating to the public the identity of the author who wanted to maintain the pseudonym or, in general, through its behavior, ruined the author's public credibility. According to this specificity of the publishing contract, the publisher must guarantee the protection of the author's moral and intellectual patrimony, in a climate of mutual trust. To this end, the publisher may publish competing works, but it does make a mistake if it takes no action to promote the first work so as to facilitate the launching of the second work.

If the publisher faultily develops the work, result of its own fault and infringement of contractual obligations, the author may request the remedy of the prejudice, which shall be appreciated by the law court and that may consist, for instance, of the destruction of the work copies[71].

The publisher may be bound to correct severe spelling or semantic errors in the manuscript or communicate the same to the author to have them corrected[72].

The insufficient promotion of the work by the publisher, the absence of a satisfactory advertising campaign and the faults in the distribution in bookshops shall be reasons for the termination of the contract by the author[73].

In so far as the author's remuneration is concerned, it must be pro rata with the results of the use of the work, respectively, as stipulated by the French courts, at the level of the public work sale price[74]. By way of exception, art. 132-6 of the Intellectual Property Code stipulates that the remuneration for bookshop editions may be under

[64] Ioan Macovei, *”Tratat de drept al proprietății intelectuale”*, C.H. Beck Printing House, Bucharest, 2010, p. 476.
[65] See the contrary opinion of Viorel Roș, Dragoș Bogdan, Octavia Spineanu-Matei, *op.cit.*, p. 376; Bujorel Florea, *op.cit.*, p. 22.
[66] *Idem.*
[67] Viorel Roș, Dragoș Bogdan, Octavia Spineanu-Matei, *op.cit.*, p. 376.
[68] Bujorel Florea, *op.cit.*, p. 25.
[69] Bujorel Florea, *op.cit.*, p. 26.
[70] Code de la Propriété Intellectuelle, LexisNexis Litec, Paris, 2009, p. 217.
[71] Code de la Propriété Intellectuelle, LexisNexis Litec, Paris, 2009, p. 218.
[72] *Idem.*
[73] *Idem.*
[74] *”Droit d'auteur et droits voisins”*, Editions Francis Lefebvre, Levallois, 1996, p. 173.

the form of a lump sum, with the author's consent, for the first edition and for: scientific or technical works; anthologies and encyclopedias; prefaces, notes, introductions, presentations; illustrations; limited deluxe editions; prayer books; upon the translator's request for translations; popular editions; children albums. Thus, the lump sum remuneration only applies to bookshop editions, for the first edition and with the author's formal consent.

The penalty clause may be applied, for instance, in the cases in which: the author tardily sends the manuscript to the publisher and the publisher registers delays in the reproduction and/or distribution of the work[75].

Unlike Law no. 8/1996, the French Intellectual Property Law stipulates that the author must personally express the written consent. Hence, the written form of the publishing contract is an essential condition for the conclusion thereof. To this end, the French courts believes that the republishing of a new run developed by the publisher in the absence of a written publishing contract is illicit.

The editor is bound to reproduce the work only under the conditions, form, and according to the means stipulated in the contract and may not change the work in any way whatsoever without the writer's written consent. Hence, the publisher is bound to respect the work, to which end, if the editor could not bring any changes to the work, this obligation also applies to the title of the work and to its preface[76]. At the same time, the author is bound to issue the ready for press notice, so that if the publisher publishes the work without obtaining such notice from the author, it severely infringes the author's moral entitlement concerning the observance of the integrity of the work[77].

Moreover, the publisher is bound to mention the author's title according to its will and without indicating the identity of the author who wanted the work to be published under a pseudonym[78].

One of the most important obligations of the editor, regulated by the Intellectual Property Code in France[79] unlike Law no. 8/1996, concerns the fact that the publisher is bound to ensure the permanence and commercial distribution of the work, according to professional customs. To this end, the French jurisprudence constantly stated that the obligation of the publisher to publish the work is an essential one, without which there is no editing contract[80]. As a principle, the publisher is bound to ensure the permanent use of the work and binds the publisher to permanently hold copies available for sale and distribution, but not to ensure the publicity of the work during its use. The publisher that did not notably managed, for more than 20 years, to ensure the permanent use of the work, may not republish the work without the consent of the authors[81].

3. Conclusions

Romanian legal regulations concerning the publishing contract are compliant with the ones in the European Union, but they do require better systematization of the wording, which is the subject of *lege ferenda* proposals.

The article presents in detail, by permanent reference to the laws applicable and the specialized literature in the field: the definition of the publishing contract, the parties, with the indication of the capacity thereof, the contract clauses, the obligations of the parties, the termination provisions. Moreover, the legal provisions in France concerning the publishing contract are analyzed. Apart from the practical nature of the article, it also is an important reference source.

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THE COPYRIGHT IN THE INFORMATION SOCIETY

Cristinel Ioan MURZEA*

Abstract

The contemporary society has imposed new demands in the development and application of copyright as a result of structural changes which occur as a result of developments in science, technology and especially communication technologies and of informatics. Legal doctrine highlights axiomatic truth according to which the "environment created by technological developments" brings forward the profound informational dimension of human being in the contemporary society. In this context the integration and the harmonization of legislation of the Member States of the European Union leads to a complex and dynamic process by which the copyright called to legally protect intellectual creation in contemporary society, acquires a universal vocation in the contemporary society, because there are no barriers or impediments in its spreading especially due to the phenomenon of multiplication and improvement of means of information and communication

Keywords: *intelectual property, intellectual creation, information period, right to information, incorporeal right.*

1. Introduction

The continuous multiplication and perfection of communication and computer technologies, as well as the gradual development of scientific knowledge and techniques in general are all aspects which define the contemporary age and these objective factors which define law give rise to new challenges in regard to enforcing positive law.

Thus, specialty doctrine shows that "the surrounding environment" created by the technical evolution gives way to more and more talks about the profoundly computerized nature of people nowadays[1].

2. Content

Nowadays, more than ever before, access to information, much like the free circulation of information, has become a paradigm concept which allows us to build new horizons by placing scientific research in a society which is more increasingly subjected to the specific effects of globalization. Within this approach, most theoreticians notice, quite justified in our opinion, that, intellectual creation can't be subject to any territorial constraint, as it clearly has an international vocation[2].

At the same time, the rapid circulation of the products of the human spirit is emphasized, as there are no more artificial boundaries in regard to spreading intellectual creation seen as a non corporal good and subject to copyright; this is why this area of human activity is able to circulate and be reproduced extremely easy[3], given the progress of modern communication and information means.

From this perspective, human creation seen from a legal point of view represents a non corporal right, which is distinctly regulated in regard to its legal protection, given the continuous development of communication means used to express these complex rights in the area of legal relations, by valorizing the legal effects they produce.

Based on these coordinates, we can state that, given the present context, the protection of intellectual rights is interconnected with the dynamic of communication and information means and the evolution of these technologies has provided the necessary background in order to expand and diversify the possibilities of knowing and spreading ideas[4]; all of these have created new forms of legal regulation objectified by the natural tendency of unifying the legal systems - the continental and the Anglo-Saxon one - in regard to copyright.

The protection of copyright in the "digital era" requires the harmonization of all moral and patrimonial rights with the natural interest of the general audience, who is the main consumer of information; on the other hand, all these must be included within the legal interest of the member states of international communities, whether these states are members of international organizations or not, the author of a new work and the work itself must be protected; this reality became an axiom which outlines positive law in regard to intellectual creation.

There are more and more opinions which state that all rights which derive from information provide

* PhD, Professor, Faculty of Law, *Transilvania* University of Brasov (e-mail: **cristinel.murzea@unitbv.ro**).

[1] I. M. Bârsan, C. Murzea, A. Repanovici, *Aspecte legislative privind dreptul de autor şi accesul deschis la cunoaştere," Legal aspects regarding copyright and open access to knowledge"*, Junimea Publishing House, Iaşi, 2015, p. 7.

[2] A. Circa, *Protecţia drepturilor intelectuale. Actualităţi şi perspective, "Protection of intellectual rights. Present issues and perspectives"*, Universul Juridic Publishing House, Bucharest, 2013, p.9.

[3] Ibidem, p.9.

[4] I. M. Bârsan, C. Murzea, A. Repanovici, *quoted works*, p.9.

new standards in the process of creating laws, as it is influenced by the dynamic of the means used to spread information as well as the natural tendency to conserve the complex content of the right which protects intellectual creation, whether it is the moral side, namely the personality of the author or its patrimonial component.

It was repeatedly stated that the age we live in is without a doubt "the age of information", thus ensuring that each individual has a fundamental right, that of being informed and given access to information[5].

This imperative, without which progress in any area of activity and human creation is unconceivable, must be harmonized with the regulation which governs copyright, thus preserving and valorizing the attributes of this dual right, as seen form the perspective of its legal reality.

Thus, a famed theoretician states that "the nature of copyright is the legal expression of the representation that a society provides for its own culture"[6].

Undoubtedly, any research states "ab initio" access to a primary information, a series of acquired knowledge which must be adapted and developed in future theoretical or experimental constructions which must represent the basis for any future science endeavor.

On a global scale, information is more and more expensive, and access to specialty literature is costly and troublesome; this is why the concept of "open access" became obvious as the "the age of information" is more and more visible as a reality imposed by the science world.

The obvious question which arises is of whether this natural tendency in communication and science by computer means violates some "classical attributes which define the complex nature of copyright". Copyright is the ensemble of rights which have as object non corporal goods, such as copyright and any connecting rights, licenses, stocks in trade, civil clients and so on[7].

As a consequence, we can establish, based on their forming elements, a congruence between intellectual property and the right to private property. Such an opinion is similar to that of the Romanian Constitutional Court, who expressly motivated Decision nr 541/2004 by stating that intellectual property seen "lato sensu" (as patrimonial copyright and as industrial property) is the object of legal protection similar to the right to private property according to article 44 of the Romanian Constitution.

However correct this interpretation may be, we must not ignore the dual character of copyright, as it has a patrimonial side and an extra patrimonial component which is classified as moral copyright included in the wide sphere of personality rights. There is talk of a subjective process of shifting the person of the author over to the work itself during the creation process; this process is manifested even after the death of the author. Thus, a pertinent opinion was pointed out, that according to which non patrimonial copyright is a "special right", distinctive from other rights of personality such as the right to have a private image, the right to honor, the right to the respect of private life and so on.

We can clearly notice that, in regard to the object it involves, we can identify a non patrimonial right presented as a real right over a mobile non corporal good; from the perspective of subjective rights, in regard to its content, we can see a „sui generis"[8] right. Thus, moral rights are an unanimously accepted species of personal non patrimonial rights[9].

Considering the complex nature of copyright, we ask the question of whether open access to information in regard to science research impairs on the attributes of this dual right - copyright - as seen in all its complexity.

There is a tendency within the science community according to which academic research and the research founded by public finances should be accessible freely along with the spread of Information Technology and Communication (ITC) as well as the internet.

We wonder to what extent this free access to information or non expensive information will impair on the patrimonial component of copyright and on the extra patrimonial component, in regard to the moral rights of the author.

The answer is different, as specialty doctrine presents different opinions in continental law, where the conclusions of the German school are opposed to those of the French school. Thus, German school supports the theory of unity of copyright, by placing great importance on the indestructible connection between the work and the personality of the author - thus showing that copyright can't be transferred but it can be licensed or chartered. According to the previously mentioned theory, the two categories of attributes are in sync and in perfect balance, in a state of equality which does not allow the hierarchy of moral rights as opposed to patrimonial ones[10]. In the spirit of this orientation, free access to information and spreading information is „ab initio" restricted by

[5] Ibidem, *quoted works*, p. 8.

[6] J. Cl. Edelman, *Propriete litteraire et artistique*, Fasc.1112, nr.2, apud A.Lucas, HJ Lucas, *Traite de propriete litteraire et artistique*, Liteq Publishing House, Paris, 2006, p. 42.

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[10] A. Frangon, *Oeuvre litteraire. Droit moral. Champ d' application. Droits de personnalite*, in *Review* "RTD com", 1994, p. 48.

the author of the work, as the work and its creator are closely connected thus making the use of the work more difficult through the legal forms of using the intellectual creation.

The French school offers, through its philosophy, the thesis according to which copyright contains two categories of prerogatives, the moral one objectified by moral rights, which are inherent and the patrimonial prerogative which includes the right to use the work, a patrimonial right which be subject to different legal procedures[11]. The supporters of this theory have pointed out the interdependence of patrimonial rights and the moral rights, as the use of creation depends on the act of divulging it, which is the moral aspect of this right[12].

This school created the opinion according to which copyright has a complex legal nature, containing both a moral right which is included in the wide category of personality rights and a patrimonial right of using the work, which is clearly a real right.

Romanian specialty doctrine - see C. Stătescu, Fr. Deak, St. Cărpenaru – supports the idea that we can distinguish between this duality, as the moral right is more influential and it removes the enforcement of common law rules[13]. This opinion was embraced by the Romanian lawmaker who, in article 1 of the copyright law states that "copyright is strictly connected to the person of the author"[14]. The moral component existed before the patrimonial one and allows for the extension of the personality of the author even after he is no longer alive, as opposed to the temporary character of patrimonial rights which are not a consequence of their legal nature, but the answer to the interest of the public[15].

This situation creates an objective premise regarding the simple valorizing of information by efficient communication, as a result of the accessible means by which the right to use a protected work on a national and international level are transmitted.

As a result of globalization, the world nowadays creates a dynamic process by which "the information person" as a creator of material and spiritual values is called to receive, analyzes, select and form a hierarchy in order to valorize information through his decisions and his behaviors. Thus, a biunique relation is created between the need for information in any human creation and the legal means to protect and valorize the right to intellectual creation; thus, we are currently in a fast and dynamic process of aligning the two great systems of law in regard to intellectual creation, namely continental law and Anglo-Saxon law.

As the present times are characterized by the accelerated development of information technology and communication, the adjustment of legal regulations regarding the intellectual creation rights is in a dynamic process which is particularized by finding new legal tools meant to ensure the rights of authors and to create an optimum background for the security of information.

The national legal background as well as the international one clearly state that the right to have free access to information - see article 19 of the Universal Declaration of Human Rights, article 10 of the European Convention of Human Rights, as well as article 30 of the Romanian Constitution - is an essential element in the context of exercising other fundamental rights, thus manifesting as a positive factor associated with the means of using information, but at the same time, guaranteeing and optimally valorizing the rights resulted from intellectual creation.

In this context, article 19 of the Universal Declaration of Human Rights unequivocally establishes that „free access to information is one of man's fundamental rights".

Any lawmaker would consider the specific legal endeavor of regulating the new social relations of contemporary society in efficient legal texts which would protect both the rights of authors of intellectual creations, as well ensuring the „free circulation of information" within the limits of full security.

Copyright, seen as a positive right, must find the optimum tool through which it can phrase regulations, principles and legal institutions which can protect the subjective rights of authors, without restricting „free access to information".

It was shown in specialty doctrine that the issue which defines „the right over information" is highly complex, an aspect which determines a constant evolution of laws, as it is found in a biunique nature in relation with the changes that occur in the area of information techniques and the spreading of information resulted from intellectual creation, with express reference to technical information.

It is undoubtedly true that „we live in an information age, in which any action of man is centered on collecting, manipulating, categorizing and saving information of any kind[16]; however, all these must not represent acts or facts which are likely to impair on copyright, seen „lato sensu" in regard to its legal nature, but especially in regard to its hybrid content.

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[11] A. Circa, *quoted works*, p. 30.
[12] Ibidem, *quoted works*, p. 30.
[13] Y. Eminescu, *Dreptul de autor, Legea nr.8/1996. Comentarii*, "*Copyright, Law no 8/1996. Comments"*, Lumina Lex Publishing House, 1997, p. 139.
[14] See *Law no 8/1996*.
[15] C. Caron, *Droit d'auteur et droits voisins*, Litec Publishing House, Paris, 2006, p. 225.
[16] I.M. Bârsan, C. Murzea, A. Repanovici, *quoted works*, p. 86.

An extremely rigid law in regard to the legal means of transmitting, transferring and especially the free circulation of information would inherently impair on progress, as access to information which is stored anywhere in the world, as well as the ability to combine and analyze information offers people the possibility of creating new notions, which have added value[17].

Under such conditions of expressing copyright, we are in the presence of an extremely dynamic process which entails a concentrated effort from national law, but especially from the dynamic perspective offered by the legal procedures meant to contribute to the harmonization of laws in this area.

The practice of national courts is influenced by the solutions of the Justice Court of the UN, the Office for Harmonization in the Internal Market, the European Patent Office, as all these institutions have a priority right in creating unified practice in the process of enforcing law, in regard to the protection of intellectual property in close connection with creating open access to information for institutions, financing and research facilities, publishing houses, libraries as well as the researchers who work on international projects.

Thus, information becomes a common good, which brings upon a new challenge for the national lawmaker as an effect of the globalization of the European or international one; this challenge involves harmonizing procedures and legal means used to sanction those who violate this rights, be it patrimonial or non patrimonial, by defining the complex content of intellectual rights.

Some researchers have undergone analysis regarding the promotion of the result of their research by means of open access to information without neglecting the specific differences which exist between national laws in regard to intellectual rights. Thus, A.Swan and S.Brown point out, in one of their most recent research, the specific means by which the result of their research is promoted by means of direct access by identifying the following paths – pointing out the active means of open access to information through the internet, familiarizing the authors with these new means of spreading information, providing access to information by computer means and increasing the interest for identifying alternative sources which follow the visibility of the impact of science research[18].

These objective factors create, in the present stage, factors which would set up intellectual property rights in the dynamic process of harmonizing national laws with the institutional and legal institutions of the European Union, but also in the complex process of unifying provisions regulated by continental law and Anglo-Saxon law, within international organisms (for example OMPI) meant to protect rights which result from the extensive activity that defines intellectual creation seen as a non corporal property.

In this context, the lawmaker of the new Romanian Civil Code states, in article 2624, the laws which apply to works of international creation, thus referring to non corporal goods as follows – „The birth, content and extinction of copyrights over a work of intellectual creation are subject to the laws of the state where they were first brought to the attention of the general public, by publishing, representation, display or other adequate means. The secret works of intellectual creation are subject to the national laws of the author”[19].

This vision of the Romanian lawmaker enforces principles regulated by European laws, expressed in the procedure of harmonizing the protection of intellectual rights. As an example, we mention – EC Directive 2004/48 of April 29th, 2004 regarding the respect of intellectual property right; EC Directive 2001/29 regarding the harmonizing of certain aspects of copyright and the connecting rights in information society, but also solutions of the Justice Court of the European Union who managed to progressively restrict the national monopoly which was obvious in this area.

It was shown that within the dynamic process of creating the unique European market, these is another process which occurs, that of changing intellectual property right from a purely national right to a harmonized right, in connection with the principles of the European Union. (Times New Roman, 10, justify)

3. Conclusions

In conclusion, in the digital era, we are in the presence of an obvious process by which an incentive is created in order to valorize the existing works, with specific agreement from the authors.

The creator of a work has the power to authorize the use of the content of the work by those who are interested, thus waving a part or all the prerogatives of copyright, according to the principle of availability; this is possible both from a technical point of view as well as from a legal point of view, by awarding the appropriate license.

By creating licenses and especially free licenses which remove any restriction in using a work, a general interest is achieved in regard to harmonizing the principles by which the right of intellectual creation is protected, with free access to information, a sine qua-non condition for the overall progress of any society.

[17] Ibidem, *quoted works*, p. 86.
[18] Ibidem, *quoted works*, p. 20.
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THE LEGAL PROTECTION OF DATABASES

Viorel ROŞ*

Abstract

The databases are a part of our everyday life and we use them almost without noticing how many and how valuable they are. Without them, our life would be extremely difficult. Just as difficult as a life without computers. There are many advantages that the databases provide to their users: quantity and quality, the ease in identifying the sought information, the possibilities of retrieving the sought information and, last but not least, the user costs, which are much lower than those required for the individual identification of the same information. These are the reasons for which the efforts for creating databases should be compensated by specific means of protection, which ensure both the investment recovery and the expected return and encourage the investments in this field. The lawmaker chose the protection by means of copyright and sui generis right, based on the originality or lack thereof. Below we shall address these means of protection.

Keywords: *databases, copyright, sui-generis right, originality, lack of originality, cumulative protection.*

1. Introduction. The general status of databases

According to some authors, the presence of databases in the French Intellectual Property Code, in the section dedicated to copyright, is explained by the fact that a French minister of culture wanted to keep them in his/her area of competence[1]. However, I believe that this statement is an exaggeration, given that **the protection of databases under** copyright has a long tradition and is internationally enshrined. Still, it is true that **the protection of databases under sui generis right is recent enough**, as Directive no. 9/1996 on database protection is only 20 years old.

Thus, the Berne Convention of 1886 for the protection of literary and artistic works, under art. 2(5) refers to the **collections** of literary or artistic works, **encyclopaedias and anthologies** which "*by reason of the selection and arrangement of their contents constitute intellectual creations*".

The WIPO Treaty of 1996 on the copyright refers in art. 5 to the **compilations of data**, which by "*reason of the selection or arrangement of their contents constitute intellectual creations*" and declares them subject to copyright protection.

And the TRIPS Agreement of 1994 states in art. 10.2 ("Compilations of data") that the "***compilations of data or other material,*** *whether in machine readable or other form, which by reason of the selection or arrangement of their contents constitute intellectual creations shall be protected as such. Such protection, which shall not extend to the data or material itself, shall be without prejudice to any copyright subsisting in the data or material itself*" are subject to copyright protection.

We may find similar statements in art. 8 letter b) of Law no. 8/1996, which declared as subject to copyright protection the anthologies, encyclopaedias, compilations of materials or data, including the **databases**, if, by ***reason of the selection or arrangement of their contents they constitute intellectual creations***.

Our law, harmonising the protection of databases, as it happened in all European Union member states, also provides protection for the databases **that are not intellectual creations**, but which meet the requirements set by art. 122[1], **under a sui generis right**. This is the case of the databases in which the elements forming their contents are ***systematically or methodically arranged*** *and may be individually accessed by electronic means or otherwise*.

However, we must note the fact that, by regulating the legal protection of databases, Directive no. 96/9/EC allowed for the possibility of protecting by other means the databases that are not protected under copyright, since they are not intellectual creations, and that cannot be protected under sui generis right either, as they do not meet special conditions. This way, by means of the Decision of 15 January 2015, rendered in case C-30/14, **Ryanair Ltd** vs. **PR Aviation BV**, the CJEU decided that "*Directive 96/9/EC of the European Parliament and of the Council of 11 March 1996 on the legal protection of databases* ***must be interpreted*** *as meaning that* ***it is not applicable*** *to a database which i****s not protected either by copyright or by the sui generis right under that directive****, so that Articles 6(1), 8 and 15 of that directive* ***do not preclude the author of such a database from laying down contractual limitations on its use by third parties****, without prejudice to the applicable national law."*

It may be observed that we have **three categories of databases**: some are subject to protection under copyright, some are subject to protection under sui generis right and another category of databases that may be protected under

* Professor, PhD, Faculty of Law, "Nicolae Titulescu" University of Bucharest.

[1] Quoting Polloud-Dulian Frédéric, *Le droit d'auteur*, Editura Economica, Paris, 2005, p. 981, who quotes "La Codification de la propriété intellectuelle – Etude critique et prospective", namely Valérie-Laure Benabou and Vincent Varet.

provisions, by means of the agreements concluded between their producers and users. However, Directive no. 96/9/CE and Law no. 8/1996 only deal with databases protected under copyright and sui generis right.

2. Definition of databases

The databases could be defined as optimised management methods for works, information, knowledge, texts, any elements deemed to be perceived and used by people, in all areas and wherever they were. Therefore, the databases have the purpose of managing what is generically known as "data", which are centralised in collections (bases) and, if required, they are updated and set on all sorts of media accessible to the authorised users, as the final purpose is that of satisfying, on request and even simultaneously, several users, according to their needs, in a selective and timely manner.

The data, the information (categories in which we include all elements that may be centralised, arranged by certain criteria and accessed by the users) are processed per interest areas and categories, following criteria predetermined by their authors, in order to form databases for various domains (technical, legal, financial, commercial, etc.) and of various sizes. Even if nowadays we relate the databases with the electronic means used to access them, they are in fact not a recent creation of mankind: collections of data, information and works have been created and arranged for a long time now, in the beginning on paper (whose accessing requires a longer time) and, today, usually on electronic media, which is why they are also supplied under the name of "information products". Nowadays, life would be hard to imagine without databases (or without computers), even though most of the time we are not even aware of the fact that we use them.

As the bases we use become more and more complex, their production costs and the use of human and technical resources also increase. However, our interest in them has also increased and is still increasing, given the facilities they provide in the quick identification processes for the data of interest, works (when these are formed of works), documentation, research, etc. We have and we use databases starting from the simple phonebooks (which are personal databases), the summary table with the train or airplane ticket reservations, the catalogues in libraries or the inventories of products that may be purchase online, to the information and data collections of medium size, which are used in the management of companies, or those of large sizes, such as the information collections containing scientific works in various research fields[2] or those intended for the general public, with highly varied contents. Furthermore, the online information search engines are nothing more than search tools for information made available to the interested parties in enormous databases[3].

The processing and organisation of data/ information/ elements, comprised in databases, are usually performed with computers and computer programs and often enough represent more complex, difficult and costly activities than the creation of computer programs. And, as we shall see below, the databases and the computer programs are tightly linked. Sometimes it is incorrectly claimed that the databases are in fact computer programs. The best know such example is the case of legal databases. And it is true that, sometimes, the difference between the databases and the computer programs is not easy to reach[4].

A database contains the elements, information (data) required in one or several fields, the logical relations between said elements or information and the processing, updating and query techniques of said elements. Both the electronic format and the non-electronic format databases are protected (art. 1.1 of Directive 96/9), as the database accessing method does not represent a criterion in terms of their protection, as long as the access is possible at individual level and by any electronic means or otherwise.

The contents of the databases may ease the intrusion in the privacy of persons and may represent elements that may be used to threaten the freedom and privacy of everyone. This is the reason behind the adoption of Directive no. 95/46/EC on the on the protection of individuals with regard to the processing of personal data and on the free movement of such data[5], which states the principles

[2] For example, SpringerLink, is one of the most used electronic resources for scientific documents. It contains specialised books and journals, edited by Springer-Verlag, Kluwer Academic Publisher, Urban and Vogel, Steinkopff and Birkhauser. This database was created on the grounds of a project called "National Electronic Access to the Research Scientific Literature - ANELiS", a project with a value of RON 97,431,792.32, of which 83% represented the non-repayable eligible value of FEDR.

[3] The stated mission of Google is **organising the information available in the world and making it accessible and useful for everyone".**

[4] To this end, see civil Decision no. 955 of the High Court of Cassation and Justice, Division I of the Civil Court and the decisions preceding it, which lead to the fact the parties themselves confuse the databases with the computer programs. The fact that the protection of databases was not regulated by means of Law no. 8/1996 on the date on which it is alleged that a legal software was contracted (2001) instead of a legal database, does not excuse this confusion, given that, at the time, Directive no. 9/1996 on the legal protection of databases was in force,

[5] By means of the Decision of October 1st, 2015, rendered in case C- 201/14 Smaranda Bara et al. vs. the Chairperson of the National Health Insurance Fund, the National Health Insurance Fund, the National Agency for Tax Administration (ANAF). By means of the rendered decision, the CJEU provided that "Articles 10, 11 and 13 of the European Parliament and Council Directive 95/46/CE of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data **must be construed as opposing certain national measures, such as those discussed under the main dispute, which allow an authority belonging to the public**

of the use of personal data. According to the principle of Directive 95/46/EC, the personal data processing systems must service the people, must observe the human rights and fundamental freedoms, particularly the right to privacy, and must contribute to the economic and social progress, to the development of trade and to the wellbeing of people.

The databases **protected under sui generis right** are neither technical innovations, nor distinctive trademarks. And yet, they are subject to protection under intellectual property right. Admittedly, by placing the sui generis right under Law no. 8/1996 at the limit of the copyright; however, we must not forget that the sui generis right may also have effects, in the case of cumulative protection, in relation to the databases protected under copyright.

According to the Romanian law, when the databases are formed of works or other elements protected by copyright and when they are also intellectual creation works (they are original), said databases are derivative works (art. 8 letter b) of Law no. 8/1996).

The fact that a database is formed of works that are protected under copyright does not automatically grant originality and the status of intellectual creation subject to protection under copyright to said database. For example, a database that contains all the alphabetically ordered information on the books in a library. Certainly, the database content is important, but a database is an intellectual creation if it reflects the personality of its author.

On the other hand, a database formed of elements found in the public domain and which have not been protected under copyright may be an intellectual creation if the personality of the author is reflected in the selection or arrangement of its content. In this case, the database cannot be considered a derivative work and its protection cannot be refused on the grounds that the Romanian law views databases as derivative works and that these must be based on pre-existing works.

3. The usefulness of databases and the justification of their protection

In the information society, in the knowledge economy in which we live and evolve, the databases occupy a very important place. They represent considerable economic values. They are the drive behind our daily activities and represent precious assets for the economic and social development of all countries and for the progress of humanity by means of knowledge and information. We have also shown that in this day and age the volume of available information is doubled over shorter and shorter periods of time (a few years, by comparison to 500 years, as it was a few centuries ago). This exponential increase in the amount of information implies their focus on areas, a processing manner meant to facilitate their identification, the access thereof and the permanent updating, because the useful information is updated one.

The usefulness of databases is unchallenged nowadays. Building databases involves considerable financial investments in information storage and processing systems (entry, update, deletion, query), as well as human-related investments, as the creation of databases requires certain important human and creative resources. However, the advantages granted by databases to their users are important ones, from various perspectives: quantity and quality, the ease in identifying the sought information, the possibility of retrieving such information from the built bases and, last but not least, concerning the time-related and financial costs for the user that is intended to use said databases, much lower costs, by comparison to the situation in which said user would have to find the required information on his/her/its own.

The effort made for building databases must be compensated by specific protection means, which ensure the investment recovery and the expected return and which encourage future activities in this field. The usefulness of databases that are processed and made available to users, on one hand, and the investments involved in building them, on the other hand, represent the reasons behind their protection. Often enough, the databases created in one country are used in other countries as well. And these databases must also be protected beyond the borders of the countries in which they were created. Given that the databases are formed of information that go beyond the individual interest and the borders of their producers' country, and that building an internal market represents a European challenge, it was necessary to harmonise the legislations regulating the protection of databases, at European Union level.

The adoption of (EC) Directive no. 9/1996 on the legal protection of databases (whose statement of reasons established **their importance for the international market, trade and industry and drew attention to the high costs** required for their creation (important technical means and human resources), costs whose profitable recovery is important for the authors of said databases – represented an important step in harmonising the legislations of the EU member states regarding the protection of databases, those protected under both copyright and sui generis right.

Although **it is inspired from the copyright** and it somewhat follows the copyright structure, **the sui-generis right** that protects a database **is neither**

administration of a member state to send personal data to another authority of the public administration and the subsequent processing thereof, without informing the targeted persons of said transmission or said processing".

a copyright, as it **is not related to intellectual creations** (those which are intellectual creations are also protected under copyright), nor **a right related** to the copyright, because it **does not protect a creation auxiliary activity**.

The databases protected under sui generis right represent compilations of elements which usually belong to the public domain. Still, there may exist certain **databases that contain elements protected under copyright**, but which **are not intellectual creations by reason of the selection or arrangement of their contents**, so that their potential protection may only be achieved by means of a sui generis right. However, this requires the presentation, in a systematic or methodical manner, of the elements included in the database.

The legitimacy of the prerogatives recognised for the database producers is a controversial problem, while in the literature it was alleged that it is difficult to understand why, in order to protect the investments for building a database, a limiting right, a monopoly, is recognised in the favour of the investors on an "object" that sometimes does not represent an intellectual creation and other times (when the "selection or arrangement of contents" takes place in an original manner) represents an intellectual creation in the meaning of art. 8 letter b) of Law no. 8/1996. In order to find the answer to this question, we must recall that in the ***copyright*** initial classic system, the right was also recognised in the favour of the investors and was subordinated to the stated interest of education. The solution for recognizing certain rights in the favour of those that invest in the creation of artworks is known even in the Berne Convention system: for example, in the case of audio-visual artworks, phonograms, computer programs and joint works, the institution of the producer, of the employer or of the commissioner that has the patrimonial copyright recognised, is a reality which, despite being sometimes severely criticised in the literature, belongs to the legal life, to the law, and must be accepted as such.

Creating this sui generis right and recognising it in the favour of database producers that may prove the substantial, qualitative and quantitative investments made, as shown in the hostile literature concerning this right, leads to the reduction of the public domain related to the copyright, which includes creations that are free to use, whenever the elements used by the databases are included in the category of works excluded from protection under copyright! It leads to the limitation of the field which includes, for copyright, the creations that the law excludes from protection for reasons concerning education, safety, order policies (political, administrative, legal texts that must be available to all and that must also be known – such as the laws) or those that must be available to everyone (means of payments, ideas, theories, concepts, etc.) or those that lack originality, such as the simple information, data, facts etc. and which may be freely used by the interested parties.

Once included in databases, the creations from the public domain may be retrieved from said databases only with the authorisation of the database producer. Certainly, if the same elements are found under other accessing options, the user may retrieve them from other places. For example, a law may be accessed by searching for it in the Official Journal, may be purchased for a price or may be retrieved from the databases in which it is provided by the database producers. An information, a study, an article, a scientific communication may be accessed in the publications in which they appeared and which are purchased for a price, or in databases, which do not provide just the quicker identification and access, but the possibility of accessing them as they were updated, accessing links to other elements from the same category or from related categories, etc. Obviously, the database accessing takes place with the authorisation of the person holding the rights to the database and which is granted for a price[6].

Taking over elements from the public domain, with free access and use, as a principle (although they may prove to be more costly in terms of time and price), and selling them to the interested parties within databases represents the reason for which the right of the database producers was viewed with hostility in literature. At the same time, the right of the database producers was defended, and not just by the producers, but by the interested parties as well, because it answers to certain pragmatic needs and because it encourages the processing of information, data, to the benefit of more and more users. Try to imagine that you would need all the versions of the Tax Code, from 2003 and until today! The effort, in terms of time and money, for identifying all the versions in which it was republished and all the amendments brought to it shall exceed by far the effort of purchasing the access to a legislative database.

We must also note the fact that this sui generis right allows for a clearance of the copyright, as it leads to avoiding the protection, under copyright, of databases of a greater practical usefulness, but which

[6] For example, the online search for Directive no. 95/46/EC on the protection of individuals with regard to the processing of personal data and on the free movement of such data provides multiple addresses (databases) in which it may be found. For the full access and download, in one of these databases you will find two notifications on the first opened page. The first, in the header, announces that the "Documents from the European legislation section are available only to subscribers (…)" and a second one, at the bottom of the first opened page, informs you that "this is a partial text. For the complete text you require a subscription to (…) or you may purchase online the entire document, in PDF and Kindle format". Obviously, these kinds of announcements accompany all the databases available online.

lack an intellectual creative contribution and originality or which show a very low degree of originality.

4. The cumulative protection for databases

The sui-generis right of database producers is a community creation and it was transposed in the internal law by means of the Law on copyright and related rights. The sui generis right created by the directive **protects the investments and not the creative act**, as the right is recognised in the favours of the database producers, regardless of whether these are protected under copyright or not.

If a database is also an intellectual creation and if it may be protected under copyright, it may also benefit from a cumulative protection, under the copyright, under the sui generis right and even by means of contractual provisions agreed upon with the user outside of the regulations of the copyright and sui generis right.

The rule is set in art. 122^2(4) of Law no. 8/1996, which states that **the sui-generis right** "*is applied independently of the possibility of protecting the database or its contents under copyright or other rights*".

The solution is a logical one: the database protection under copyright and under sui generis right takes into account different protection conditions and has different effects. However, in both protection systems, the creation of databases involves financial, human and technical investments. In the case of databases protected under copyright, the (quantitative and qualitative) investments are usually greater than those in the case of databases protected under sui generis right. However, one of the Directive purposes was that of protecting the investments made for creating the database, while the protection of investments must be secured even more so in the case of databases that represent intellectual creations, and not just for those that lack originality. Protecting the investments made for creating a database that lacks originality under sui generis right and refusing to protect the investments in databases that are intellectual creations and which are superior in terms of quality represents both an infringement of the Directive purposes and a discrimination between the two database categories.

On the other hand, we must note that the protection of databases under sui generis right must not prejudice the rights already existing on their contents (art. 122^2(4) the second sentence of Law no. 8/1996). In other words, if the database contains elements protected under the limiting right of another person, these may be included in the database only with the agreement of said person, while the limits of using the database elements shall be agreed with the holders of the rights concerning said elements.

However, the rule is also valid for the databases protected under copyright, as it is presented in art. 8 of Law no. 8/1996, which establishes that the derivative works (which include the databases) are protected, without prejudicing the rights of the authors of the original works.

Art. 122^2(4) and art. 8 of Law no. 8/1996 shows that, when a database is protected under copyright or sui generis right, or when the database benefits from cumulative protection and it (also) includes works protected under copyright, said works also benefit from cumulative protection: under the copyright recognised in the favour of the work author and under the copyright of the database that included the work with the author's consent.

The cumulative protection rule is also valid for other elements included in the database and on which a person may claim or already has a limiting right. This right may be an intellectual/industrial property right (a collection of drawings or models – for example, the database of a fashion designer, which may include all the designs created by said designer and by other designers from the same field; a collection of trademarks, geographical indications etc.), a right on certain elements which, without being protected under intellectual property rights, belong to a person (for example, a collection of ideas, theories, concepts, laws, the set of works belonging to collective management bodies, a collection of maintenance works for various types of automobiles, etc.).

5. The legal system established by (EC) Directive no. 9/1996 and its comparison to the Romanian national law

(EC) Directive no. 9/1996 on the legal protection of databases shows, in an ample statement of reasons, why it was created and why it was considered necessary to harmonise the protection of databases at European Union level and the reasons behind their special protection under sui generis right.

But we must begin with the fact that, although it creates **a sui generis right in the favour of the database producers**, the Directive still preserves **the principle of the database protection under copyright**, setting several special rules for the latter and stating that the databases that are intellectual creations that may benefit from cumulative protection.

Summarising the Directive arguments concerning the need to protect databases (under copyright and/or sui generis right), they may be expressed as follows:

The databases are protected under copyright in the EU member states, but the copyright legislation is not sufficiently harmonised and the inconsistencies, particularly in the field of unfair

competition, may cause the prevention of the free movement of goods and services and the market distortion;

The databases represent essential tools for the EU economic and social development, while the volume of data that requires processing, in order to be made available to users, is ever-growing;

The creation of databases involves the use of considerable human, technical and financial resources, while these databases may be copied or accessed for much lower costs than those required by an autonomous design, as the unauthorised retrieval has severe economic and technical consequences for the authors, as they are unable to recover their investments and shall not be encouraged by the activities in this domain as long as there are no adequate rights;

An investment-related imbalance exists in this field, in the EU member states, and there will be no future investments in modern data storage and processing systems made within the Community as long as there is no stable and homogeneous legal system to protect the rights of database authors;

The usefulness of databases, the prevention of unfair competition in this field and the recovery of the investments made by the producers are the reasons for protecting said databases under sui generis right as well; however, these arguments are closer to those for protecting industrial creations, than they are to those for setting the copyright protection. The situation is somewhat similar to that of the computer programs, which are utilitarian and not literary creations, much like the databases.

We must also mention that **the Directive recognises copyrights, in terms of expression, for original database authors; these rights are different from the ones of the producers, who receive sui generis rights**. Certainly, the author of a database may also be its producer and in this case said author shall have the rights of both categories of holders, if they shall be simultaneously invoked. When the original databases represent collective creations, we believe that the special provisions regarding the collective works are applicable, while rules concerning joint works shall be applied for works created jointly (still, separating the contributions is something hard to imagine).

There are authors that severely criticise (EC) Directive no. 9/1996 on the legal protection of databases, under the belief that the Directive writers have committed a serious confusion between two different legal techniques: the intellectual property and the unfair competition. It was shown that "if the action for unfair competition is meant to sanction the incorrect practices by means of which the investments made by other people are unfairly taken advantage of, also serving to the cause against parasitizing data banks, after adopting (EC) Directive no. 9/96 and implementing it in the national legislations, the rules have changed. However, the intellectual property rights are limiting rights which, by their nature, cannot have as object elements from the public domain or information (data). Fundamentally, the investments, regardless of their importance, cannot be and are not assimilated to neither the creation, nor the innovation, the only two things that justify the recognition of a limiting right. And the case law proves that the sui generis right intervenes only in the cases concerning the freedom of trade or the unfair or parasitizing competition"[7], as the example provided by the quoted author is that of the download of a company telephone directory by a competitor, in order to constitute, with much lower costs, an inversed telephone directory.

This point of view is difficult to accept, because, despite the principle stating that it is fair for some databases to be composed of elements from the public domain, not all databases are in the same situation. On the other hand, even if they are composed of elements from the public domain, some databases with such contents may be original ones. And last, but not least, the usefulness of these databases cannot be challenged. If these databases did not exist, our access to information would be highly limited or extremely difficult to accomplish. Either way, as taken over from the primary sources, these data are still available to the interest parties. The costs of the personal identification of the information of interest shall be much greater if the individual retrieval of all information of interest shall be attempted at a certain time, by comparison to their quick retrieval, with the related costs, from a database.

As shown before, the Directive creates the sui generis right for the data producers, sets the requirements that must be met by the databases protected under copyright and those which must be met by the databases protected under sui generis right and states the rights recognised to the authors of databases representing original creations, as well as the right recognised in the favour of the producers of databases that are not intellectual creations and that protected only under sui generis right.

Given that it is flawed from the legislative technique perspective (in our opinion), the Directive has established a set of uniform rules for the protection of databases. And we recall that **according to the interpretation granted by CJEU**, the Directive **opposes a national legislation that grants certain databases**, which enter the scope of the definition found in art. 1 paragraph (2) of the Directive, protection under copyright in conditions

[7] Polloud-Dulian Frederic, *op. cit.* p. 981.

that are different from those provided in art. 3 paragraph (1) of the Directive.[8]

These are the reasons for which we shall examine the protection of databases, as governed by Directive no. 96/9, when Law no. 8/1996 does not fully take over the Directive provisions.

6. Database protection requirements

As shown above, the Directive refers to two database categories: some that are intellectual creations and **are subject to protection under copyright**, and others that lack originality and for which **a sui generis right** is recognised in the favour of the producer. Those that do not meet the requirements for protection under copyright or sui generis right may still be protected under the contractual provisions set by their producers and users. However, as previously shown, the Directive also leaves room for the protection of databases that cannot be protected under copyright or sui generis right.

The collection is conditioned by the existence, in its content, of independent elements, elements that may be separated from each other without damaging the value of their information, literary, musical or any other kind of content. The issue at hand here involves the database content, the elements integrated in databases and the relation between said elements and the databases in which they are integrated, as well as the relation between the holders of the rights and the users. From this perspective, we distinguish between:

The databases **containing elements protected under copyright, which are also intellectual creations protected under copyright** (these are databases which, by reason of the selection or arrangement of their contents, represent intellectual creations);

The databases that, w**ithout containing elements protected under copyright**, as the content is **formed of elements from the public domain**, are **intellectual creation by reason of the selection or arrangement of their contents** and are subject to protection **under copyright**;

The databases that are formed of elements protected **under copyright or unprotected under copyright** (from the public domain) and **which are not intellectual creations**, but, b**y means of the systematic or methodical arrangement of elements, which allows for their individual accessing**, are databases **that may be protected under sui generis right.**

Data (bases) compilations that are not protected under copyright or sui generis right, but which may be protected under contractual provisions. For example, by means of a contract in which the author of an unprotected database agrees with a co-contractor to make available the elements of said database for use, establishing the access method, the price, the manner of using said information, etc. In this case, the violation of the contractual obligations may be sanctioned by means of a lawsuit based on the common law provisions.

7. Original databases subject to protection under copyright

The first category of databases are those protected under copyright. Truly, Law no. 8/1996 on the copyright, as well as Directive 96/9/EC, mainly refers to these: our law views these **databases as derivative works**, when the selection or arrangement concerns creations protected under copyright; however, as shown above, there may be databases that include unprotected elements and that were not protected under copyright, but which are intellectual creations. Therefore, the fact that the database representing an intellectual creation must be exclusively based on pre-existing works is not a *sine qua non* condition.

This way, according to art. 8 letter b) of Law no. 8/1996, the **derivative works**, protected as such, include, among others, **databases that by reason of the selection or arrangement of contents represent intellectual creations**. Here we note that the lawmaker avoided addressing the **originality of databases** and preferred to state the rule that these (databases) are subject to protection under copyright **if they are intellectual creations**. However, in order **to be considered intellectual creation works** and **subject to protection**, the law requires for **the works to be original**. If this condition is not fulfilled, namely if the database is not an intellectual creation (by choice or arrangement of materials), in other words if it is not original, then said database cannot be protected under copyright. However, it may be protected under sui generis right, if it meets the requirements set for the protection under said right.

Concerning the **originality** of the creations – databases, both the Directive, in considerations (15) and (16), and the Romanian copyright law, in art. 8 letter b), state that, for the copyright protection of databases, **the criterion to be fulfilled is that of the originality, excluding any qualitative or aesthetic criteria**.

According to art. 8 letter b) of Law no. 8/1996, the databases **are derivative works** and the **condition regarding originality**, **the one granting**

[8] CJEU, the Decision of March 1st, 2012, pronounced in case file C-604/10 Football Dataco Ltd et al. v.Yahoo! UK Ltd et al. Thus, CJEU decided that: *"Directive 96/9 must be interpreted as meaning that, subject to the transitional provision contained in Article 14(2) of that directive, **it precludes national legislation which grants databases**, as defined in Article 1(2) of the directive, **copyright protection under conditions which are different to those set out in Article 3(1) of the directive**".*

the status of intellectual creation, namely that of a work that is subject to protection, is reflected in the "***selection or arrangement of their contents***". We do not believe that the selection **or** arrangement (and not the selection **and** arrangement! – our note) **implies a high enough level of creative activity!** However, the law is absolute regarding the established condition. For this reason, we must admit that, in order to be protected under copyright, a database must be original, in the meaning that it reflects the personality of its author by means of the selection and classification work for the information contained, and that no other qualitative or aesthetic criterion may be taken into consideration.

Regarding this qualification of databases (as derivative works, according to the Romanian law, n.n.), we believe that the opinion expressed in our case law is somewhat justified, in the meaning that in order to have a database protected under copyright, it must be created **starting from pre-existing works**. However, this qualification, whose consequences are the exclusion from protection of certain databases when the contained elements are not represented by pre-existing works, does not comply with the one of the Directive, which must prevail. We believe that there **may exist original databases that are not necessarily derivative works**. In other words, we believe that there may exist databases that are intellection creation works, and not derivative works, because they are formed of elements from the public domain and which were not and are not protected under copyright, but which **represent intellectual creations by reason of the selection or arrangement of their contents**.

The French case law established that the databases, **even those formed of elements from the public domain**, **may represent creation works** through to their form and structure, given that these "showcase" the personal brand of the author, which surpasses the logical restrictions. It is true that it is sometimes difficult to overcome these constraints and that it must be acted upon not just the visible arrangement, namely the televisual characteristics or those of the presentation on paper, but on the truly original presentation as well, which is not required by its object or by the database type[9].

The French case law stated that "the information that form the database may only claim protection in so far as the overall plan, content, form, structure or language prove a creative contribution that exceeds the inclusion in the work of an automatic and constraining logic for the creation of said database. Therefore, a so-called "Greek" directory is subject to protection under copyright if its data do not represent the simple listing of data taken over from public documents and classified according to an automatic logic, and reflect the creative contribution of the author in the specific presentation manner, column setting, statements regarding the persons included in this directory. Or: "the presentation text of Senegal and the databases concerning the holidays and/or public holidays in Africa, as presented in a Senegal-themed schedule, are subject to protection under copyright, given that these texts concerning the geographical, climatological and technical characteristics of Senegal bear the mark of their author's personality, by means of composition and style, which are personal (…)"[10].

According to art. 3(1) of (EC) Directive no. 9/1996, the condition set for database protection under copyright is the originality and it is considered to be fulfilled if the database is the author's own intellectual creation "by the selection or arrangement of its contents". However, unlike the Romanian law, **the Directive no longer considers the databases as derivative works**. Thus, according to the Directive, the database may **also** contain **elements that are not protected under copyright**.

What is the consequence of this regulatory difference? We find a disagreement between the Romanian copyright law and (EC) Directive no. 9/96 in terms of the qualification of databases as derivative works. However, the Directive must be fully and accurately implemented in the internal law, by requalifying the databases protected under copyright **or by simply accepting the interpretation resulted from the Directive, according to which the databases may be original and, in order to be original, they must not be based on pre-existing works**. If they include pre-existing works they shall obviously be considered derivative works.

This problem is an important one, as the **case law decided that a legal database is not protected under copyright**, for two reason:

The first is that the elements contained by the database, namely the laws, are not protected under copyright; however, Law no. 8/1996, by means of art. 8, qualifies the databases as derivative works, which are created based on one or more pre-existing works. The literal interpretation of the legal text is truly meant to lead to this conclusion, which is contrary to Directive no. 96/9, which does not state such a condition. This opinion was supported by the Bucharest Court of Law and invalidated by the Bucharest Court of Appeal and by the High Court of Cassation and Justice, by means of Decision no. 955 of March 25th, 2014: the High Court correctly considered that there may exist databases that represent intellectual creations, even if their elements are not protected under copyright. The opinion of the High Court of Cassation and Justice complies with the CJEU case law, which, under the Decision of March

[9] See Bertrand Andre, Droit d`auteur, Dalloz, 2010, p. 583.
[10] Bertrand Andre, op. cit., p. 584.

1st, 2012 in case file C-604/S05, *Football Dataco Ltd. et al. vs. Yahoo! UK Limited et al.*

The second was the one according to which the person requiring protection for "**an information product containing legal acts** published in the Official Journal, (….) must refer to *the **database structure originality** elements, regarding t**he selection or arrangement of its contents**, given that the processing, systematisation and updating stages of the texts published in the Official Journal – as indicated in the case as representing an intellectual creation – **are followed in all legislative programs existing on the profile market** in Romania **and cannot be considered as elements of originality"** and that in this situation **"the originality criterion is not met when the database creation is enforced by technical considerations, rules or limitations which leave no room for creative freedom".***[11]

Regarding the rights of the authors of databases protected under copyright, we find that they are explicitly stated by (EC) Directive no. 9/1996 and that they are, in terms of content, **partly different from the patrimonial copyrights**. Thus, according to art. 5 of the Directive, **the author of a database** benefits, in relation to the expression[12] of said database, **which may represent the object of protection under copyright**, **from the exclusive right of executing or authorising**:

(a) the permanent or temporary, total or partial copy, by any means and in any form whatsoever;

(b) the translation, adaptation, arrangement and any other transformation;

(c) any form of public distribution of the database or its copies. The first sale of a database copy within the Community, by the holder of the right or with his/her/its consent, exhausts the right to control the resale of said copy within the Community;

(d) any communication, display or representation in relation to the public;

(e) any copy, distribution, communication, display or representation, in the relation to the public, of the results of the actions mentioned at item (b).

As regards the terms of the Directive, which, in Article 5, stipulates that the original database can be the subject of copyright protection, we believe that the holder is free to choose between copyright protection and the *sui generis* right.

As regards the databases protected by copyright, the following questions of principle arise:

If the elements of the database (all or part of them) **are also protected by copyright, the rights of the authors of these creations may not be affected by the inclusion of their works in the databases**, as the inclusion of protected works in databases may only be performed **with the authors' permission**. The inclusion of a work protected by copyright in a database, on a digital medium or in a computer memory constitutes a reproduction, which allows public communication, within the meaning of Articles 13(a) and 14 of Law no. 8/1996. Consequently, such an introduction of the protected work in a database is subject to authorisation by the copyright holder.

Furthermore, Recital (18) of the Directive stipulates that the **authors of works are free** 'to decide whether, or in what manner, they will allow their works to be included in a database, in particular whether or not the authorization given is exclusive.' But in such a situation (a database constituting an intellectual creation), the database protection shall be take place as a derived work, by copyright, if the database is an intellectual creation (is original) pursuant to Article 8

[11] Expanding the justification, the High Court of Cassation and Justice, by means of Decision no. 955 of March 25th, 2014, showed the following: "Concerning the creation of a database, **this criterion of originality** is fulfilled, according to the constant ECJ case law, ***when, by means of the selection or arrangement of the contents, its author originally expresses his/her creative capacity, making free and creative choices***. The selection and arrangement of data in a database should be capable of reflecting the personality of the author: this situation takes place when the author is allowed to make free and creative choices to this end. ECJ also specified that, in general, the **required originality** is missing if the characteristics of a work are established by its technical function. In this case, ***the characteristics of the "Indaco Lege" database are established by its technical function***. This technical function helps the user (the legal practitioner) identify the legal acts regulating a certain area in social relations, the repeals and amendments thereof over time. The database ***also contains 135,000 cases*** from all the courts in Romania, **which may be accessed** by means of an internal search engine, **on the grounds of a finite set of criteria that may be chosen by the user**. The legal practice in the Indaco database is not selected according to a theme-related criterion, but contains judgments and decisions from absolutely all public and private law domains, was previously published by third parties and does not contain comments and notes of the respondent. **In other words, the Indaco database automates all the routine operations that a legal advisor would have performed 20 years ago, only with the help of the Official Journal, in order to find out the positive law regulations applicable to a certain factual situation and the form of a legal text on a certain date.** At the same time, the database permits finding the relevant case law of certain courts regarding a certain law issue. All these operations, described by the judicial review court (mentioning within the document the date of entry into force, the amendments brought from the publication, mentioning the amending acts, the correlation with other legal acts, stating (for certain legal provisions) certain decisions rendered by the Constitutional Court on the unconstitutionality exceptions and the access to the text of said decisions, as well as all the acts repealed by means of the legal act), involve "work, competencies or effort" and *do not reflect originality in choosing or arranging said data and, thus, the authors' personality; on the contrary, they are repetitive due to the strict rules that must be obeyed.* In conclusion, *the databases, although involving significant work and know-how, may be protected under copyright only in terms of the information selection and arrangement system contained; only subject to the condition that these databases are an original expression of the creative freedom of their author.* However, given that the respondent is only the holder of the sui generis right on the "Indaco Lege" database, it cannot be considered the case of the application of the provisions of art. 12 and 139 of Law no. 8/1996, as their scope is limited to intellectual creation works, the object of the copyright protection; the provisions of art. 122/1 - 122/5 of Law no. 8/1996 were not invoked as grounds of the action, by means of the statement of claims or by the end of the debates in the lower court; the conditions provided by art. 122/2 item 5 of Law no. 8/1996 are not met".

[12] Our law uses the word "notion", which we find to be incorrect.

(b) of Law no. 8/1996, instead of the *sui generis* right defined by Article 122[1] of the Law.

If the work is in the public domain due to the expiry of the term of protection, then its inclusion in the database is free, but the moral rights shall continue to be observed.

The downloading of the work from a database constitutes a distribution of the work within the meaning of Articles 13(b) and 14 of Law no. 8/1996. This download is lawful if done with the consent of the database right holder. Obviously, if an **author** or holder of a related right **authorises** the insertion of some of the works or services thereof **in a database**, pursuant to a **non-exclusive licence agreement** (agreed with the database maker, instead of the creator, who lacks the financial means and does not hold the investment), **a third party may use these works or services through the authorisation acquired from either the author or the holder of related rights**, but the *sui generis* right of the database maker may not be enforced against it, **provided that those works or services are neither extracted from the database** or re-used starting from it. It is only natural since, for a non-exclusive licence, the copyright holder retains the right to use the work personally and to also transfer the non-exclusive right to another person (Article 39 (5) of the Law).

In case of including works in databases under **exclusive licence** agreements, the provisions of Article 39 (4) of Law no. 8/1996 shall apply: so, the copyright holders may no longer use their works in the ways, within the term and for the territory agreed with the assignee, and the user will extract the work from the database subject to the conditions directly agreed with the holder of the *sui-generis* right to the database. Obviously, **if the copyright holder grants an exclusive license to the database maker**, the database maker **may oppose its exclusive right against a user who uses the work from the database**. But this right may also be opposed against the author who has assigned the exclusive right to use the work.

8. Databases lacking Originality and protected by a *Sui-generis* Right

The protection of **databases by copyright is subject to the condition of originality**, which covers either the choice of materials or the arrangement of the materials (it seems clear that the condition is fulfilled even more so when both the selection and arrangement of the materials 'betray' originality), which is equivalent to the originality of the database structure. But, sometimes, it is difficult not only to prove, but even argue that there is originality. This is the case, for example, of the information classified in a base in an ascending, descending, alphabetical or historical order, all of which are customary methods of processing and arrangement of the elements making up the base and which do not show creative activity or originality.

But may a *sui-generis* right, which is also different in its contents from copyright, protect a database lacking originality? May one acknowledge *sui-generis* rights in favour of the maker of databases lacking originality? And what is then the meaning of the provision of Article 122[1](2) and Article 1(2) of the Directive which, when on defining the scope, refers to databases consisting of collections of independent works, data or other materials **arranged in a systematic or methodical way**?

The obvious answer is yes, because the Directive itself considers the two categories of databases, because Law no. 8/1996 refers, even if not explicitly enough, to both categories of databases, because these are the reason and logic behind the regulation of the *sui-generis* right.

Moreover, please note that, on the one hand, Chapter VI of Title II of Law no. 8/1996 entitled '*Sui Generis* Rights of Database Makers' **makes no reference to the condition of originality of the databases for the recognition, in favour of the makers, of *sui-generis* rights**, and, on the other hand, although the idea is not explicitly expressed, it arises from the interpretation of Article 122[2] (1) and (4) of Law no. 8/1996. Thus:

- According to Article 1222(1) of the Law, '*the maker of a database* ***has the exclusive economic right to authorise and to forbid the extraction and/or re-use of all or a substantial part of it, assessed either qualitatively or quantitatively***.' This is, basically, the *sui-generis* right of the database maker, the method of use of the base, which may only be performed with the database maker's authorisation although the maker is not the creator.

- According to Article 1222(4) of the Law, '*the right provided for in paragraph (1)* ***shall apply irrespective of the ability to protect the database*** *or its contents* ***by copyright or other rights. Database protection under the right provided for in paragraph (1) shall not prejudice the existing rights concerning database contents***.'

As regards the scope of the Law and the Directive, namely the *sui-generis* right, they consider databases consisting of collections of independent works, data or other materials arranged in a **systematic or methodical way** and individually accessible by electronic or other means[13]. The

[13] The concept of *database*, as described in Article 1 (2) of Directive 96/9/EC of the European Parliament and of the Council of 11 March 1996 on the legal protection of databases, covers any collection which includes works, data or other elements that can be separated from one another, without affecting the value of their contents, and which has a system or method of any kind that allows finding of each of its constituents. Judgment of the CJEU of 9 November 2004 issued in Case C-444/02, Fixtures Marketing Ltd v Organismos prognostikon agonon

provision seems just as vague as the one covering the '***selection or arrangement of the contents***' (Article 3 of the Directive, Article 8 (b) of the Law), and we are unable to identify a difference of substance between them.

The protection covers **both electronic and non-electronic databases**, as the form in which the databases are secured on a medium and are presented has no relevance for the protection. The provision is likely to allow even the protection of databases created on paper, for which the identification of the information sought is more difficult than for searches using technical means.

The collection is conditional upon the inclusion in it of independent elements, which can be separated from one another, without affecting the value of their informative, literary, artistic, musical or other content.

9. The *Sui-generis* Right Holder

The sui generis right holder is the **maker of the database**, i.e. 'the individual or legal entity who has made a substantial quantitative and qualitative investment in view of obtaining, verifying or presenting the contents of a database [Article 122^1 (4)].' Recital (41) of the Directive defines the maker, in similar terms to the producer or originator of the collective work, as the 'person who takes the initiative and the risk of investing.'

Protection is granted to a database in which substantial qualitative and quantitative investment has been made and its maker[14]. The sui generis right is founded on investment protection and return. The foundation of the sui generis right is clearly stated in Recital (39) of the Directive, under which 'this Directive seeks **to safeguard the position of makers of databases against misappropriation of the results of the financial and professional investment made in obtaining and collecting the contents**.' As for the Romanian law, although less explicit, it also refers to the maker, thus the right holder, as the person who has made a substantial qualitative and quantitative investment in view of obtaining, verifying or presenting the contents of a database.

This investment must be proven by the one making use of it and claiming the recognition of the sui generis right.

Public institutions are not undertakings within the meaning of Article 102 of the Treaty on the Functioning of the European Union. The activity of a public authority, which is to store, in a database, data which undertakings are required to submit on the basis of legal obligations, and to enable the interested parties to check these data and/or to provide them with copies of these on paper, does not constitute an economic activity and, consequently, within this activity, this public authority should not be considered an undertaking within the meaning of Article 102 of TFEU. **The fact that this consultation and/or provision of copies is/are made in exchange for the remuneration provided for by law and not determined, either directly or indirectly, by the entity in question is not likely to change the legal classification of the activity**. Additionally, even if such a public authority prohibits any use of the data thus collected and made publicly available, relying on the sui generis protection afforded to it, as the maker of the database in question, pursuant to Article 7 of Directive 96/9/EC of the European Parliament and of the Council of 11 March 1996 on the legal protection of databases or other intellectual property rights, it does not pursue an economic activity and, therefore, should not be considered, within this activity, an undertaking within the meaning of Article 102 of TFEU[15].

10. The Content of the *Sui-generis* Right

The principle of protection of databases by the *sui generis* right is that, even if a data collection is not original in light of the selection or arrangement of the materials and cannot claim protection under copyright, since its implementation has required material, human and financial investment, **no one may use this achievement** (the database), **without the authorisation of its maker, without committing an act of unfair competition.**

The ***sui generis* right** of the maker of the database is a monopoly and consists of the exclusive economic right to authorise and to prohibit the extraction and/or re-use of all or a substantial part of it, assessed qualitatively or quantitatively, but the rights to the database or its contents are also subject to protection by copyright or other rights [Article 122^2 (1) and (4)].

podosfairou AE (OPAP) and the Judgment of 9 November 2004, issued in Case C-203/02, The British Horseracing Board Ltd e.a. v William Hill Organization.

[14] The concept of investment in obtaining the contents of a database, within the meaning of Article 7 (1) of Directive 96/9/EC of the European Parliament and of the Council of 11 March 1996 on the legal protection of databases, must be understood as designating the resources dedicated to searching for existing elements and collecting them in that database. This does not include the resources used for the creation of the elements that make up the contents of a database. In the context of developing a schedule of matches, in view of organising a football championship, therefore, this does not cover the resources devoted to establishing the dates, timetable and pairs of teams for the various matches of the championship in question. Please see CJEU Judgment of 9 November 2004 issued in Case C-444/02, Fixtures Marketing Ltd v Organismos prognostikon agonon podosfairou AE (OPAP).

[15] CJEU Judgment of 12 July 2012, issued in Case C-138/11, Compass-Datenbank GmbH v Republik Österreich.

- **Extraction** means the permanent or temporary transfer of all or a substantial part of the contents of the database, assessed qualitatively or quantitatively, to another medium, by any means or in any form;

- **Re-use** means any form of making available to the public all or a significant part of the contents of the database, assessed qualitatively or quantitatively, by the distribution of copies, by renting or other forms, including making available to the public the contents of the database so that anyone might access it, at the place and time chosen individually.

The extraction or re-use, both repeated and systematic, of insubstantial parts of the contents of the database is not allowed if it involves acts contrary to a normal use of the database or causes wrongful damage to the legitimate interests of the database maker.

The public lending of a database is not an act of extraction or re-use. The first domestic sale of a copy of the database by the *sui generis* right holder or with the consent thereof **exhausts the right** to control the resale of that copy [Article 122^1 (2) (b)].

The maker of a database which is made publicly available in any manner may not prevent its **legitimate use**, by the extraction or re-use of insubstantial parts of its contents, regardless of the purpose of the use. A lawful user of a database which is available to the public in any manner may not perform acts that are in conflict with the normal use of that database or unreasonably harm the legitimate interests of the database maker. Furthermore, a lawful user of a database which is available to the public in any way may not harm the holders of a copyright or related right to works or services contained in that database [Article 122^3 (1), (2) and (3)].

A lawful user of a database which is available to the public in any manner may, **without the authorisation** of the maker of that database, extract or re-use a substantial part of its contents:

a) If the extraction is done for the private use of the contents of a non-electronic database;

b) If the extraction is for purposes of education or scientific research, provided that the source is acknowledged and to the extent justified by the non-commercial purpose pursued;

c) If the extraction or re-use is intended to defend public order and national security or as part of administrative or jurisdictional proceedings [Article 122^3 (4)].

11. The Term of Protection of Databases

Sui generis rights of the maker of a database arise at the same time as the completion of the database **and the term of protection is 15 years** as of the 1st of January of the year following the completion of the database.

The substantial changes, assessed qualitatively or quantitatively, of the contents of a database, by additions, deletions or successive changes, for which substantial investment can be deemed to have been made, assessed qualitatively or quantitatively, shall allow the allocation of a specific term of protection for the database resulting from such investment. This way, the monopoly can become perpetual.

12. Conclusion. The Relation between Databases and Computer Programs

Databases also exist on a conventional medium, paper, and they are still current and the Directive and the Romanian law on copyright grant protection to databases regardless of the form in which their contents is secured.

However, nowadays, for creating databases, technical means of collection and processing, computers and computer programs are usually used and, more often than not, the medium of databases required for making or operating such programs is technical par excellence. **But there is no dependence between databases and the computer programs used** (without excluding the fact that, for a particular database, a special program may be created); our Law, under Article 122^1 (3), the same as Directive (EC) no. 9/1996, under Article 1 (3), stipulates that the protection of the computer programs used as medium for making or operating databases is independent from the protection of the databases accessible by electronic means and that the special provisions relating to databases do not apply to computer programs.

Nonetheless, the link between databases and computer programs is strong. Not infrequently, the completion of databases is a broader and more difficult and more costly activity than creating computer programs, and the distinction between databases and computer programs is not even made by informed database, computer or computer program users.

Indeed, sometimes, making the distinction is not easy. What characterises a computer program is that it contains a set of instructions and is operational with it. **The set of instructions and their effects can be protected in the case of computer programs.**

As opposed to computer programs, **databases process data, information, works, other elements, but they are static**. And unlike computer programs, these data, information and elements **can be dissociated from their medium and exist independently of it**. Of course, even in the case of databases, there are various nuances. For example, in the case of tables, their dissociation from the medium on which they are secured is hard to imagine.

Nowadays, the huge databases to which we have already grown accustomed are hard to imagine

without computer programs to operate them or without special programs designed to make the database more accessible, more easily updatable, fuller of information, cheaper and faster. But, seeing as there is continuity between computer programs and databases, a connection which makes them inseparable, their separation is becoming increasingly artificial.

It is obvious that a database query and the effectiveness of the query depend on both the computer program, and the arrangement of the elements making up that database, the connections between these elements and the logic of their processing and arrangement. Moreover, under Recital (20) of the Directive, the boundary between computer programs and databases is eroding since it is argued that '*protection under this Directive may also apply to the materials necessary for the operation or consultation of certain databases such as thesaurus*[16] *and indexation systems*.'

References:

- *Polloud-Dulian Frédéric, Le droit d'auteur, Editura Economica, Paris, 2005;*
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- *Directive no. 95/46/EC;*
- *Berne Convention of 1886;*
- *Directive 96/9/EC of the European Parliament and of the Council of 11 March 1996;*
- *CJEU Decision of March 1st, 2012, pronounced in case file C-604/10 Football Dataco Ltd et al. v.Yahoo! UK Ltd et al;*
- *CJEU Judgment of 12 July 2012, issued in Case C-138/11, Compass-Datenbank GmbH v Republik Österreich;*
- *Case C-203/02, The British Horseracing Board Ltd e.a. v. William Hill Organization;*
- *Decision of October 1st, 2015, rendered in case C- 201/14 Smaranda Bara et al. vs. the Chairperson of the National Health Insurance Fund, the National Health Insurance Fund, the National Agency for Tax Administration (ANAF);*
- *High Court of Justice Decision no. 955 of March 25th, 2014.*

[16] The Romanian version of the Directive uses the word 'repertoriu'. The English and the French versions, which we consider preferable, use the word 'thesaurus'. And thesaurus means the whole of the information grouped together by a database.

NEGOTIATION OF REMUNERATION PAYABLE TO PERFORMERS AND PHONOGRAMS PRODUCERS FOR PUBLIC COMMUNICATION OF PHONOGRAMS AND AUDIOVISUAL ARTISTIC PERFORMANCES.

Mariana SAVU[*]

Abstract

Given that certain categories of authors' rights or neighboring rights holders do not exercise them individually, but is mandatory collective management by collecting societies, as CREDIDAM - art. 1231 of the Romanian Copyright Law no.8/1996 provides for the categories of rights that requires mandatory collective management, including, in letter f) recognized the right to equitable remuneration of performers for communication to the public and broadcasting of commercial phonograms or reproductions thereof, stipulating the art. 1231 par.2 that collecting societies, for these two categories of rights, are representing also the rights holders who have not given the mandates to them.

The mandate given by right holders, members of CREDIDAM, is thus extended to non-members, Romanian and foreign performers, that can benefit from equitable remuneration as required by art.146 d) of Romanian Copyright Law and art.12 of the Rome Convention – the latter article providing that "if a phonogram published for commercial purposes, or a reproduction of such phonogram, is used directly for broadcasting or for any communication to the public, a single equitable remuneration shall be paid by the user to the performers, or to the producers of the phonograms, or to both."

Keywords: *public communication; performers; phonograms producers; negotiation; mandate.*

1. Introduction

According to **art. 15 paragraph 1** of Law no. 8/1996 on copyright and related rights, as amended and supplemented (hereinater referred to as Law/the Law): *„It iscontemplated **as public communicationany communication of a work, made directly or through any technical means, made in a place open to the public or in any place where a number of people exceeding the normal circle of family members or their acquaintances is gathered,** including the representation on stage,reciting or any other form of direct performance or presentation of a work, the public display of work of fine art, applied art, photography and architecture, the public projection of cinematographic and other audiovisual works, including works of digital art, presentation in a public place, through sound or audiovisual recordings, as well as the presentation by any means of a broadcasted work in a public place. It is also considered public any communication of a work,either by wire or wireless means, achieved by making available to the public, including via the Internet or other computer networks, so that any member of the public may access it from any place or at any time individually chosen".*

According to paragraph 2 „*The right to authorize or prohibit the communication or making available to the public of works shall not be deemed exhausted by any act of communication to the public or making available to the public".*

In order to determine the final form of the Methodology regarding the remuneration payable to the performers and producers of phonograms for public communication of trade phonograms/ phonograms published for commercial purposes or reproductions thereof and/or of audiovisual artistic performances, for ambient and profit purposes, and the tables including performers' and phonogram producers' royalties for the phonograms and audiovisual, through compulsory collective management, the collective management organizations and the users in the field must negotiate.

The negotiation procedure is prescribed by Law[1], meaning that collecting societies should proprose a Draft Methodology to be submitted to ORDA. Within five (5) days ORDA should issue a decision establishing a negotiating committee, a decision to be published in the O.G. (Official Gazette)

The parties negotiate within 30 days. At the end of the negotiation period, if the parties have agreed, they conclude a protocol to be submitted to ORDA in order to be published in the O.G. If the parties do not reach an agreement they switch to the second stage, that of arbitration. After arbitration, the party which is not satisfied by the arbitration award pronounced by the Arbitration Panel may address the Court, by submitting an appeal in this regard.

[*] Attorney-at-Law, Ph.D Candidate, Faculty of Law, "Nicolae Titulescu" University of Bucharest (e-mail: **liliana.savu@credidam.ro**).

[1] Art.131, art. 131^1 and art. 131^2 of Law no. 8/1996 on copyright and related rights define the negotiation and arbitration procedures.

2. Content

Such a negotiation took place between the collecting society which represents the rights of performers – CREDIDAM, the collecting society which represents the rights of phonogram producers – UPFR, on the one hand, and the representatives of users in the field on the other hand, meaning the carriers which were represented by COTAR[2], the hoteliers which were represented by FIHR[3] and FPTR[4], the large stores (supermakets) which were represented by FPRC[5] and three major users, i.e. Altex Romania, OMV Petrom Marketing and Dedeman.

The above mentioned parties were members of the Methodology Negotiation Committee, established by the Decision of ORDA General Manager no. 65/19.06.2015 amended by the Decision of ORDA General Manager no. 76/14.07.2015 (publihed in the Official Gazette of Romania no. 542/21.07.2015), conducted negotiations on the determination of the final form of the Methodology, in accordance with the provision of art. 131^1 of Law no. 8/1996, within the meetings dated 20.07.2015, 24.07.2015, 29.07.2015, 30.07.2015 (two of the meetings on different branches of activity), 05.08.2015, 12.08.2015; 14.08.2015, 18.08.2015, 27.08.2015 and 02.09.2015. The meetings were held according to the schedule agreed by the parties at their first meeting.

During the above mentioned meetings, the representatives of collective management organizations, CREDIDAM and UPFR, have proposed the Methodology form to be negotiated as it was determined by the Court through the Civil Judgment no. 192A/27.12.2012 of the Bucharest Court of Appeal - IX Civil Section and for intellectual property, labor disputes and social security cases, published in the Official Gazette no. 120/04.03.2013, by ORDA Decision no. 14/2013.

The new regulations proposed in the draft Methodology as well as the increased remunerations (compared to the current ones), as they are stipulated in the draft methodology, are justified against:

the circumstances that current remunerations (provided by ORDA Decision no. 399/2006, amended by ORDA Decision no. 189/2013) have not been negotiated since 2006, being maintained at the same value for 9 years;

the circumstances that, within the period 2006 – 2014, the remunerations were not indexed to inflation rate, so their value was devalued by the inflation accumulated within the period 2006 – 2014;

the circumstances that, within the period 2006 – 2015, the turnover of the users in the incidental industries (tourism, public catering/restaurants, bars, accommodation premises, etc., public passenger transport, retail chains/commercial spaces) significantly increased, bing necessary to correlate the remunerations in relation to the evolution of users' revenues over time;

the need to ensure an equitable remuneration and likely to support the creative activity of rightholders (performers and phonogram producers), especially in a context where public communication for ambient/profit purposes is one of the main sources of income for these rihthlders;

the need to correlate these remuneration with the European practice and also with remunerations determined for other categories of rightholders, especially those of the authors of musical works, which registered an important increase during 2011 - 2012 (compared to the remunerations envisaged in 2006), especially in the context in which it was declared as unconstitutional by the provisions of art. 134 paragraph 2, letter g) of Law no. 8/1996 (which limited the related rights to one third of the copyrights), by the Decision no. 571/2010 o the Constitutional Court, under the reasoning that in many circumstances the artistic performance of an atist can be more valuable than the work he/she plays;

the incorporation of some legislative changes in certain industries incidental to ambient public communication (mainly in the tourism and public passenger transportation) that require regulation of certain aspects (such as the requirement of submission by users of supporting documents during their licensing) which the old methodology has not taken into account;

the need to determine a predictable methodology, easy to be applied in practice, enabling a better collection of remunerations and corresponding decrease of collecting costs;

In turn, the representatives of users have submitted for debate proposals for amending or supplementing the Methodology, in order to reasonably increase the remunerations provided by ORDA Decision no. 399/2006, but with some nuances which I shall present below.

The issues on which the parties have agreed in the sense of determining the final form of the methodology have resulted in concluding of protocols, as required by law.

Thus, UPFR, CREDIDAM, FPRC, ALTEX and OMV signed a protocol on 22.09.2015 regarding

[2] Confederația Operatorilor și Transportatorilor Autorizați din România (Confederation of Licensed Transport Operators and Hauliers from Romania).

[3] Federația industriei hoteliere din România (Federation of Hoteling Industry from Romania).

[4] Federația Patronatelor din Turismul Românesc (Romanian Tourism Employers Federation).

[5] Federația Patronală a Rețelelor de Comerț (Employers' Federation of Trade Network).

the final form of the methodology as well as of the remunerations contained in the table at letter B, representing the remunerations due by the supermarkets.

On 28.09.2015, UPFR-CREDIDAM-FIHR-OMV also signed another protocol by which they agreed on the final form of the methodology, as well as on the remuneratins due by hotels, restaurants, bars, swimming pools, elevators etc.

Those agreed under the Protocol of 22.09.2015 (between UPFR, CREDIDAM, FPRC, ALTEX, OMV) are similar to those provided by the Protocol of 28.09.2015 (between UPFR, CREDIDAM, FIHR and OMV), noting that in the latter Protocol was further agreed:

a) „inside the hotels, for the reception/public catering area", justified removal of the reception/public catring areas from the remuneration set per accomodation premises;

b) exemption from indexing to inflation rate of the remuneration provided for accommodation premises, in the frame of interest of determining a differentiated remuneration per each year, for the years from 2016 to 2020, with a gradual increase;

c) if inside an accomodation premises there are accomodation places (rooms) having different classifications (stars/daisies), the remuneration for all accommodation rooms shall be paid based on the higher classification, as according to the classification certificate of the accommodation premises"**.**

The changes stipulated in the Protocol of 28.09.2015 are relevant only for the the users in the hotel and public catering industry represented by OMV and FIHR.

During the negotiations for the remunerations proposed by the collecting societies for fairs, exhibitions, advertising events, bus/railway stations, railway passanger transportation, train stations, subway stations and waiting areas, passangers plane transportation, airports and passangers waiting areas, ships/boats for recreational transportation, cable transportation, parking areas, sports and recreation, offices/production areas, telecommunications, the users' representatives in the negotiation committee have not express any criticism, proposals or changes in remunerations.

Also during the negotiations, the methodology text has been determined with the following exceptions:

a) COTAR formulated criticism, in that it disagrees with bringing up the supporting documents required for their licensing, and willing to agree only with the *Agreement Certificates* related to the passengers' public transportation vehicles.

We find as ungrounded such criticism because the collective management organization has the legal right to request, according to art. 130 paragraph 1, letter h) of Law no. 8/1996, both the information and the submission of the documents required in order to determine the remunerations, so that the proposed regulation appears completely justified in assuming obvious that the documents which the methodology text refers to are necessary in order to determine the obligation to pay remuneration. Relating only to *Agreement Certificates*, which are specific only to Taxi transportation activity (not to other means of transportation - bus, motor coach, minibus), is not sufficient and does not allow a clear representation of the payment obligations of the remunerations due by users in the passengers' transportation category.

b) COTAR criticized the amount of penalties stipulated by this article (of 0.1% per day of delay), requiring, as an alternative, the applying of legal interest. COTAR criticism is inconsistent with the position initially expressed during negotiations, when it was willing to sustain the regulation of severe monetary penalties for those who delay the payment of remuneration. However, applying the legal interest would represent only a general remedy that would not take into account the specifics of the collection activity and that would neither improve the collection system nor discourage late payments. On the other hand, this late payment fee is also used in other collection areas, being also agreed in the license agreements by the users in the field of public communication.

For the remuneration due by the public catering establishments, restaurants, bars, coffe shops, etc., users' representatives have agreed to increase remunerations, but in a reasonable way, especially given that for the public catering establishments (dining room, restaurant, etc.) inside the accommodation premises the remuneration corresponding to these areas is to be included in the remuneration per accommodation premises, as proposed by the representatives of FIHR and FPTR.

By the Protocol dated 22.09.2015, concluded between CREDIDAM-UPFR-OM-FIHR, they determined an appropriate remuneration for public catering areas being reduced by 10% compared to the ones proposed by the collective management organizations during negotiations (in relation to those determined by the Decision of the Bucharest Court of Appeal) and set differently depending on the area (on area levels - up to 100 square meters, between 101 to 200 sqm, and over 200 sqm) and location (A1 for those in the cities and resorts and A2 for those in the communes and villages).

FPTR did not suggest for negotiation certain values of remuneration corresponding to such areas, but asked that they should be differentiated depending on area and location, which requirements we believe that the said Protocol meets.

In relation to the remuneration payable for commercial premises, the associative structures and designated users in the negotiation committee,

which had been interested in negotiating and determining the final methodology form, were FPRC, ALTEX, DEDEMAN and OMV.

As we mentioned above, UPFR, CREDIDAM, FPRC, ALTEX and OMV have signed the Protocol dated 22.9.2015, having as object both the methodology text and the amount of remuneration.

The only interested party that has not signed this protocol was DEDEMAN, but given that DEDEMAN did not raise any objection either on the text of the methodology or on the remunerations determined by the parties at the negotiating table, we believe that it also concured with those agreed.

In relation with the remuneration due by the hotel, tourism and public catering industry (hotels, villas, pensions, etc.), users' representatives in this branch of activity, FPTR and FIHR, have proposed several versions for calculating the remunerations for the public communication inside the accomodation and public catering units. The positions of the two representative associations have been convergent regarding some aspects, and different (and somewhat divergent) regarding others, so that negotiating and finding a common ground with the representative collecting societies was difficult, without being able to materialize in an understanding of the parties.

In order to better understand the reasons for which UPFR, CREDIDAM, FIHR and OMV have signed a protocol on 28.09.2015 regarding the methodology form and the due remunerations, in a different form than the initial one (which was subject to negotiations), I will display the position of each party in relation to which the elements contained in the Protocol have been adapted.

FIHR originally referred to the parties two negotiation proposals about how to determine the remunerations for the tourism accomodation premises:

a) the first being related to maintaining the current fees structure (the one in the ORDA Decision no. 399/2006, also maintained in the Decision no. 189/2013, but with updated fees), exclusively for hotel rooms, however, with the remark to determine differentiated remunerations for hotels of 4 * and 5 * stars and to maintain or, at most, to reasonably raise the remuneration for all accommodation premises, regardless of the occupancy of accommodations premises;

b)) the second is about *setting a flat rate fee per room* (proposals similarly submitted by CREDIDAM and UPFR during negotiations), differentiated according to the classification of the accommodation premises by stars/daisies, but which should be weighted with the occupancy degree of the rooms and expected that such occupancy to be estimated, either by reference to the statistics of the Institutul National de Statistica INS (National Statistics Institute (NSI)) regaring the occupancy in the previous year, or by judgment of the parties during the negotiations, and taken into account for determining a remuneration flat rate per room.

FPTR supported the second option proposed by FIHR, for the purpose of determining a remuneration flat rate per room, but which takes into account the occupancy degree of the accommodation premises.

The representatives of CREDIDAM and UPFR have showed that the occupancy degree of rooms in the accommodation premises represent a criterion which in practice is difficult to assess and verify, because one can not ignore the lack of reporting in this area, and the alternative **assessment of the occupancy degree based solely** on statistical data applied consistently to all the hotels, it is not fair neither towards users, ignoring here the principles of competition (being inequitable to apply the same values of occupancy degree of rooms to all the users), nor towards the rightholders, while reducing remuneration after an arbitrary criterion that would greatly complicate the collecting of remuneration.

On the other hand, the introduction of such criterion as a way of weighting the value of the flat rate remuneration is contrary to the notion of "public communication" that the ECJ has construed in Case C-162/10, meaning that the act of public communication is conducted by hotels operator, by placing TVs for its customers in the hotel rooms, not being relevant if they (the customers) actually use them, so that the degree of use of the works is not given by the occupancy degree of the rooms, but by the number of rooms equipped with such devices for playback and reception of works.

We consider that CREDIDAM and UPFR position was clearly understood by the representatives of the users, the proof being also the circumstance that FIHR proposed a new calculation version to be negotiated, by which they requested ***to determine a single remuneration rate for the entire accommodation premises*** that includes, besides the remuneration corresponding to the hotel rooms, also the remuneration corresponding to the reception, the bar and restaurant inside the accommodation premises.

In light of this latest proposal, FIHR presented two value alternatives of the remuneration proposed, namely:

a) either the increase by 65% of current remunerations (stipulated by the Decision 189/2013) for hotels, rise justified in order to also include the appropriate remuneration for the restaurant, bar and reception and, at the same time, a 5% increase of such increased remuneration per each year, from 2015 through 2018 inclusive, as follows: 10% (in

2015), 15% (in 2016), 20% (in 2017) and 25% (in 2018);

b) or the increase by 70% of the current remunerations for hotels, rise justified in order to also include the appropriate remuneration for the restaurant, bar and reception, and, at the same time, a 5% increase of such increased remuneration per each year, from 2015 through 2018 inclusive, as follows: 5% (in 2015), 10% (in 2016), 15% (in 2017), 20% (in 2018).

The increases targeted by FIHR proposal were based on the current reference value of remunerations provided by ORDA Decision no. 399/2006, amended by ORDA Decision no. 189/2013, as well as on the fees structure and differentiation of remuneration in the ORDA Decision no. 399/2006.

Although FPTR stated that they disagree with the values submitted by FIHR, however they agreed with this option to determine a single remuneration for the whole accommodation premises, showing that remuneration should include all the areas which are prescribed mandatory for the classification of the accommodation premises, according to the ANT Order no. 65/2013, and for the areas that exceed the classification compulsory criteria and that are found inside the accommodation premises, to determine a distinct remuneration for each area, according to their size and destination. In reply, FIHR showed that the said Order is considering a number of criteria against which the accommodation premises are classified, without necessarily binding certain areas inside the accommodation premises, which, however, still have relevance in terms of the score which the accommodation premises can get, points relevant, in turn, as of the classification by stars/daisies. Precisely for this reason, FIHR considered that there should be clearly determined and right from the start for which areas inside the accommodation premises the remuneration is to be included in the one set per unit of accommodation, otherwise, questionable analyzes would be generated in terms of determining the areas for which the remuneration is included in the one set per unit of accommodation.

In relation to the things shown by FIHR, FPTR did not present counterarguments but they required for that remuneration per accommodation premises to be represented by a remuneration per room (accommodation area), as they are provided in the Annex to the Classification Certificate of the accommodation premises, irrespective of their level of occupancy, in this manner not sustaining the theory of remuneration weighting with the occupancy degree of the accommodation premises. This remuneration per room/accommodation area[6] would also include the appropriate remuneration for the reception area, the bar and the restaurant inside the accommodation premises. This remuneration per room would also be differentiated depending on the location of the unit and on the classification level by stars / daisies. In this regard, FPTR proposed the determination of some remunerations differentiated per room for the villages/communes, for cities, municipalities, for touristic areas of national and local interest, which in turn, to be differentiated by each section depending on the number of stars of the accommodation premises, or depending on where they are located in the city, town, etc. As a reference, they refered to a draft law on determining a flat rate tax in the hospitality (hotels) industry, a draft containing such a complex scheme of taxation based on many criteria (related to the location, the rating on stars/daisies, the number of rooms, etc.), the flat tax being set, in turn, per room.

FIHR showed that even the current methodology (which I agree with in principle) contains such criteria of differentiation in remunerations per villages / communes and towns, namely depending on the levels as per the number of rooms and depending on the classification by the stars and by the categories of accommodation premises, but, in their opinion, the introduction of other additional criteria to differentiate remuneration is not justified because such an approach would greatly complicate the pricing structure of the accommodation premises and thus would generate significant costs for both sides when collecting the remuneration.

The same arguments were also presented by CREDIDAM and UPFR, showing that the application of the fee structure requested by FPTR would entail significantly higher costs in the collection of remunerations and, implicitly, the determining of much higher remunerations than those originally proposed. CREDIDAM and UPFR have shown that in order to collect remunerations they can only carry costs within the legal limit of 15% from the collected remunerations and therefore they prefer a more predictable form of methodology and easy to apply in practice. As the financial resources and also the logistics of the two collective management organizations are limited by law, they cannot be required to apply the " taxation scheme" of a draft law in differentiating the remuneration, because the collecting societies cannot compare with ANAF in terms of the number of inspectors in the field or in terms of pecuniary sanctions provided by the law for ANAF.

[6] FPTR criticizes the notion of room in comparison with the circumstance that an accommodation area may be composed of several rooms, as is the case of the apartments inside the accommodation units; such a distinction between "room" and "accomodation area" we believe it's irrelevant given that the fee relates to the room/apartment booked and not to the number of rooms from an apartment.

term in the current methodology is "*By user of the*

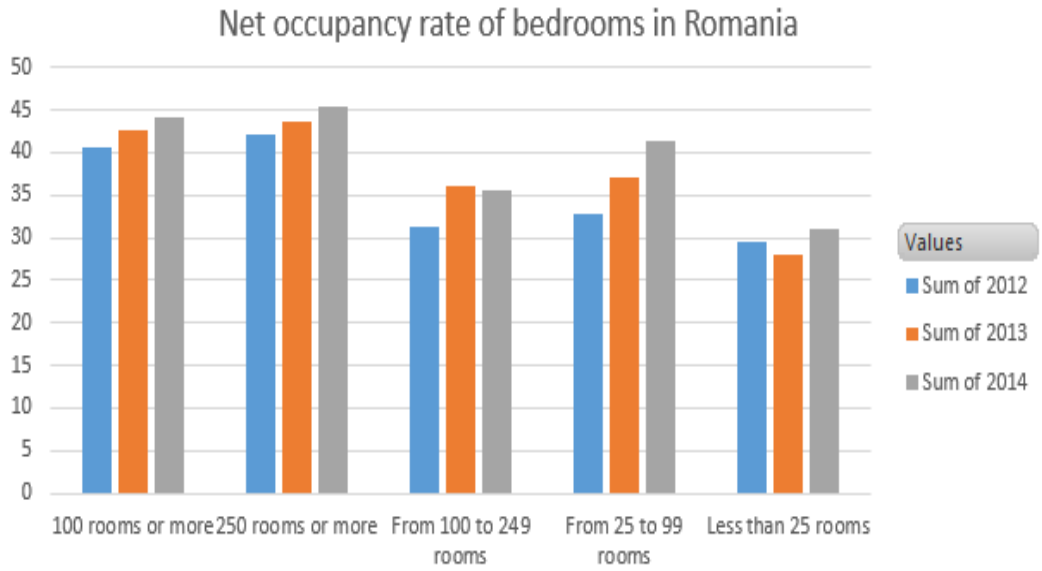

Figure 1

FPTR returned on its proposal, simplifying the scheme originally proposed, meaning that differentiation of remunerations should be made depending on the number of stars/daisies and depending on area in villages/ communes, the area in city/municipality/resort, and on this occasion they sent by e-mail to the representatives of the collective management organizations the values of required remunerations, which is lower by 40% compared to those in force (provided by ORDA Decision no. 189/2013). This latest proposal was considered by all other parties involved in the negotiation (including by FIHR) as absurd, especially given that the FPTR position was not consistent during the negotiations, alternating between opposing to the right to an equitable remuneration in comparison with construing the concept of "public space", and submitting proposals for remuneration differentiation by too many criteria, perhaps only in order to aggravate the collection system and the application of methodology in practice. This is the reason why we could not negotiate reasonable terms and sign a possible protocol with FPTR.

FPTR allegations regarding the "user" definition in the draft methodology according to which it is contrary both to the "grammatical" definition and to the "Romanian jurisprudence in the field" as well as to the "European precedents and acquis communautaire", is completely ungrounded. By the definition of the term "user" in the new methodology draft no extension was made for the payment obligation of the persons communicating publicly trade phonograms/phonograms published for commercial purposes or reproductions thereof and/or audiovisual artistic performances, for ambient or lucrative purposes. The definition of this *audiovisual artistic performances we understand any natural or legal person authorized to use under any title (ownership, management, rental/lease, sublease, etc.) the spaces in which audiovisual works are used for ambient purposes"*, so it is easy to see that the new definition does not extend this concept, but simply outlines it in order to be more understandable. Moreover, the obligation to pay the remuneration due to performers and to producers of phonograms turns only to users that communicate publicly trade phonograms/phonograms published for commercial purposes or reproductions thereof, and/or audiovisual artistic performances.

We also believe that it is very important to note, in comparison with FPTR allegation regarding the average occupancy of tourist accomodation structures functioning as accomodation premises for the period 2010-2015, that the occupancy of the bedrooms in Romania, in principle, is in an uptrend, or at least it is steady (fig. 1).

Moreover, we specify that in Europe, the occupancy is not used as main criterion, for instance in: France, Spain, Slovenia, Moldova, etc. One of the problems we predict where the payable remuneration would be calculated based on occupancy, is the need for transmission by users of monthly financial reports in which they declare on their own responsibility the occupancy degree. This is to the disadvantage of users, given that for establishing a flat rate per room there must be also determined a minimum remuneration (in order not to negate the legal provisions and to protect the holders of neighboring rights). Moreover, in case CREDIDAM and UPFR will receive from the users these financial reports on monthly basis, we see ourselves in the situation where the fiscal inspection

bodies request information about these users, or taking into account the increased number of tourist accomodation structures with functions of tourist accommodation, this will result in the obstruction of CREDIDAM and UPFR activity.

Given that rightholders cannot exercise individually certain categories of copyright or related rights, and a collective management by collecting societies, as CREDIDAM and UPFR, is mandatory – the art. 123^1 of the Law provides for the categories of rights for which collective management is mandatory, among which, at letter f), the right to equitable remuneration acknowledged to performers for the public communication and broadcasting of trade phonograms or of reproductions thereof, stipulating at art. 123^1 paragraph 2 that for these two categories of rights the collecting societies also represent the rights holders who have not granted a mandate. The mandate given by rightholders, i.e. members of CREDIDAM and UPFR, is thus extended to non-members, both Romanian and foreign artists and producers of phonograms, as provided by art. 146 letter d) of the Romanian law and art. 12 of the Rome Convention - the latter article providing that "when a phonogram published for commercial purposes or a reproduction is used directly for any type of broadcasting or for any type of public communication to the public, the one who uses it shall pay an equitable remuneration to performers or to producers of phonograms or to both of them".

If the collected amounts of money are due to foreign performers and to phonogram producers, such amounts shall be transmitted to the collecting societies in that country, with which CREDIDAM or UPFR have concluded a reciprocal representation agreement.

Whereas, in accordance with Article 123^1 the collective management of copyright or neighboring rights, in certain cases provided by law, is mandatory, in the same manner according to the provisions of Article 129^1 of the Law no. 8/1996 "*in case of compulsory collective management, if a holder is not a member in any organization, jurisdiction lies with the organization in the field with the largest number of members. Claiming by the unrepresented rightholders of the amounts due can be made within 3 years from the date of notification. After this period, undistributed or unclaimed amounts are used according to the decision of the general meeting, excluding the management costs."*

As concerning the supplementation of the documentation for the authorization-exclusive license with the documents indicated by FPTR, we do not see an opportunity in such an endeavor, and we believe that the draft methodology requested documents are sufficient in order to issue the authorization-exclusive license. It is completely irrelevant the allegation that all permits and regulations refer to seats and not to areas, as long as we require "any justifying document that shows the area where the phonograms /audiovisual artistic performances are broadcasted", and not the total surface area.

We believe that removing the article on requesting the authorization from the Draft Methodology is completely inappropriate and meaningless as long as not all users publicly communicating trade phonograms/phonograms published for commercial purposes or reproductions thereof are willing to obtain an authorization - license from CREDIDAM and from UPFR, and/or to be in compliance with the law. Thus, this point in the Methodology is required in order to establish a guarantee regarding the payment of the remuneration due to the performers and to the phonogram producers.

Complying with the defined process and the basic principle of negotiation, one should bear in mind that CREDIDAM and UPFR are two collecting societies representing holders of rights related to copyright, performers or producers of phonograms, and they are bound by a special law applicable in the field to defend their rights and to not create any damage to them.

In the article 124 of the Law no. 8/1996 is stated that "*the collective management organizations of copyright and related rights, referred to in the Law as collecting societis, are, in the present law, legal entities established by free association and* ***having as main activity, the collection and distribution of royalties which maangement has been entrusted to them by the holders***."

We did not agree with the change proposed by FPTR on reducing by 20% the amount due, in the circumstance in which the payable remuneration is paid in advance for 12 months until February 28th. Such a reduction will result in ridiculously low remunerations due to performers and producers of phonograms. It is necessary that FPTR understands that these earnings are not "fees" but rights of the author (copyrights), private rights accruing by composers and performing artists/performers as remuneration for their creation work from those using the outcome of their creative activity (music). We believe that the amounts collected by CREDIDAM and UPFR are at a reasonable level, and such a major reduction is inappropriate.

However, summarizing the proposals of both representative associations (FIHR and FPTR), we find that **both prefer to establish a *remuneration per accommodation premise***, which should include the remuneration corresponding to the reception area, the bar, the restaurant and the dining room, the

difference between the proposals of FIHR and those of FPTR being that FIHR wants to determine a *monthly flat remuneration for the entire accommodation premise*, differentiated both by stars/daisies rating of the accommodation premise, and by the levels of rooms for those which are classified; and FPTR wants to determine a *monthly flat remuneration per room*, which should also include the remuneration corresponding to the areas inside the accommodation premise which are mandatory under the classification, differentiated both by stars/daisies rating of the accommodation premise and also depending on the area where the accommodation premise is located, because there is a different remuneration for the ones in villages/communes and the ones in cities/towns and resorts.

The position of the two representative associations converges in terms of determining ***a remuneration per accommodation premises***, a situation towards which the representatives of the collective management organizations have reconsidered their original proposal (the one set by the Bucharest Court of Appeal) and expressed their willingness to determine a flat rate remuneration that includes besides the rooms/accommodation areas alsothe reception area, the restaurant, the bar, provided that they are managed by the same hotel operator, as well as the determination of different remunerations for other areas (than those mentioned above) inside the accommodation premises, such as the swimming pool, the gym, the elevator, the lobby (inside which music is played), which will be paid where appropriate and separately from the remuneration per accommodation premises.

In this respect, negotiations continued even after the expiry of the initially agreed timetable and even after the arbitration was initiated by the two collecting societies, carrying a rich correspondence by e-mail for determining the final form of the tables and the corresponding fees for the accommodations premises

Thus, depending on the proposals of FPTR and FIHR during negotiations, UPFR and CREDIDAM proposed to OMV, FIHR and FPTR a new form of fees for the accommodation premises, claiming for the determination of a monthly flat remuneration (for the entire accommodation premises, of which excluding the elevators, the fitness, massage and spa facilities, the event halls, bars with nightclub programs, night clubs and other clubs, etc.), differentiated by the type of accommodation premises, by the stars/daisies classification, by the levels on the number of accommodation spaces (rooms), estimating that such proposal is pretty close to the things proposed by FPTR and FIHR.

Following the proposal formulated on 28.09.2015, UPFR, CREDIDAM, FIHR and OMV signed a protocol in which they agreed the fee structure and the value of differentiated remunerations, so that the negotiations and the fees agreed by the representatives of OMV and FIHR users, provide an absolute position to the parties in determining a remuneration per accommodation premises, as this term was appropriated by the parties.

Related to the remuneration payable by the users of the public road transport of passengers, the representatives of this branch of activity, namely COTAR, made a counterproposal saying that the current fees (provided by ORDA Decision no. 189/2013) should decrease, but the collection rate of remuneration by the collective management organizations should increase, and for this purpose they have offered their support in order to identify solutions in this regard. Thus, they discussed the solutions for charging the remuneration either at the moment of authorizing the public passenger transport (per each vehicle in part) by the state authorities (namely by the ARR[7]) or at the moment of homologation or classification on stars and/or on categories of motor vehicles by the RAR[8], and the remuneration would subsequently be allocated to the vehicles based on the number of permits/authorizations issued in this manner and notwithstanding such vehicles authorized for public passenger transport were or were not actually used in passenger transport.

The right to an equitable single remuneration of these categories of rightholders represented by CREDIDAM and UPFR is statutory, and users' obligations established by the special law are mandatory and not left to the discretion of each individual.

Thus, article 106^5 paragraph 1) of the Law no. 8/1996 on copyright and related rights, as amended and supplemented, explicitly provides: "(1) *For direct or indirect use of the phonograms published for commercial purposes or of reproductions thereof by broadcasting or by any means of communication to the public, the performers and producers of phonograms are entitled to a single equitable remuneration. "*

COTAR showed that they categorically disagrees with differentiation of remuneration depending on the number of seats of the vehicle, showing instead that they wish to establish a remuneration depending on the type of vehicle, namely taxi, bus, coach (as means of transport for which, according to the regulations in the field, the number of places available for public passenger

[7] Autoritatea Rutieră Română (Romanian Road Authority).
[8] Registrul Auto Român (Romanian Motor Vehicles Registry).

transport is determined), and to this purpose they have submitted alternative proposals: either to establish a single remuneration throughout the lifetime of the vehicle, payable at the moment of its agreeing or authorization by the RAR (but without indicating a remuneration value for this type of calculation) or to determine a monthly remuneration of RON 1/taxi, RON 3/bus, RON 5/domestic coach and RON 10/international transport, but which will be comparable to the number of permits/authorizations for the public passenger transport issued by the public authorities for user's fleet of vehicles and notwithstanding they were actually used in public passenger transport.

The proposal of certain fees with a sole remuneration value payable on the first registration of vehicles depending on the manufacturing year or on the type of vehicle, without specifying the appropriate amount of remuneration for each category of rightholders in part or without presenting the essential elements in determining the representation value of the proposals made, namely stating the number of CECAR members, who are they and which is the fleet of vehicles owned by each member, proves the lack of seriousness of the negotiations with this organization.

We also believe that it is very important to note, relative to CECAR allegation regarding the economic situation in the "*years of crisis*" as well as the current situation, and coming to meet the difficulties faced by the users, that starting with the beginning of 2015 the prices for the urban transport increased by 2%. Moreover, in 2010 (in full "*economic crisis*") Romania was in first place in the European Union with regard to price developments in the field of transport, with an increase of 42.66% in five years. In 2014, the annual average index of prices charged by carriers was with 54%[9] higher than the reference year 2005. It had a steady upward trend between 2005 and 2014 (Fig. 2).

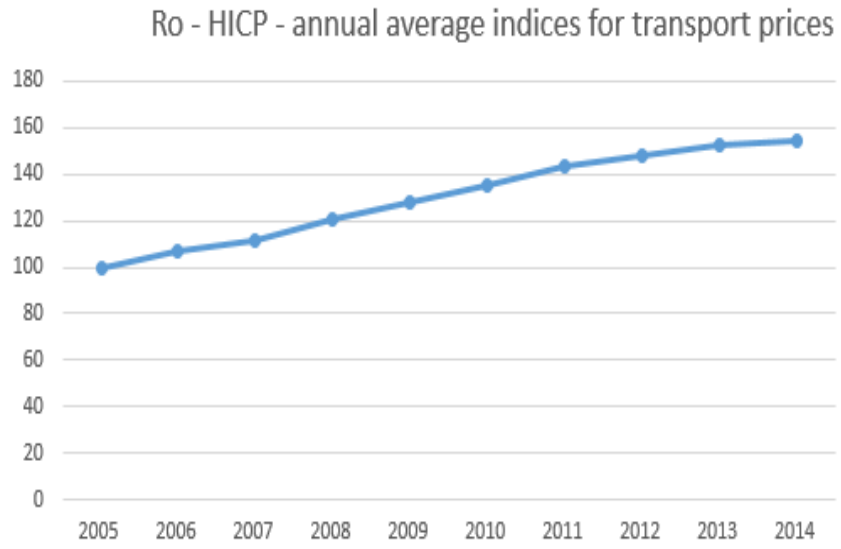

Figure 2

Thus, we note that neither COTAR has met the difficulties faced by consumers of their services, and thy chose to consistently raise prices.

Also as evidence of COTAR concern for increasing the collection of remuneration by the collective management organizations, they showed that they agree with regulating by this methodology the very high pecuniary sanctions for the users who are late in payment or for those who play ambient music without previously getting a non-exclusive license from CREDIDAM and UPFR.

There were also ongoing negotiations on finding solutions to regulate the situation of collaborating taxi drivers (mostly natural persons/individuals) who drive a taxi in collaboration with major taxi companies by using their personal vehicles branded by the company and for the services provided on behalf of the Taxi Company, but without any result.

In order to have a representation of value of the proposals made by COTAR certain information were requested regarding the COTAR members (which is the number of members, who are they and what is the fleet of vehicles owned by them), information that COTAR was bound to make available for collecting societies during the negotiations, but did not meet this obligation until the end.

On the other hand, UPFR and CREDIDAM discussed a number of issues which, in fact, hinder the collection of remunerations, most problems

[9] http://ec.europa.eu/eurostat/tgm/table.do?tab=table&plugin=1&language=en&pcode=tsdtr310.

appearing while identifying the fleet of vehicles (the number of motor vehicles for public passenger transport), the type of transport (domestic and/or international) or about the distinction between bus and coach (relevant distinction in terms of related remuneration).

Regarding the issues discussed, UPFR and CREDIDAM considered that the methodology itself must provide sufficient tools in order to clearly determine users' payment obligations in this branch, such as regulating the distinction between bus and coach in terms of the remuneration due to the performers and to the producers of phonograms, in relation to the type of transportation (urban, interurban/inter-county, international) or regulating the obligation of the user to present documentary evidence, as it clearly results from the form of the proposed methodology.

COTAR considered that a regulation is not required in the methodology in order to make the distinction between notions of bus and coach, because such a distinction is made by GO no. 27/2011 and the letter will be taken into account in determining the remuneration for the bus and the coach respectively.

Summarizing the position of COTAR during negotiations, we noted that their proposals focused on:

a) the reduction of remunerations proposed by CREDIDAM and UPFR (the fees proposed by COTAR being ridiculous and, consequently, unacceptable);

b) the increase in the collection rate of CREDIDAM and UPFR;

c) the non-differentiation of remunerations depending on the number of seats of the vehicle, especially for the bus and coach;

The negotiation is a process that takes place between two or more parties (in which each side has needs, objectives and points of view) which attempt to reach a mutual agreement on a problem or dispute regarding the parties involved. Exchange principle states that each participant in the negotiation must win something and give up something. However, the principle of exchange does not necessarily imply equality between what we give and what we receive.

Thus, both during the negotiation and arbitration stages, one can find that the collecting societies have taken into account the counterproposals of CECAR representatives and changed the fees structure.

However, the representatives of carriers have only submitted requests for the decrease of the payable remuneration proposed by CREDIDAM and UPFR, promoting only ridiculous fees and proposing to increase the collection of remuneration by CREDIDAM and UPFR, but without presenting viable solutions and requesting for an undifferentiated remuneration depending on vehicle's number of seats, especially for buses and coaches.

It can thus be concluded that, on the one hand CREDIDAM and UPFR have both complied with the negotiation process and with its basic principle, aiming to protect the rights of the represented holders (and not to harm users), but on the other hand, the users have the only aim *to win something, WITHOUT willing to give up something*. Furthermore, COTAR appreciates, in an entirely misrepresented manner, that a clear delimitation (regarding the remuneration increase) should be made between carriers and other categories of operators, namely those operating in public catering, hotels, retail, motivated by the fact that only in the latter's activity the use of *„devices for the communication of musical artistic creations"* is appropriate, because the essence of their activity has the *"purpose of entertainment"*. Such an assessment only reinforces the total lack of understanding of COTAR with regard to the creative industries.

CREDIDAM and UPFR took into account the user's position expressed during the negotiations and have reconsidered the proposal by changing the fees structure and also by reducing the remuneration proposed during negotiation, so that the **new structure proposed in Table E1** to differentiate remunerations depending on the type of vehicle and on the type of transport, following that the distinction between bus and coach to be done according to GO 27/2011[10]. The fees so proposed (as listed in the table below) are differentiated by type of transportation; the remuneration is higher for the passenger's touristic transportation by coach, both domestically and internationally, and much lower in the case of regular people transportation by bus at urban/suburban level or domestic-interurban/inter-county level. A differentiation of remuneration as well as of the amount thereof has been proposed considering several economic aspects, such as the price difference of the ticket depending on the type of transport carried out or on the type of vehicle used (for eg. in scheduled domestic - urban/suburban and inter-county transportation by bus the ticket price being lower than in the touristic and/or international transportation by coach).

[10] GO no. 27/2011- regarding the road transport, with subsequent amendments and supplements, defines the coach as "a bus with more than 22 seats, designed and equipped only for the carriage of seated passengers, having special spaces for carying the luggage on long distances, arranged and equipped to ensure comfort of transported persons, with the interdiction to carry people standing up (article 3, point 4). GO no. 27/2011 makes the distinction between bus and coach, the bus being "designed and constructed for the carriage of passengers seated and standing, which has more than 9 seats including driver's seat".

There have also been proposed separate remunerations for both the cars used for taxi and for the minibuses. For the taxis (specific for urban or suburban transportation), the remuneration is higher than in urban transport buses, given that the price of the ticket per person is much higher than the corresponding "public" transport. For minibuses, the remuneration is determined as the average between the remuneration corresponding to urban transport and the one for the scheduled intercity transport, taking into consideration that minibuses are used both in the urban transport and in the in scheduled intercity transport.

Therefore, the user must submit a monthly report (a statement on its own responsibility - affidavit) by which it communicates the number of cars that have been used / introduced into traffic. Moreover, in the current methodology in force, and in the new structure proposed for Table E1 by CREDIDAM and UPFR, there is clearly and unequivocally stated that we talk about the means of transport equipped with sound systems, radio, TV, and headphones for individual listening. In this regard, we believe that all COTAR allegations on the exemption from payment of the remuneration for the vehicles either in terms of construction or for the ones that had the music devices removed or sealed or that belong to the "Cold Park", based on the self-statements on their own responsability submitted by the carriers to the collective management organizations, are deeply ungrounded.

E	**Transports*****)**			
E1	**Passenger Road Transport - means of transportation equipped with sound system, radio, TV, individual headphones for listening, whether they are in a rent-a-car system, or in a collaboration, or lease, etc.**			
	Framing type	**Monthly remuneration (excluding VAT)**		
		Producers of phonograms (UPFR)	**Performers for the phonograms (CREDIDAM)**	**Audio visual Performers (CREDIDAM)**
1	Recreational vehicle (tractor, small train, semitrailer, platform)	RON 10	RON 10	RON 5
2	Bus, trolley bus, tram and minibus used in regular urban / suburban transportation of persons	RON 10	RON 10	RON 5
3	Car up to 6 passengers seats used for taxi service ******)	RON 15	RON 15	RON 7
4	Car up to 6 seats used in the rent service (rent a car)	RON 15	RON 15	RON 7
5	Minivan / minibus regardless of the number of seats	RON 20	RON 20	RON 10
6	Bus used in domestic (national) transport,both interurban / Intercounty	RON 30	RON 30	RON 15
7	Coach used in domestic transport, both interurban / Intercounty	RON 60	RON 60	RON 30
8	Coach used in international transport	RON 80	RON 80	RON 40

We believe that the reconsidered form of the table in letter E1 is a fair proposal in relation to the users of this activity segment, which takes into account their position on the criteria of differentiation of remunerations but also on the reduction of the remuneration originally proposed for negotiation.

On the other hand, an increase in remunerations is justified in comparison with the current ones (in the ORDA Decision no. 399/2006, amended by ORDA Decision no. 189/2013), for the above outlined reasons.

Taking into account the preponderant position of the parties involved in the negotiation regarding the increase of the remunerations relative to the current ones, regarding their differentiation structure and regarding the methodology form, as such position was recalled by the concluded protocols, we consider the position of the two associations, i.e. PFTR and COTAR, as being an unconstructive one in the negotiations and arbitration that took place.

3. Conclusions

As a result of the arbitration, the Arbitral Award was rendered under no. 1/2016, published in the Official Gazette no. 146 / 25.02.2016, setting the remuneration due by the users for this collection field – i.e. the public communication, starting with March 2016.

The collecting societies CREDIDAM and UPFR believe that the remunerations determined by the Arbitration Panel are very small relative to the economic situation of the users, which is why they shall submit an appeal to the competent Court.

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- **2.** Mihaly Ficsor, *Collective management of copyright and related rights*, WIPO, 2002;
- **3.** Tarja Koskinen-Olsson, the *Collective Management of Reproduction.* This study was developed under the cooperation agreement between WIPO and IFFRO in 2003;
- **4.** WIPO Treaty on performances, executions and phonograms, ratified by Romania by Law no. 206/2000;
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LABOR MARKET IN ROMANIA DURING TRANSITION. FORMING AND CHARACTERISTICS

Viorel CORNESCU[*]
Anca Monica ARDELEANU[**]

Abstract

One of the most important problems of the contemporary society is the flawless and efficient management of the human resource. Thus, it is of great interest the in-depth knowledge of what happens inside the labor market, its mechanisms, its multidimensional relations with the economic, social, educational and political structures and institutions.

In the present study we begin with the clarification of some theoretical issues related to labor market, we stopped trying to explain some aspects on formation and evolution of the labor market after December '89 and we focused on its specificity in the general context of the transition to market economy.

Keywords: *Labor, labor market, transition, labor market mechanisms, occupation.*

1. Introduction

Any reference to labor market, inevitable brings on the concept of work. We believe that we cannot fully understand the essence and the specifics of this important part of the market – labor market – its mechanisms, its forming, evolution and characteristics without clarifying the concept of work, especially from an economic perspective.

The labor was analyzed from many points of view in social sciences. Starting with the *"toil and labor grief"* as it appears in Adam Smith's vision, going further with the importance of labor as the principal generator of social identity[1], or with the interpretation of labor as an imperative of human life and reaching the idea that labor is *"an essential factor for the full expression of our humanity"*[2].

From an Economic perspective, the labor is defined as *"the sum of physical and intellectual human activities, with the purpose of production of rare goods and services. The value of labor depends on its capacity to produce goods and services characterized by shortage"*[3]. In a broader vision, the same author shows that *"labor can be described as an understanding between human beings and their surrounding environment, mainly aiming to self-preservation. The value of the labor must be measured in relation to the success in terms of survival and preservation of human species"*[4].

In our opinion, the labor is a sum of physical and intellectual human activities, through which there are produced goods and services that are characterized by rarity, addressing the physiological, social, psychological and spiritual needs of human individuals.

We can say that the labor occupies a central place in the system of the production factors, being the one that sets in motion the process of human activities by capitalizing the other production factors. Moreover, the world as it is known today, cannot be imagined without the human labor, and our social construction cannot operate without human labor.

Over the time, we find relevant reflections and points of view, expressed by the representatives of all Economic theories, related to labor and its role in ensuring the existence of human society, the wealth of nations and their prosperity etc. we cannot avoid mentioning the Mercantilists' references (Jean Baptiste Say and Jean Baptiste Colbert) the Physiocrats' references (Richard Cantillon and François Quesnay), but most of all, the references of the Classics (Adam Smith and David Ricardo) that gave labor – from an Economic point of view – a clear status, they captured and analyzed the division of labor, the labor-value ratio etc. Their ideas were continued, developed and nuanced in various fields by other thinkers (John Stuart Mill, J.B. Clark, Karl Marx, John Keynes, Roy F. Harrod, Joan Robinson, Paul Samuelson, Herbert Simon, Gary Becker, Daniel Khaneman etc.).

Only by fully understanding the Economic concept of labor, the implications of labor in the natural course of the human society, we can relate to the way that labor acts as a production factor and, moreover, to the way that labor integrates in the relations system generated by what we call market

[*] Professor PhD Viorel Cornescu, Faculty of Administrative and Social Sciences, "Nicolae Titulescu" University (e-mail: **cornescuviorel@yahoo.com**).

[**] Associate professor PhD Anca Monica ARDELEANU, Faculty of Business and Administration, University of Bucharest (e-mail: **monica.ardeleanu@faa.unibuc.ro**).

[1] **Lipovetsky, G.,** *"Fericirea paradoxală. Eseu asupra societății de hiperconsum",* Ed. Polirom, Iași, 2007.

[2] **Grigore, L.**, *"Probleme specifice în domeniul pieței muncii pe plan mondial*", Ed. Lumina Lex, București, 2000, pag.66.

[3] **Giarini, O., Liedtke, P.M.,** *"Dilema ocupării forței de muncă și viitorul muncii"*, Ed. All Beck, București, 2001, pag.30.

[4] ***Idem***, pag 30.

economy. If the market is seen as the *"soul"* of the contemporary economy, then the labor – as an objective reality – cannot be perceived outside the market, but inside of it, generating a specific market segment – labor market.

2. Briefly about the labor market

The Economic activity involves – directly and immediately – the labor factor that capitalize material, monetary resources etc., for the purpose of satisfying human needs.

The labor is traded as any other good, through the labor market, which is one of the most important and interesting components of the society's general system of markets.

We believe that the labor market should be analyzed from a double perspective: *as a closed entity*, where the supply and demand for labor force is adjusted throufgh specific mechanisms. This is a necessary but not sufficient approach, if we reffer to the regularities for the formation of the labor force supply and demand, and also to the relations of the labor market with the entire economic and social bosy; *as an open system, with inputs and outputs*, being in interrelation with all the other social subsystems, that express all the ongoing actions in the labor market, all the processes which by their interaction generate employment; the labor market is a segment of any economy (nationl, regional etc).

The Economic literature presents nuanced definitions of the concept of labor market. According to some authors, the labor market is *an economic space where the capital owners as buyers (demand) and the labor force owners as sellers are freely negotiationg, and the supply and demand for labor force is adjusting through the price mechanism of labor force, of the real sallary, of the free competition between economic agents.*[5]

Other authors consider the labor market – in a more condensed formula – *a complex mechanism that assures the adjustment between supply and demand of the labor force both by the free decisions of the economic subjects, and by the real sallary*[6].

The labor market always implies establishing relations between the bearers of the supply of labor force and the bearers of the demand of labor force. These relations determine specific some mechanisms of adjustment of the supply and demand, of forming the labor price, of establishing a system of regulations and social values. In this regard, the labor market reflects the mutual relations between the demographic realities that determine the offer for work and the realities of the economic and social development that generate the demand for work.

It is important to mention the fact that the labor market has an important social function, meaning that it also involves the negotiation of some elements related to work conditions and the overall quality of life. All these are correlated with the formative-cultural function of the labor force, ensuring a greater mobility and an easier adjustment of the labor force. We observe that the labor market was formed and works in correlation with the determinant role of work over the economic and social development and with the general demanding of the market and the price. This market reflects a complex of relations which include, mostly, the relations between people and their evolution in time and space, thereby influencing the type of civilisation. This market is influenced by the other markets and, in the same time, generates effects in all economic and social sectors.

Nevertheless, the labor market, like any other market, is a social institution with its limits and imperfections, its functioning depending on other social institutions, on restrictions from the economic environment, on different mentalities and economic agents' behavior. *"The labor market* – said Francoise Perroux – *is a very complex problem, a subtle maneuver through which the society is trying to set restrictions that are indispensable to the production"*[7].

From another perspective, the labor market can be seen as *a sum of operations performed by different economic agents* – at different levels of macrosocial organisation – *operations that are related to ensuring the balance between the offer and demand for labor force*.

These operations are performed by organising, regulating and conducting the employment relationships and the professional relationships, taking into consideration the estimations and track keeping of the demand and of the offer for labor force. For this purpose, the orientation, the selection and the employment are taken into consideration, as well as the whole system of institutions, authorities and bodies that are related to these processes, along with the working hours and the standardization.

That is the reason why there is a focus on the diversifying and promoting of the work force, especially the part-time work, for the purpose of reconversion and re-qualification of the work force, in order to ensure the rapid and efficient insertion in an adequate professional environment.

All these are aimed at increasing the quality of life, humanisation of work, protection and safety for work, as well as professional training.

[5] **Răboacă, Gh.,** "Piața muncii. Teorie și practică. Muncă și progres social", Ed. Economică, București, 1990.
[6] **Dobrotă, N. (coord.),** "Dicționar de economie", Ed. Economică, București, 1999.
[7] **Perroux, F.**,"Œuvres complètes", 6 tomes, Presse universitaires de Grenoble, 1993.

According to some authors, the labor market is the most regulated and organised markets of all. Alfred Marshal said: *"It is a natural thing that the labor market to be more regulated than any other market. The changes that take place here are related to some goods that need more protection than any other goods"*[8].

The labor market is the most imperfect and rigid of all markets, due to the natural limits of the work force mobility and of the regulatory mechanisms of the offer and demand, but also due to the increasing level of organisation, regulation and control of the processes that take place on the labor market.

The specialists point to two theoretical approaches of the labor market, related to the conceptualization of the commodities traded on this market: *regular commodity* – just like any other commodity - or *special commodity* – a different commodity, with specific characteristics, different from all the other commodities.

As a result of considering work as a ***regular commodity***, we see that between labor demand and labor offer appears the same kind of transactional type of relationship that it appears in other markets – a relationship based on impersonal exchange for remuneration. Răboacă[9] said that in this exchange relation, the two parties have certain freedoms.

For the individual, those freedoms are:

- to choose one's profession according with one's abilities and wishes;
- to choose the organization where to perform the professional activity;
- to choose whether one works or not;
- to change the workplace any time one wishes;
- to sell one's services at the highest price.
- For the employer, the freedoms are:
- to hire whom one chooses, having the obligation to pay the salary for the job done;
- to fire those individuals whose services are no longer needed;
- to buy the services at the lowest price.

There are also some characteristics that lead to the conclusion that work is more that a simple commodity or, in other words, to be considered a ***special commodity***.

It is not by chance that Paul Samuelson said that Nu întâmplător Paul Samuelson afirma că *"man is more than a simple commodity"*[10], highlighting the fact that the work is emodied in the human being. This is a characteristic of the human beings, beeing seen as a creative form of human manifestation, an atribute that is specific to human kind. It has a capitalizing role for all the other production factors, which – in the absence of this special production factor – cannot find their use[11].

Lujo Brentano[12] *(1844 - 1931) highlights some other essential characteristics of work, that fundamental differentiate it form other commodities. First, the work represents the exploitation of the living force of the human being – thus, by selling the work, it is sold the very person of the seller. The seller does not separate from the commodity. The worker has to follow the work; he has to go where the work has to be done. Secondly, the sale of a regular commodity it is done once and for good and this sale allows the seller to support himself a longer period of time, while selling the work has to be done continuously, daily, and the price for work does not allow the seller to support himself but a very short time. Thirdly, selling the work involves a domination of the buyer over the person of the seller, a domination over the whole moral, intellectual and physical life of the seller, because, considering the price that the employer buys, considering the sallary that the employee receives, his whole moral, intellectual and physical life is build.*

The main difference between the two perspectives over work resides in the way that the institutional role of the labor market is considered. The vision that sees the work as a regular commodity minimizes its role. On the other hand, the vision that sees the work as a special commodity, gives the institutional framework a special importance and ensures promoting the interestes of the participants on this market.

The institutionalization of the labor market not only serves to prevent abuses that can occur and affect humans, but also to create a rational labor market, where the offer and demand to be organized from the perspective of the whole society, according to capacities and needs.

According with this vision over work, seen as a special commodity, we consider that the labor market is the most regulated market and its organization and functioning have a very strict regulation.

On the other hand, a labor market overly regulated can act as a break on economic development, making it difficult or even limiting the ability of the enterprises to fold quickly to market requirements and to meet the challenges of the moment, generating adverse effects such as discouraging companies to hire labor force due to

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[8] **Marshall, A.,** *"Principles of Economics"*, Eighth Edition, McMillian Press, London, 1992.

[9] **Răboacă, Gh.,** *"Piaţa muncii şi dezvoltarea durabilă"*, Ed. Tribuna Economică, Bucureşti, 2003, pag.6.

[10] **Samuelson, P.,** *"Economics"*, ed. a IX-a, Mebrow-Hill Bask Company, 1973, pag.570, citat de **Răboacă, Gh.**, *"Piaţa muncii şi dezvoltarea durabilă"*, Ed. Tribuna Economică, Bucureşti, 2003, pag.29.

[11] **Răboacă, Gh.**, *"Piaţa muncii şi dezvoltarea durabilă"*, Ed. Tribuna Economică, Bucureşti, 2003, pag.30.

[12] **Bretano, L.,** *"Das Arbeitsverhaltniss Gemass Dem Heutigen Recht" (1877)*, Kessinger Publishing, 2010, citat de **Gîlcă, C.**, *"Munca nu este o marfă"*, http://www.costelgilca.ro/stiri/document/3095/munca-nu-este-o-marfa.html, accesat 04.09.2014, ora 17.13

difficulties anticipated in dismissal of employees who no longer meet the requirements.

Given these considerations, the present emphasis is increasingly more on the process of deregulation and making a more flexible labor market.

There are also specialists who argue that a high level of regulation of the labor market generates a number of benefits, such as providing personnel motivation, conflicts avoiding, ensuring good cooperation between employers and employees, which allows a high level of employment and investment, supporting a rapidly developing pace[13].

Experts believe, however, that the two ways of defining, corresponding to the two approaches, coexist within the surrounding economic reality, the two being applied specifically to the paid work, while the first approach can be applied to other types of labor relations for example the work performed by freelancers.

In terms of investigation techniques, the labor market is - as we said – the sum of all operations taking place at different levels of economic and social organization by various economic and/or social actors for regulating the demand and offer of labor, and of professional relationships in general.

They regard mainly the work offer forecasting and highlighting or the demand for labor; orientation, recruitment and employment; the system of public institutions operating in different parts of the labor market; management and labor management; hours of work and working time arrangement; training, retraining and reintegration; quality of working life, working conditions and occupational health; payroll forms and systems; social protection of the unemployed; collective bargaining and, in general, industrial relations.

The labor market operates in a system of permanent communication, interrelated with all other markets. It gets and receives their signals; in turn, it sends its own signals, which – most often – have the role of warning over the socio-economic status in the investigation area. (Scheme 1).

Scheme 1: The relation system between the labor market and the other markets
(Constantin Ciutacu – Labor market: selected texts 1990 – 2000/2001)[14]

Compared to other markets, it is appropriate to highlight some features.

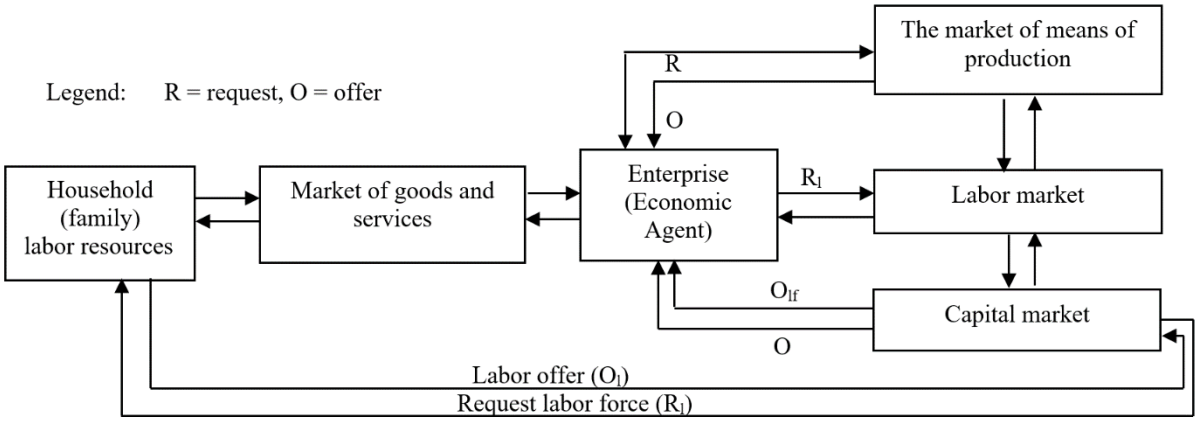
First, the demand for labor is manifested in the labor market, but it is great training and services market, for which appears as a derived demand. Between these two markets there is a system of interdependence, demonstrated economic. In other words, the labor market has a dual nature. From the labor demand's point of view, the labor market appears as a *secondary market*. The volume and structure of demand for labor depends directly on the production system (size of production of goods and services, capital stock and its structures, organization of work, productivity, solvent demand etc.).

In terms of labor offer, the labor market appears as a main market. This depends on the evolution of demographic phenomena, an external factor of the labor market, as well as on the offer of the vocational education system, and on the formal and informal labor behavior itself.

Secondly, in economic theory and modern sociology, the labor market is considered a *central square*, which penetrates, permeates the whole texture of socio-economic relations, the more so as, in terms of industrial relations, it is a fragile market, with significant conflict and explosive potential.

Thirdly, it is a *multidimensional* market. On this market interact economic, social, cultural, psychological factors etc.

A feature of the labor market – as we have seen – is to be the most *imperfect* of all the markets, beeing restricted by a variety of extra-economic conditioning: natural (ethnic structure, gender or age), acquired conditioning (social structure) or induced conditioning by collective bargaining on adjusting offer and demand.



[13] **Răboacă, Gh.**, *"Piaţa muncii şi dezvoltarea durabilă"*, Ed. Tribuna Economică, Bucureşti, 2003, pag.73.
[14] **Ciutacu, C.,** *"Piaţa muncii, texte selectate:1990 – 2000/2001"*, Ed. Expert, Bucuresti, 2001, p.10.

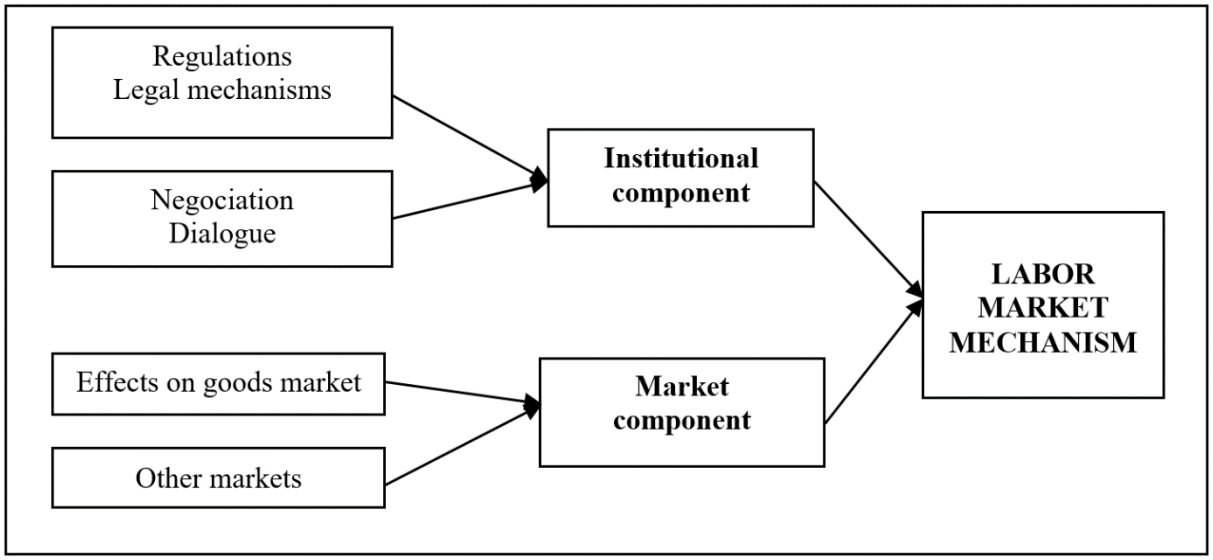
Fourth, the labor market is an *organized and regulated* market because of its very special subject of transactions: workforce.

Fifth, the labor market is also a market *negotiated* between three partners. All labor relations have a contractual basis. In addition, the wage levels, the working conditions, the rewards, the volume and structure of employment are often the result of collective bargaining and trade union pressure.

Lastly, the labor market is a *segmented* market – a professional and occupational market, an educational market related to the environment, age, ownership of firms and branch of activity (public, private or mixed).

The labor market mechanism is a very complex one, and it highlights two components. One that reflects the correlation of demand and offer of labor by market laws, the second which is intertwined with the first, an institutional component reflected by all the institutions, principles, legal regulations, etc., by which the negotiations and social dialogue are performed, both components having as final result specific transactions on the same market.

Scheme 2: Institutional component and Market component – Components of the labor market mechanism



(Cristina Lincaru – Labor Market in Romania: organisation, functioning, ways to improve performances,2008, p.18)

3. Transition and labor market in Romania

After the Second World War, Romania's transition to socialism meant major changes in the system of national economy and its mechanisms, giving up everything or almost everything related to the capitalist system and the establishment of a system based on socialist ownership, on the principles and centralized management methods, the unique national plan strangling the free market and its mechanisms.

We do not intend to characterize socialist economic system, but only to emphasize that the labor market, as other markets, experienced a strong rebound, being – practically – annihilated.

The State, through actions of central planning, was creating jobs in the economy and was directing the working population toward them. As a result, the market and its mechanisms existed no more, or were constrained to extinction.

The institutions involved (the government, the legislative, the trade unions etc.) in achieving centrally planned economy had as major tasks: a) providing jobs for all members of society; b) conversion of the obligation to work in the right to work ; the participation rate of the labor force to all the activities performed in society was very high across all age groups and gender, without discrimination; c) maintaining relatively comparable wage levels for different levels of training; d) elimination of certain payments to unemployment funds or other forms of social security related to this.

The wages were no longer determined nor by the value that human capital had and skills which he held, neither by the productivity or the added value of goods or services produced, their composition being completely different than the wage structure that should met the requirements of a real economy, a market economy[15].

After the communism system fell, Romania would face the same major shocks like other European countries of the former Communist bloc:

a) transition to capitalist market economy, reflected in the emergence of free market institutions and enhancement of its mechanisms, parallel with

[15] **Rashid, M., Rutkowski, J., Fretwell, D.,** "Labor markets", 2005, pag.60, citați de **Barr, N.,** "Labor markets and social policy in Central and Eastern Europe: the accenssion and beyond", 2005.

the restructuring of the national economy branches and other economic reforms;

b) pre and post -accession efforts of meet the requirements of a free market economy in all areas of political, economic and social life.

In this context arises, develops and gradually strengthens the labor market, as an important and necessary component of the market system of the capitalist era that we strove to build.

In the late 90s, the labor market in the European Union was marked by sustained expansion determined by the accession of new member states from Central and Eastern Europe (2004-2007), by the strengthening of the Union's economic and social perspective, as a consequence of the adoption of the single currency.

In this context, the 90s was for the European Union a period of economic growth, generating economic optimism , the eastward expansion being considered as a new challenge and opportunity by the European Union and, in Central and Eastern Europe, a genuine transitional period , a *"burning stages" period* with consequences and significant impact on the labor market .

From this perspective, Romania is comparable with the other countries of the Eastern bloc, the main features of the labor market being common, but also with some specific accents generated by the national peculiarities, both in terms of privatization for economic sectors and the implementation and operation of institutions, policies and measures for this market.

All the labor markets in former communist countries share some common features: segmentation and high rigidity, low flexibility in the professional aspects of life; territorially reduced mobility; the absence of a direct link between productivity and wages; high degree of formal syndication; the absence of adequate social services for a labor market in a free market economy; overregulation of labor relations, leaving no room for the existence of the necessary conditions of a free market work.

The labor market – in process of formation in the 90s – knew real malfunctioning as a result of the decline of production in the entire area of Central and Eastern Europe, which entails two major changes in the *level and structure of occupations* and the *level and distribution of wages*.

The beginning of a difficult transition period had a serious impact also over the employment.

While most economic sectors showed slight increases already in the mid 90s, the employment did not show the same growth trend, which determined that the employment rate to be below the level before the start of the transition period and much lower compared with the employment rates of the Member States of the European Union.

Throughout the period from the beginning of the transition to the present, Romania's population has been in a process of slow decline, but definite decline, based on the following factors: the liberalization of abortion, which resulted in a decrease of 3.4% in about 10 years, while the birth rate has dropped from 16 ‰ to 13.6 ‰ in 1990 and to 8.8 ‰ in 2013, this adding and increasing migration for work in 2001 and in the coming years up to EU accession.

Another interesting phenomenon to watch and relevant to the country's economic development was the rural-urban mobility and urban areas who had several reversals of trend for the entire period.

In the early 90s, the trend was from the rural to the urban areas, but this trend reversed in the mid-90s when, as a result of reduced employment opportunities in urban areas, but also as a consequence of restrictions that existed in households due to rising costs for providing daily life, intensified the trend of moving from urban areas to rural areas, the population choosing – as a solution for survival – the subsistence farming.

The participation rate of active population, aged between 15 and 64 years, was, according to the Labour Force Survey of 1994, of 69.7% and registered even a slight increase in 1996, when it reached 72.3%, after which it followed a slow process of decline to 68.5% in 2001, respectively below the EU average which was of 69.2%.

Starting with that moment we could see a worrying trend, affecting not only Romania, but also the other new Member States, including the old Member States of the European Union, namely that young people were most affected by the worsening labor market conditions.

The evolution of the labor market participation rate for young people during the transition and the pre-accession to the European Union has several explanations, starting with the education level and ending with a whole series of subjective factors.

Studying the evolution of the youth on the labor market, it appears that this segment is becoming more and more vulnerable during the transition and in the pre-accession process, on the one hand due to difficulties faced after finishing school, regardless of the educational level, in identifying a job, the lack of experience and on the other hand due to the claim (often unjustified) of employers in the private sector to hire young, but experienced.

Moreover, over the years we can observe an increased risk of mismatch between market demand and the skills provided by the education system in the process of preparing young people to enter the labor market.

It is the time when it starts the migration of the young labor force to EU countries, USA and Canada.

After accession, starting with 2007, the situation on the labor market in Romania did not registered significant improvements, as expected, due to the crisis that started in the United States in 2007 and that spread to other developed states both in Europe and worldwide.

One of the most affected markets was the labor market, which has faced major problems such as:

a) the private sector has changed the employment structure and also the requirements of employers;

b) the emergence of the decentralized wage setting system, which has brought new distortions and dysfunction, contributed to increasing economic and social disparities between the different age groups and between occupational categories;

c) the emergence of declared unemployment, together with many social implications, was a true challenge considering that there was no prior institutional framework to cover all the economic and social challenges generated by that.

The evolution of employment in Romania, is closely related to the transformation and restructuring processes and is correlated with macroeconomic results recorded since 1990.

It has a descending trend, being accelerated due to the layoff process. This process has been encouraged by legislation on collective dismissals (Government Ordinances 9 and 22/1997) that have contributed to lower employment and increasing the unemployment rate.

The low level and the slow progress of investments was also a cause of the continuous decrease of jobs.

The investments' decline after 1990 was due to delayed economic reform and restructuring of state-owned companies that generated losses in the economy; to the low volume of own resources for financing; to the high interest rates; to the amplification of the financial blockage; to the existence of an uncertain economic environment; to insufficient domestic and foreign demand; to competition of imported products; to the existence of an unstable and often incomplete economic legislation.

Table 1. *The evolution of employment (2000 – 2012)*
Source: Statistic Directories of Romania (2006 - 2013)

Year	2000	2001	2002	2003	2004	2005	2006	2007	2008	2009	2010	2011	2012
Employment Total – thou persons	10508	10440	9234	9223	9158	9147	9313	9353	9369	9243	9240	9138	9263
By sex													
Male	5633	5581	5031	5057	4980	5011	5074	5116	5157	5100	5112	5026	5126
Female	4875	4859	4203	4166	4178	4136	4239	4237	4212	4143	4128	4112	4137
By area													
Urban	4756	4732	4607	4662	4906	4889	5115	5072	5101	5032	5032	5072	5078
Rural	5752	5708	4627	4561	4252	4258	4198	4281	4268	4211	4208	4066	4185

After 1990, the employed population of Romania has suffered massive structural changes in the sectors of national economy. There are two clearly distinguishable features of the composition of employment by sectors:

- there is a high share of the population employed in agriculture and forestry (27.9%), a level 4.7 times higher than the average in developed countries and 1.4 times higher than the average of the former socialist countries;
- there is a lower share of employment in the service sector (27%), compared with developed countries and former socialist countries (the share of employed in services in Romania was less than half the average level in developed countries, and to former socialist countries there were differences of about 9-13%).

Since 1990, the evolution of the shares of employed in industry and agriculture was different from other former socialist countries, meaning that it emphasized the agricultural employment and in the meantime it was a disadvantage for the employment in services and industry for at least another decade. In 1998, Romania ranked last in the group of Eastern European countries in transition in terms of the employed population in the secondary sector.

The decrease of jobs in the secondary sector was present in all transition countries as a result of implementing policies of restructuring, modernizing and improving the economy. In Romania the largest reduction in employment in the secondary sector was manifested in the construction and industry sectors which have recorded large decreases in production.

During 1990-2006 in the secondary sector there is a decrease in the number of jobs, but also the proportion of people employed in this sector in total employment. Subsequently, this trend tends to fade by reducing employment in agriculture and the growth in other sectors.

In the sectorial composition of employment the following trends occurred[16]:

a) the increase of the percentage of population employed in agriculture, together with an emphasis

[16] **Mihăescu, C.,** *"Populație & Ocupare - Trecut, prezent, viitor"*, Ed. Economică, București, 2001.

on demographic aging and feminization of the industry and rural resident population in the period 1990-2000. Since 2001, the trend was reversed and the share of employed in agriculture began to decline to 28% in early 2008;

b) the steady decline in the share of employment in industry throughout the period since 1989 until today, which will affect economic efficiency;

c) the very slow evolution of employment in services in the first decade after 1990. By 2000, this share has increased continuously and we are witnessing a revival of this sector that in the past was considered underdeveloped.

The economic restructuring after 1990 had important consequences for the labor market structure. Industrial sector privatization, especially in the '90s, led to massive restructuring in sectors such as mining, metallurgy and railways. Reducing the number of jobs in the industry has been accompanied by an increase in the number of jobs in agriculture. Since 2000, the trend reversed and the number of jobs in agriculture decreased from 42.8% in 2000, to 31.6% in 2004 and 28% in 2008. Conversely, the share of services in total employment increased from 26.2% in 2000, to 31.2% in 2004 and 40.2% in 2008. Overall, the total rate of employment in Romania (57.9%) is low compared to the EU25 average (62.5% in 2003) and to the EU target for 2010 (70%).

In 1990, about 4,000,000 people were recorded as being involved in various branches of industry; in 2000 this number was reduced to 2,000,000, and in 2008 fell to 1,969,000 people. The average number of employees in the Romanian industry was reduced by half.

The population employed in the industrial sector has differently evolved at the industrial sectors level.

Employment in mining decreased by 48.3%, the most important labor losses being recorded after 1996, and manufacturing employment fell also by almost 50%.

In the electricity industry, gas and water, employment rose by nearly 38% until 1996, then went into decline, reaching in 2003 the levels recorded in 1990.

So, the biggest reductions in employment were recorded in industries in which existed overcapacity for production and low performance (mining industry, chemical industry) and also in industries that, due to strong foreign competition, went through a tough restructuring process (the textile industry, communication, radio -TV equipment production industries).

The structural changes in the national economy represent the fundamental cause that determined this dramatic evolution. The inefficiency of the industrial giants, built during communism regime and the mismanagement led to the bankruptcy of businesses which had tens of thousands of employees.

The employees that were fired from the industry branches are not found to the same extent in other sectors of the economy. Industry workforce reduction was accompanied by a significant increase in employment in agriculture. This phenomenon is perfectly explainable by demographic shifts that occurred during the communist period, migration from rural to urban.

After 1990 a reverse phenomenon occurred, the lack of subsistence means in urban areas for the fired employees from the industrial branches has led to migration to the native places in rural areas and return to former occupations.

Employment in agriculture has experienced a period of sharp increase during 1990-1994, when it reached a maximum of 3.647.000 people, then it reached a new "peak" in 2000, of 3.570.000 people, after which there was a reduction trend.

Unlike Western European countries, where the labor force is concentrated in the activities of the " downstream " or " upstream " agricultural production, in Romania the labor force is mainly concentrated in the manufacturing sector .

This fact is caused by the scarcity of technical facilities, by the lack of financial resources, but also by the advanced age of those working the land or livestock. All these factors contribute to the maintenance of a climate not so receptive to innovation and developing entrepreneurial and managerial skills, which are so important for the transformation of the working system in agriculture. For these reasons, the agriculture still gas an extensive character, of subsistence. The yield is two or three times lower compared with those in developed countries, but close to those achieved in neighboring countries.

Employment growth in agriculture where labor productivity is small has no economic justification, perhaps more political or social. This anachronistic trend can be seen as a natural reaction of the population to agriculture branch during the crisis that Romania has been through. The application of the Land Law has made agriculture the only way to ensure the subsistence for a large proportion of the workforce that was laid off from non-agricultural sectors.[17]

Since 2001, is registered an annual reduction in the number of people employed in agriculture.

The development of individual or collective agricultural units based on the use of modern technologies – including the mechanization of agricultural work – represents a slow process in Romania with a timeframe that depends on the volume of investments made in this field, a process

[17] Raportul dezvoltării umane în România – 1997, Academia Română, PNUD, Bucureşti, 1997.

that will help reduce the employed population in agriculture.

Information provided by the last census and the AMIGO survey reflects the emphasis of the demographic aging of the population employed in the primary sector (agriculture and forestry). Only a percentage of less than 30% of the farming population is represented by young people under 35 years old. Agriculture is the only branch of activity in the national economy with a high elderly population employed.

After 1991, due to restructuring and privatization, there were massive layoffs, especially of employees in the industry, residing mainly in rural areas. According to the census of 7 January 1992, the employed population in urban areas still had a majority share. Declining share of employment in urban areas is visible in the same time as the employment growth in rural areas. This trend manifests itself after 1989 until the early 2000s, when there is a sudden drop in employment in rural areas, while urban employment level is maintained, registering just a sensible increase.

These structural changes are dependent on changes in employment by industries and sectors. A structure of employment with high levels in rural areas correlates with a high proportion of the workforce employed in the primary sector (agriculture and forestry). A low share of employment in secondary and tertiary sectors, which bear the economic and social progress, will influence the level of social labor productivity, GDP growth, real incomes of population and standard of living of the population.

In rural areas, the employees between 25-49 years is a small category, representing little over half of all occupations , while in urban areas this age group represents more than three quarters of the total. On the other hand, the rural workforce is largely constituted by elderly, as they are still in business after the age of 65. In urban areas, little over 1% of the employed population is over the age of 65, while in rural areas its share exceeds 20% of the employed population.

After 2005 the employment rate of the population aged 65 years and more in rural areas was significantly higher than in urban areas. This phenomenon highlights the emphasis of the process of demographic aging of the workforce in rural areas. In the age group 15-24 years the share of employed is decreasing in both environments.

In the age group 35-44 years different environment evolutions can be found:

- in rural areas this share is diminishing, and on the other hand increases the share of employed persons in the age group over 65 years;
- in urban areas is recorded an increased share of the age group over 50 years due to the decrease recorded in the age group 15-24 years.

In terms of increasing of the working- age significant positive results were achieved. If in the second half of the 90s, the trend of the activity rate of the population aged 55-64 years was slightly downwards, starting with 2002 it goes on a continuous upward trend both in urban and in rural areas.

If in the early 2000s, the employment rate, calculated as the ratio between the occupied population and the population aged over 15 years, was equal to the EU average of 63% of the total employed population, starting with 2001 it has steadily declined, oscillating around 59%.

The employment rate has been declining since 2000, recording a more reduced level of female employment (from 57.8% in 2000 to 51.3% in 2003) and less reduced level of men employment (from 69.5% in 2000 to 63.81% in 2004). In 2012 there were 13.9 percentage points between the sexes – men 66.5% and 52.6% women. The highest employment rates were recorded for persons in age group 35-44 years (85.9% for men and 80.6% women).

By age groups, it occurred a strong reduction in the employment rate of young people, aged 15-24 years, and an increase of the activity among the elderly people, aged over 65 years. This shows the installation of a phenomenon of extending of active lives to older ages, accompanied by a lack on the labor market of young people, which is leading to a decreased vitality of the workforce. In terms of female labor force, the increasing participation of older people (over 65 years) is even stronger than men's case, a situation that is full of significance if we consider that the retirement age for women is lower than for men.

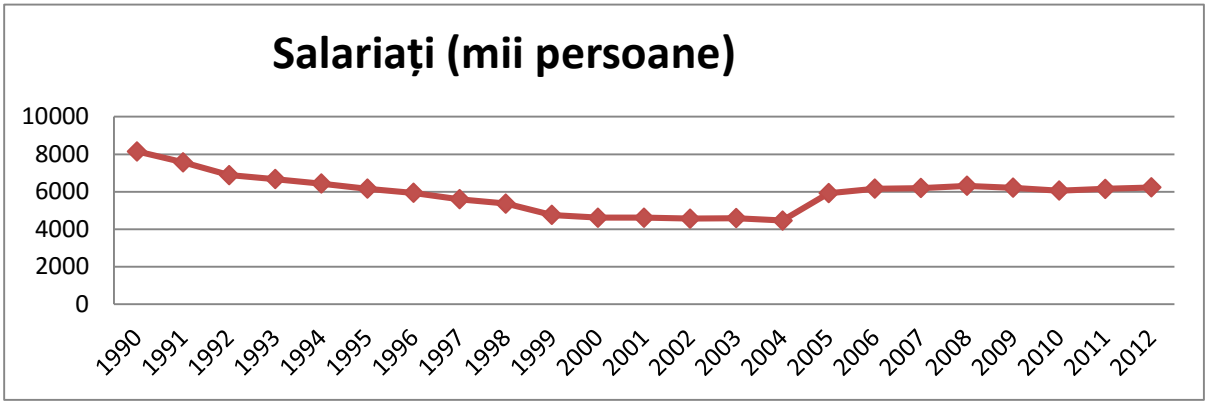
Significant changes occur also in the structure of employment by professional status. These are determined by diversifying professional structure and the changes in forms of ownership that allowed encouraging private initiative.

Thus, after the events of 1989, in Romania appears and develops a new category of occupied population - *patrons*. A significant number of *patrons* are found, in decreasing order, in trade, manufacturing, hotels and restaurants and also in construction.

Another emerging category in the occupied population after 1990 is the freelancers. The freelancers and the unpaid family workers represented, in the first quarter of 2008, 30.2% of the employed population. Most of them were concentrated especially in rural areas (nearly 90 %). The number of unpaid family workers has continued grown in the analyzed period. Also, in this category of occupied population, the majority is represented by people who work in agriculture. Analyzing the gender structure of the unpaid family workers we

find out that it is favorable to women, whose share in this category is approximately 71%.

The evolution of the category "employees" experienced a significant decline during the economic transition, with 3.5 million people, respectively 43% in 2006 compared to 1990.



Graffic 1. Evolution of employed population from 1990 to 2012 (thousand persons)
Source: Statistic Directories of Romania 1990 – 2013

This category of employed population highlights the various developments in relation to the form of employment. In the public sector, employees have systematically reduced weight. Over a quarter of the employees in the public sector worked in manufacturing industry.

The downward trend of the number of the employees in the public sector is closely related with restructuring and massive layoffs in this sector over this period. The number of employees in the private sector showed continued growth, so at the end of 2006 the number of employees in the private sector represented three quarters of the total number of employees. The shifts in the population structure by profession followed the same trends as the employed population.

Romanian Economy development in the context of the knowledge economy is based on complex processes of restructuring and modernization processes that require a skilled workforce with an increasingly complex higher level qualification. Thus the changes in the national economy caused significant changes in the socio-professional structure of employment population.

Analyzing the dynamics of employment structure by level of education there is a slight increase in the share of employed persons with higher education. For the same period (2006-2012) the share of population with post-secondary education or technical education was increasing and the share of population with high-school and middle school level of education was decreasing.

Tabel 2. *The evolution of the structure of the occupied population by the education level from 2006 to 2012 (thou persons)*
Source: Statistic Directories of Romania – 2006-2013, INS, Bucharest

	2006	2007	2008	2009	2010	2011	2012
Total	9313	9353	9369	9243	9240	9138	9263
Superior	1253	1290	1386	1428	1480	1606	1660
Medium	5745	5738	5686	5516	5437	5406	5494
Specialized or Technical post-secondary	454	420	402	398	387	370	357
High school	2921	2977	2966	2941	2990	3064	3099
Professional	2370	2341	2318	2177	2060	1972	2038
Low	2315	2325	2297	2299	2323	2126	2109
Gymnasium	1690	1706	1709	1763	1824	1721	1736
Primary school or no schooling	625	619	588	536	499	405	373

The structure of the employed population by education level reveals that a share of more than 45% of the population has a training of secondary or higher education level, which draws the conclusion that the workforce in Romania has a quite high level of training. Considering the criterion of age, the highest degree of training corresponds to people in groups of 25-34 years and 35-49 years.

The phenomenon of unemployment has been officially recognized starting with 1991, along with the entry into force of the Law no. 1/1991 on social protection of the unemployed and their professional reintegration[18].

[18] Republicată în Monitorul Oficial al României nr. 257 din 14 septembrie 1994, abrogată prin Legea nr.76/2002 privind sistemul asigurărilor pentru șomaj și stimularea ocupării forței de muncă, publicată în Monitorul Oficial al României nr. 103 din 6 februarie 2002, cu modificările și completările ulterioare.

The unemployment phenomenon in Romania was determined both by demographic and economic factors, as the national economy, after 1989, was in restructuring process. It should be noted that the unemployment phenomenon was determined jointly by two processes: the decrease in demand for labor force (reducing the number of jobs) and the increasing of the offer of labor force.

In Romania, these processes occurred as follows:

- the high level of availability of manpower , a process that resulted in over 60 % of the total unemployed
- entering the labor market of new contingents of workforce from graduates of secondary and higher education but also other categories of unemployed people.

This explosion of unemployment in the early years of transition reached a peak in 1994 when it was registered an unemployment rate of 10.9% (at the end of the year). After 1994 there was a period of decreasing of the unemployment but, by the end of 1997, the unemployment rate increased again as a result of the restructuring or liquidation of non performant economic entities (especially in the mining sector), culminating with a rate of 11.8% at the end of 1999. The unemployment rate has decreased in recent years: in 2003 the unemployment rate was 7%, at the beginning of 2008 the unemployment rate reached 5.8 %, and in 2012 it returned at the level of 7%.

	1991	1992	1993	1994	1995	1996	1997
Total unemployed (thou persons)	337	929	1165	1224	999	658	881
Unemployment rate (%)	3,0	8,2	10,4	10,9	9,5	6,6	8,9

	1991	1992	1993	1994	1995	1996	1997
Total unemployed (thou persons)	337	929	1165	1224	999	658	881
Unemployment rate (%)	3,0	8,2	10,4	10,9	9,5	6,6	8,9

	1998	1999	2000	2001	2002	2003	2004
Total unemployed (thou persons)	1025	1130	775	711	845	692	799
Unemployment rate (%)	10,4	11,8	6,9	6,4	8,4	7,0	8,0

	2005	2006	2007	2008	2009	2010	2011	2012
Total unemployed (thou persons)	704	728	641	575	681	725	730	701
Unemployment rate (%)	7,2	7,3	6,4	5,8	6,9	7,3	7,4	7

Table 3. *Number of unemployed people and the unemployment rate from 1990 to 2012*
Source: Statistic Directories of Romania – 2006-2013, INS, Bucharest

In the early '90s, women constituted the largest part of the unemployed population. After 1997, the share of women among the unemployed population was reduced, because of the collective layoffs that started in 1997 included construction activities, mining, metallurgy, branches in which activated predominantly men. Another factor that contributed to lowering unemployment among women it was the development of the clothing and footwear industry, where labor is mostly carried out by women.

	Women	Men
1991	62	38
1992	60	40
1993	59	41
1994	57	43
1995	55	45
1996	54	46
1997	48	52
1998	47	53
1999	47	53
2000	41	59
2001	42	58
2002	42	58
2003	41	59
2004	39	61
2005	40	60
2006	38	62
2007	38	62
2008	36	64
2009	38	62
2010	40	60
2011	41	59
2012	40	60

Table 4. *Unemployment by sex from 1991 to 2012*
Source: Statistic Directories of Romania – 2006 – 2013, INS, Bucharest

From 1990 to 2006 the proportion of women in the total number of unemployed steadily decreased from 61.8% so in 1991 to reached 41.5% in 2006. Starting with 1991 until the end of 1996, in Romania, the evolution of unemployment by sex revealed a higher share of women that are unemployed. The decreasing trend of the share of female unemployment has contributed to balancing the gender unemployment towards the end of 1996, after which there was a reversal in the unemployment structure. Starting with 1997 (after massive restructuring of the economy) the unemployment rate of men became higher.

4. Conclusions

Over time, those who have been analyzing and deciphering the economic life of the society also examined the issues of labor, employment and, more recently, human and intellectual capital. In this context, it was and is inevitable to capture the connections between work and the other elements of the economic system. In other words, everything that is related to work, from an economic perspective, is related – one way or another – with the market, regarded as the core base of the economy, no matter what space we are related to – national, regional or global.

As we have seen, the labor market has a very important role in ensuring a balanced development of economy and society, in knowing this market, its regularities and mechanisms of its functioning, the links between this market and other markets, structures or institutions in the society. This allows us not only a broadening of our knowledge, but also the possibility to intervene to ensure the necessary balance for a sustainable development.

That is why, in democratic societies, it is important to support the creation, where appropriate, and strengthening of the labor market. Romania, after the events in 1989, along with the abandonment of the "blessings of communism" had to rebuild from ground zero (to reinvent) the labor market. This effort was made during the whole transition period and aimed towards a sustainable economy. The analysis of the trends registered in the employment phenomenon at certain moments in time at the level of national economy, enables the understanding of the economic development of a certain country, the ups and downs of the economy, the relations between the labor market and other segments of the market, and between those and various other institutions (government, unions, employers, etc).

By highlighting certain aspects of employment in post-revolutionary Romania, we believe that we have started a further analysis on other aspects of the labor market and its characteristics in this turbulent period of transition to capitalism

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THE MAIN PRINCIPLES OF TOTAL QUALITY MANAGEMENT

Andrei DIAMANDESCU*

Abstract

Nowadays the industry is one of the main economic sectors, with a major contribution to achieving and maintaining a high rate of economic growth. The processing industry operation to high economic performance requires changes in structural terms, the re-engineering of processes and management. In this regard, one of the main actions taken at the level of companies in the manufacturing industry is the implementation of quality systems. Practicing quality management system not only allows businesses to react to changes taking place in business, but also to inflict them by the controlling of the future. This paper aims to analyze the principles of Total Quality Management – TQM and will highlight the advantages that organizations could obtain by applying each principle separately in the process of management.

Keywords: *Quality, Total Quality Management, Quality Assurance System, Quality Standards, Competitiveness.*

1. Introduction

The principles of total quality management (TQM) can be defined as rules or fundamental and complete convictions in the management of an organization, oriented towards the continuous improvement of performance in the long term, by the total customer orientation, while taking into consideration the needs of all other stakeholders.

Both in theory and in practice organizations it is generally accepted that the conceptual basis of the TQM philosophy is the principle of continuous improvement. To lead the continuous improvement process it is necessary to apply a number of fundamental principles of TQM. There are different formulations of the basic principles of TQM. For example, R.J. Schonberger makes particular attention to the principles of continuous improvement and quality assurance processes. G. Merli highlights the following basic principles: customer satisfaction, quality first, continuous improvement, involving all staff. Stora and Montaigne[1] believe that the basic principles of TQM are: management implication, involving all staff and rational improving of quality. According to the authors Haist and Fromm[2], they highlight the following principles: customer orientation, the 'zero defects' principle, continuous improvement, and focus on prevention.

2. The eight principles of TQM

Considering the different opinions expressed by specialists, as well as the stipulations of SR EN ISO 9000: 2006 – Chapter 02, we support the assertion that the basis for TQM and the development of family ISO 9000 were the eight principles of quality management considered being determinant for continuous performance improvement. Analyzed and interpreted today (under the impact of the increasing number of enterprises which have implemented ISO Standards and the methods of Kaizen system), the eight quality principles on which ISO 9001 is based are totally harmonized on the European Model of Excellence, Lean, Six Sigma and Business Process Management (BPM), but they are deficient when it comes to quality critical concepts such as social responsibility and stakeholder needs, which are limited to customers.

2.1. Customer Advocacy

This principle is to relief the organization's capacity to understand and meet the needs of its customers. For this, it is necessary, first, to identify external customers and internal customers. Then the requirements, the needs and the expectations are determined and then they are translated into specifications, based on which the products are made with certain quality characteristics. The customers' needs knowledge through market research is done on buyers, consumers and even competitors' customers. Also, if customers of the organization are other organizations, the study should be extended to their clients. Based on study results, a list is drawn up with the needs expressed by customers and the importance given to each need.

Then it will be determined the technology and the processes required for the achievement of appropriate product requirements, and the investments that are necessary to provide manufacturer technical equipment.

In developing forecasts of customer needs organizations must cover both current interests and their evolution over time. Also, manufacturers can even determine an orientation of future customer

* Assist. Prof., PhD, Faculty of Economics, "Nicolae Titulescu" University, Bucharest (e-mail: **dandrei@univnt.ro**).

[1] Stora, G., Montaigne, J. – *La Qualité Totale dans l'entreprise*, Les Editions d'Organisation, Paris, 2006.

[2] Haist, F., Fromm, H. – *Qualität im Unternehmen, Prinzipien - Methoden - Techniken*, Carl Hanser Verlag, Műnchen-Wien, 2011.

requirements using intelligent advertising, like other channels offered by the media. The collaboration with the customer is recommended ('partnering') for cases where customers' real needs are different than those expressed in conducting the study. This can be done either through a dialogue with customers either in an organized frame or by customer participation in developing processes for a new product required by him, or through customer engagement in internal activities processes of the company such as planning new product development, technological estimation etc. Thus may be introduced in product design features that meet the unexpressed needs.

One method to correlate the customer requirements and expectations with the manufacturer's possibilities is Quality Function Deployment (QFD) developed by Yoji Akao and Mizuno Shigheru. The method can be applied in the market research process planning and in the customer-oriented production. The method is based on the answers to the following questions: 'What will consumers?' and how their requirements can be met? Based on analysis of customer requirements, the characteristics and technical specifications of products designed to satisfy these requirements will be set. But for this goal, the organization must provide the necessary information to knowledge needs. To this end it is necessary to adapt management subsystems, especially information subsystem. This subsystem should be adapted to allow the organization to retrieve and process all customer data. Thus, a customer-oriented information system should enable the compilation of reviews, the analysis of the customer after their effectiveness etc. The system also must exchange information with upstream and downstream partners of the organization.

Regarding the acceptance of orders made by the client, ISO Methods referring to the customer describe how to proceed to set a number of questions that must be addressed by the manufacturer, for example:

- What are the conditions specified by the customer, including those related to shipping the product and support requirements?
- What are the conditions unspecified by the customer but necessary for intended use (e.g. color)?
- What are the rules on product (e.g. legal or otherwise)?

Then the standard requires a review covering the following questions:

- It was well explained the requirement?
- If the order was made verbally, it was confirmed by the client?
- They were resolved all issues of contract?
- Is the company able to meet customer requirements?
- What happens if the customer changes the order?

Finally, the standard tries to clarify if the company has effective methods of contacting the client in order to obtain: product information, call for tenders, orders and changes, customer response including complaints.

Most companies have their own method of receiving orders. ISO standards in this area are flexible, asking just to formalize and adapt them to cover all aspects of the standard.

Since this principle is considered crucial to the present and future competitiveness of organizations we have introduced questions in our studies about how the organization's management understands this principle in the current activity. When asked 'What consumers / customers want?' The answer of the most business representatives was limited to three requirements that they considered most common in relationships with customers: the best quality; compliance with the delivery time; lowest price.

Trying to make a summary of the benefits generated by the application of this principle, they could be:

- provide reliable information for knowledge and understanding of customer needs and expectations
- allow the establishment of appropriate organizational objectives according to the customer needs and expectations;
- increase market share
- create the best conditions for customer loyalty;
- allow to measure and analyze customer satisfaction and initiate actions based on results;
- managing the client relationship, ensuring a balance between satisfying customers and other direct stakeholders (shareholders, employees, suppliers, society etc.).

2.2. Ensuring leadership (management involvement)[3]

This principle is to ensure the personal commitment of the general manager and management structure to be involved in the implementation of the integrated approach to TQM. For this purpose, the organization management will adopt plans for the development of TQM, the management system of the organization, internal training system, financial resources and personnel etc. Leaders involve employees in the

[3] This criterion covers both the capabilities of a leader and the organization management. Leaders have the mission to find solutions to motivate employees and develop enthusiasm for quality. While managers are currently working, leaders are leading for future. In quality management, the term refers to how all managers of an enterprise initiates, supports and ensures the promotion of TQM culture. Leadership for Quality expresses the ability to positively influence people and systems under a single authority to have a significant impact and achieve important results.

implementation of quality management, with a decisive role in the operationalization of all the principles underlying quality management. Top management of the organization is formulating the vision, mission, strategy, policy and quality objectives and it is required to observe permanently the realization of those, in all activities of the organization, and to react in case of nonconformities to remove them.

The role of managers in promoting TQM to the structural operating levels must be:

- Top managers must focus their attention throughout the organization. Activities in which they are directly responsible for quality must be: establishing the purpose of the implementation of the quality standard; direct involvement in solving the problems that are generated by the achievement of the aim; allocation of resources required for implementation and effective operation of the quality system; rewarding employees for participation in continuous quality improvement; minimize problems of communication between organizational levels.
- Middle level managers (heads of departments) must focus their attention at process level to optimize the activities of the departments they lead. Activities are evaluated, correlated and made in a unitary manner.
- Employees must understand and comply with quality system at execution level: 'well done the first time and every time' to remove non-quality and to the compliance with the requirement of 'zero defects'.

This principle plays a key-role in developing and implementation of projects. Project managers must act as leaders themselves, establishing unity of purpose of the project, project objectives and actions of the project team. The project manager is the person who has formal authority and responsibility for project management and thus to ensure that quality management is established, implemented, maintained and improved. He must assume leadership, developing a favorable culture for the project quality.

To get the desired results, the project manager's decision related to the implementation and efficient operation of the quality management system must be taken in an effort to ensure the beneficiaries that there are conditions for it to be executed in conformity with the stipulations set by the contract.

- The benefits of applying this principle can be summarized as follows:
- ensure compliance with the needs of all stakeholders;
- enable the development of the objectives that will ensure increased competitiveness of organization and thereby will establish a clear vision of the organization's future;
- providing the necessary resources for the training and the freedom to act with responsibility and efficiency for the staff;
- build confidence and eliminate fear, by encouraging and recognizing personal contributions;

2.3. The involvement of all staff in decision-making

This principle consists in developing the capacity to act and to decide individually in solving problems, and to engage in quality improvement projects. The staff has the main role at all organizational levels and only by total and conscious involvement and aware is possible that everyone's skills should be involved to achieve quality policy. For this purpose it may act through measures to ensure full motivation of all staff to permanently participate to the process of improvement, innovation and creativity, thus ensuring the organization's objectives.

For the implementation of this principle it is very important to create an internal environment based on the cult of quality, and for the 'well done work for the first time and every time'.

If we refer again to the development projects, to achieve this goal it is necessary that for all project team members to be clearly defined the authority and responsibility to participate in the project. Employee involvement in improvement (quality, cycle-time and loss), usually by teams, can be achieved through various forms of training associated with participation in management decisions and actions that give rise to employee empowering. The results of applying this principle can be measured through the quality indicators, among which the most important are the quality and cost of labor productivity.

Among the advantages of applying this principle we retain:

- understanding by employees of the importance of their role and contribution in the organization;
- employees can evaluate their own performance compared to their personal goals;
- employees will be permanently preoccupied to develop the knowledge and experience to enhance their performance;
- it creates the framework in which employees openly share their knowledge and experiences in solving involving problems.

2.4. Process approach to management

Principle 'approach as a process' for quality management system is reflected in clauses 4.1 and 4.2 of ISO 9001: 2008. This principle is a fundamental concept underlying the international standard ISO 9000 family, each process having inputs and outputs and involving people and other resources. More resource-intensive activities that contribute to achieving an output element (a blank,

subassembly products, part of a service, important activities of a project, etc.) can be considered a process. In this interpretation, the process means a set of activities that relate and interact to transform inputs into outputs. We observe that most times the output elements are elements of a process of entry into the next process. Applying a system of processes within an organization, including identification and interactions between them and their management may be considered a 'process approach'. This type of approach is aimed at fulfilling a dynamic cycle of continuous improvement and enable significant gains for the organization by reducing costs, shortening the implementation process by efficient use of resources and better results based on focusing to consistent and predictable opportunities of process improvement.

This approach requires, in particular, identifying processes that an organization should implement to keep them under control and continuously improve their efficiency. Such an approach will allow management to focus on those processes and not every activity that takes place within an organization. It will also facilitate the focusing on customers and increasing their satisfaction by identifying the key-processes in the organization and their further development towards continuous improvement.

By knowing the main processes of the company we can determine precise responsibilities for the management and identify process interfaces with the organization functions to be pursued consistently.

To identify the processes needed for quality management system and their application in organizations we need to know what processes is required for the proper functioning of the quality system and which are inputs and outputs of each process, if there are processes subcontracted and, of course, who are customers for these processes and what are their requirements. Generally, the processes-chain includes processes of management, execution of works processes, support processes and monitoring and measurement processes. For the needs of quality management the identified processes system should include all production processes, execution and customer service provided by the administration that product or service quality and customer satisfaction.

The process identification may be performed by more than one solution – for example, the outline of broad processes or simply by listing the departments of the organization, e.g. purchasing, receiving, production control, sales and marketing, customer service, production, quality control, expeditions. Then it will be shown the correlation between the processes, by using a flow chart or diagram representing visually the sequence of interfaces between them. This activity is a prerequisite for the subsequent formulation of the process improvement solutions.

Another solution is recommended by a document of ISO TC 176 Secretariat / SC 2 which specifies four categories of management processes: processes for management of the organization; resource management processes; product development processes; measurement, analysis and improvement processes.

- processes for management of the organization include processes referring to strategic planning, determining quality policy and quality objectives, ensuring communication between functions and processes in the organization, ensure availability of the resources for quality objectives and the analyzes of the quality management system;
- Resource management processes are those processes that provide resources, and they are necessary for the organization's management processes for realization and measurement of the product.
- Processes for implementation (product development processes) are those which result in the intended outcome and refer to the product or production process of service. These processes include: planning processes of product realization, processes related to customer care, processes of design and development of the product or service, production process or service provision, the supply process control measurement devices and monitoring. Product realization processes can be adapted in quality management system documentation and implementation to the specific needs of the organization. Document specifying the quality management system processes, including product realization processes and resources to be applied to a product, project or contract is called 'Quality Plan'.
- The measurement, analysis and improvement processes are necessary to measure and collect data to analyze performance and to improve the effectiveness and efficiency of quality management system. These include processes for measuring, monitoring and auditing, performance analysis and improvement processes (e.g. for corrective and preventive actions) and constitute an integral part of management processes, resource management and realization processes.

These four categories of quality management processes can be considered as typical processes, but it can be identified also specific processes for each organization.

To implement the processes, the organization must develop draft-implementing activities that compose processes and measurement processes, projects that include: communications in the organization, awareness, training, re-engineering management, involvement of top management, applicable analysis activities. Implementation

projects must include measurements, monitoring processes and achieving planned inspections

Every part of the processes-system has clients (internal or external to the organization) and other stakeholders who are influenced by the process and determine the desired outputs, according to their needs and expectations. To ensure the operation and monitoring of these processes there are necessary information about the required resources for each process, about the characteristics outcomes, criteria for monitoring, measurement and analysis and also determine how these criteria can be included in the quality management system and in the works.

Among the advantages derived from this principle, we mention:

- defining systematic activities necessary to obtain the desired result and formalization of their main processes.
- setting clear and quantifiable responsibilities for the process management and identifying process interfaces with functions of the organization that will be tracked constantly;
- analyze and measurement of key processes capability;
- identifying interfaces between key-activities and the other organization's functions;
- focusing on factors that can lead to improving the organization's activities (resources, methods and materials);
- risk assessment, consequences and processes impact on all stakeholders;

2.5. System approach to management

The principle of the system approach for quality management system is reflected in clauses 4.1 and 4.2 of ISO 9001: 2008. The principle requires global approach to quality management, including all structures of the company and all employees. A perfect work performed by a department of the company, but neglected to another, loses all value. In fact, all departments of a company are, in one way or another, customers or suppliers to one another, as are the customers and external suppliers to the company. The qualitative approach will not bring positive results than respecting the condition that the entire company to align this approach that quality management is an organic component of the overall management of the company. Quality management system is part of the overall management of the organization, along with other parties such as human resources management subsystems, suppliers, health and safety etc. Even if these subsystems are not enough visible, they are found in every organization.

The principle involves understanding and conducting the quality management system in the company, given that its activities are embodied in interrelated processes, so as to ensure efficiency improvement organization. Quality management system processes are managed as a system by creating, understanding and conducting network-processes and their interactions. Consistent operation of this network of processes is often called a 'systemic approach' management and applies to the entire quality management system. 'The process' is related to the activities carried out and results obtained intermediate to produce the desired result for the client. Every process in the system processes has clients (internal or external to the organization) and other stakeholders who are influenced by process and defining the desired outputs according to their needs and expectations.

Applying this principle has as results:

- better achieve of the objectives pursued by integration and alignment of processes
- it provides confidence to the stakeholders on the existence, effectiveness and consistency of the organization;
- understanding the interdependencies between processes within the organization;
- a structured approach to harmonization and integration of processes;
- achieving a better understanding of roles and responsibilities;
- understanding the organization's capabilities and prioritization of actions according to material constraints;
- defining how specific activities will take place within the system;
- pursuing permanently the system improvement by measurement and evaluation;

2.6. Continuous improvement in performance

This principle consists in involving all staff at all levels and in all entities in activities to improve the organization's distinctive capabilities.

Responding to the requirements of this principle it was invented in Japan and applied by Masaaki Imai (2006) a new strategy of continuous improvement, named in Japanese 'Kaizen' which involves continuous improvement and involving everyone from managers to workers. In his turn, W.E. Deming has developed a continuous improvement process called 'P-D-C-A Cycle', introduced in Japan in 1950 and called 'the Deming Cycle'.

The four phases of this cycle are:

- *Plan (P)* – Planning activities for the improvement plan. At this stage the goals and necessary processes are determined to obtain results in accordance with customer requirements and the organization's policies.
- *Do (D)* – Implementation of the improvement plan. This stage consists in implementing in fact the processes.
- *Check (C)* – Checking the performed work. This stage consists in monitoring and measuring processes and products against policies, objectives

and requirements for products, and reporting results. It is check therefore whether or not the implementation is on schedule and where the activities are, comparing to the planned activities.

- *Act (A)* – Action to correct the process. The stage includes actions to continuously improve process performance based on the findings of the previous stage. It aims at conducting and achieving standardization of the new procedures to prevent recurrence of nonconforming problems or to set goals for further improvements. PDCA cycle continuously spins given that once an improvement is made the resulting state becomes another target for improvement.

Current standards will be improved by KAIZEN activities, which will make it possible by passing from maintenance stage to improve stage.

Corresponding to this principle, the organization's overall performance should be a permanent objective of management. The phrase 'continuous quality improvement' can be used only when, as specified in ISO 9000: 2005, quality improvement is permanent, temporary actions to improve quality do not meet this principle.

Although most experts consider to be the most important principle of TQM, understanding its importance and how it applies is very different in the world. The greatest interest is granted by the quality management system practiced in Japan. We retain in this regard, Kaizen system practiced in this country, which is a concretization of the principle.

In our assessment, the inclusion of this principle in the 2000 edition of the standard 9001 by dropping the phrase 'quality assurance' and replacing it with the phrase 'continuous quality improvement', targeting the excellence, was correct. It can be considered that the implementation and efficient operation of the quality management system presumes that was effectively ensured quality in all activities of the organization. Therefore the concern of management and employees must focus on continuous quality improvement, i.e. towards excellence, as required by the guidelines provided by ISO 9004: 2011, which was designed to pair with ISO 9001. The observation is consistent with requirements for continuous quality improvement, which is manifested in the European Union. Currently, the requirements for product quality and service have increase beyond the level implied by the phrase 'quality assurance', and believe that customer satisfaction is no longer sufficient to overcome expectations by promoting the concept of 'Beyond Customer Satisfaction' according provided that the product must exceed customer requirements, to enthuse him.

- Among the advantages of organizations applying this principle, we remember:
- continuous performance improvement becomes a permanent approach across the organization
- requires staff training methods and tools for continuous improvement;
- continuous improvement of products and processes is a goal of every person in the organization;
- establishment of measures for continuous improvement and its tracking;
- recognition and distribution of the improvements.

2.7. Management by facts

This expression signifies that each person involved in the organization must ensure that any decision is based on facts. Management decisions and actions on quality management system is based on the analysis of 'facts' that represent data and information on the performance levels of current products or services provided by the organization and which are obtained from information contained in the audit reports, corrective actions, non-conforming products, customer complaints, etc. Analysis of relevant data based on information reduces the risk decisions based on personal 'opinions'. All documents, information, procedures constitute a proper quality management information system that intertwines, in some areas, with general information system existing in the organization. Those managers must be reserved in making decisions for which there are no verified information in practice

The benefits of the principle can be:

- decisions are pertinent and reliable because they are based on accurate and verified data and information;
- data and information analyzing is made using established methods;
- making decisions and setting up actions based on an analysis of the facts, balanced with experience and intuition;
- providing access to data to those who need them.

2.8. Mutually advantageous relations with suppliers

The latter implies definition and proper documentation requirements that must be met by suppliers. It is necessary to analyze and assess their performance to control the supply of quality products or services.

At the same time the manufacturer must also take account of the interests of the supplier, so both have benefited from business conducted jointly. Relations beneficial win-win between the organization and suppliers increases the capacity of both entities to create added value. This principle includes relationships with domestic suppliers. Mutually beneficial relations between all processes undertaken within the organization and between them and external partners contribute to an osmosis between internal activities, on the one hand, and between the organization and working environment

on the other. So the management of relations with suppliers focuses on providing quality and performance of services, involvement and integration provider (supplier partnership) and the capability of providing improvements in its work.

In practice, we noticed that there are few companies that were aligned to the requirements of stakeholders in the supply chain, manufacturing processes and solutions capabilities to achieve this "best practice" deeply rooted in quality standards. Therefore, we consider it necessary to reconsider the customer-supplier relationship, often adverse positions they were in traditional models of management in achieving the idea of partnerships throughout the supply chain.

As said Professor Daniel T. Jones, co-author of the paper 'The Machine That Changed the World', '*No organization is like an island. Your customers depend on the excellence of your supplies ... The best companies create alliances with suppliers to ensure their customer retention'*[4].

In fact the application of quality management in terms of efficiency is impossible without the existence of these alliance relationships with suppliers. One example is enough to confirm this assertion: the method Just In Time, which aims "zero inventories and total quality" means that the product must reach exactly when the client needs it. However, a prerequisite in this regard is thus synchronizing the production may be achieved only reduce inventory, related costs, increase quality, productivity and adaptability to changes.

During the process of choosing suppliers to establish relations of partnership, companies pursue objectives such as:

- the possibility of establishing relationships that balance short-term gains with long-term;
- mutual consent providers and beneficiaries on resource gains;
- identification and selection of major suppliers able to make improvements in their own activity;
- setting common activities to improve quality.

3. Conclusions

Analyzing the above principles, we believe that the basic principles of TQM must be included in the organization's culture to generate a climate of open cooperation and teamwork between members, customers and suppliers. Managers must understand that by implementing total quality management principles can improve considerably the competitiveness of organizations. We consider that the implementation of generalized systems of quality management, organizations can record a short-term benefits such as winning new business, increasing customer demand and protect business reduce costs by continuously improving efficiency and reducing losses and increasing labor productivity.

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HARMONIZATION, HISTORICAL COST AND INVESTMENTS

Valentin Gabriel CRISTEA[*]

Abstract

Choosing depreciation of assets; revaluation of tangible or keeping their historical cost; registration, whilst the tangible assets are entered in the conservation of amortization expenses or a corresponding adjustment to depreciation expense ascertained; choosing the method of evaluating stocks is accounting policies. IAS 40 is significant because it was the first time the International Accounting Standards Board has introduced a fair value accounting model for non-financial assets. All firms must provide fair value for their real estate assets either directly in the balance sheet in accordance with the fair value model choice, either in the footnotes below cost model selection.

Keywords: *Harmonization, historical cost, investments, fair value.*

1. Introduction

Fair value accounting was developed in Financial Accounting Standards Board (FASB) 157 by Landsman (2006); Maines and Wahlen (2006); Owusu-Ansah and Yeoh (2006); Bahal et al. (2008); Christensen and Nikolaev (2008); Muller et al. (2008); Peng in (2008).

Fair Value Accounting FVA is defined as the price that would be received to sell an asset or paid to transfer a liability for an orderly transaction between market participants at the measurement date. Bahal et al., (2008) deems fair value more relevant and reliable than historical cost. The application of FVA is more complicated because of its complex and controversial side. Muller et al. (2008) study the fair value of investment properties while studying the properties of the article of European companies listed on the real estate market in China. Agency theory is detected by the extent and determinants of investment properties valuation based companies listed on the stock exchange in Romania. A study of Taplin, Wei Yuan and Alistair Brown (2014) are based on construction based mainly on Western countries' ideas of a market-oriented study and can be applied in China. Ke & White (2009) states that the property market in China have rapidly been expanded and Li et al., (1999) have showed that a high percentage of foreign investment in China dedicated properties in cities in China. Wang et al., (2009) state that a huge pool of quality investment property is currently owned by commercial banks, developers, and government of China. What in Romania can speak only of Banca Transilvania SA, Bucharest Stock Exchange SA, Property Fund SA and BRD Groupe Societe Generale as main actors on the Romanian stock market with increases of 0.41% and respectively 1.12% and decreases 1.32% and respectively 0.19% on 03/11/2016. Quek and Ong (2008) notes that China's economy surpassed most developed economies in the world leading to the rapid growth of real estate market in China. Chinese real estate market is dominated by real estate investment trusts (REITs). This is explained by the fact that the Chinese economy has exceeded the more developed economies in the last ten years, which is reflected by the rapid growth of real estate market in China (Quek and Ong 2008), which we can not talk of Real Estate Investment Trusts in Romania.

1.1. The question of the research topic

We note that important cultural and legal differences in property investments made by Chinese and Western companies. Nobody has the right to land ownership in China because it is an active state. It may be intangible value associated with land that welcomes rather than the building itself, which stands as a physical object that depreciates mostly by aging. Deloitte[1] (2011) recognizes that while transparency in contracts for real estate investment market in China has improved in recent years, there are still some issues that have an impact on the background check calendar periods and contractual transaction costs.

These problems include the lack of accurate property sales and leasing, transaction data, the lack of statistics on supply and demand for investment goods and the lack of centralized data on real estate investments. This makes empirical evaluation of Chinese companies applying either for real estate investments on historical cost or fair value accounting FVA and to ask a question. This is observed in Romanian companies. The problem of research is expressed as:

Features Romanian companies using fair value accounting are much different than those that use historical cost accounting for real estate investments?

[*] PhD Candidate, Faculty of Economic Science , "Valahia" University of Targoviste (e-mail: **valentingabrielc@yahoo.com**).

[1] Deloitte 2011, *China real estate investment handbook,* Deloitte Touche Tohmatsu, Beijing.

This paper is presented in three sections: Section 1 is Introduction, Section 2 provides literature review, data assumptions and research methods and conclusions as Section 3 .

2. Literature review, data assumptions and research methods

Filds et al. (2001) present more research regarding the accounting policy choice. A considerable interest is generated by economic implications of accounting elections among some researchers (Fields et al. 2001). There are economic incentives for managers selecting accounting techniques that can generate revenue growth or a decrease in revenue (Watts and Zimmerman, 1986; Skinner 1993). Economic factors of a positive outlook accounting theory are used to explain the election management accounting policies. This study presents the accounting regulations of OMPF 1802 (2014) of Romania. As FVA is a major component of International Financial Reporting Standards (IFRS), the findings provide insights on global challenges to the international accounting convergence. To promote convergence between national and international standards, OMFP 1802 (2014) is an internal standard issued to comply with IFRS 13. Investment property presents the perspective in this convergence.

IAS 40 Investment property is defined as property (land or a building - or part of a building - or both) held (by the owner or lessee under a finance lease) to earn rentals or for capital appreciation or both, rather than: (a) use in the production or supply of goods or services or for administrative purposes; or (b) sale in the ordinary course of business. (IAS 40.5).

IAS 40 Investment Property Finns propose to choose between cost and fair value models and apply the policy chosen all their property investment. Under the cost model, companies that apply the requirements of IAS 16 Property, Plant and Equipment (IAS 40.56) on this method, according to which real estate investments are carried at its cost less any accumulated depreciation and any accumulated impairment loss (IAS 16.30). However, the fair value must be disclosed in footnotes, unless, in exceptional circumstances, fair value can not be determined reliably (IAS 40.79 (e)).

Under the fair value model, investment property is carried in the balance sheet at fair value (IAS 40.33), with all changes in fair value reported in profit (IAS 40.35). The fair value of investment property is the price at which the property could be exchanged between knowledgeable parties concerned in arm's length transactions (IAS 40.5).

It will be determined in accordance with a fair value hierarchy described in IAS 40.45-47, where the best evidence of fair value is given by current prices in an active market for similar properties in the same location and condition and subject similar lease and other contracts. The companies must hire independent experts (eg assessors), with qualifications and relevant experience in order to establish fair value (IAS 40.32).

IAS 40 is significant because it was the first time the International Accounting Standards Board (IASB) has introduced a fair value accounting model for non-financial assets. All firms must provide fair value for their real estate assets either directly in the balance sheet in accordance with the fair value model choice, either in the footnotes below cost model selection.

However, given that only gains resulting from the fair value model or the fair value of unrealized losses streams of income, the choice between the two models affect reported net earnings and volatility in asset values. The standard specifies that firms are able to shift from cost model to fair value model. The standard explicitly states that the presentation will be prohibited by a switch from fair value to cost model (IAS 40.30).

The historical cost is an accounting convention involves recording assets at their purchase or production while the claims and liabilities are recorded at their nominal value.

Short-term securities represent shares and other financial investments. They are admitted to trading on a regulated market and an estimated value of trading on the last day of trading, and those traded is estimated at cost less any adjustments for impairment.

Long-term securities are shares and other financial investments. They are estimated at historical cost, without any adjustments for impairment.

The accounting policies contain principles, bases, conventions, rules and practices applied by an entity in preparing and presenting financial statements.

Choosing depreciation of assets; revaluation of tangible or keeping their historical cost; registration, whilst the tangible assets are entered in the conservation of amortization expenses or a corresponding adjustment to depreciation expense ascertained; choosing the method of evaluating stocks represent accounting policies.

Non-monetary items such as fixed assets, stocks, purchased with payment in foreign currency and recorded at historical cost will be presented in the financial statements using the exchange rate at the date of the transaction.

In the notes to be presented at historical cost value of revalued assets and the amount of cumulative value adjustments; or at the balance sheet value of the difference between unrealized gains and representing the historical cost and, where appropriate, the cumulative amount of the additional

value adjustments. separately for each item in the balance of nature revalued property and equipment when making revaluation.

Williams (2003), Watts and Zimmerman, (1986) showed that positive accounting theory has contributed significantly to the understanding of corporate reporting practices.

Agency theory, an important building of positive accounting theory, was a popular concept for researchers interested in the choice of accounting problems and incentive mechanisms for dealing stimulation (Guilding et al. 2005).

Accounting is a link between the choice of accounting records and leverage and firm size Christensen, HB and Nikolaev, V (2008), Gopalakrishnan (1994), Kalay (1982). EFET leverage increases by raising capital. Fields et al. (2001), and Watts and Zimmerman (1986). show leverage can be reduced through management techniques. We hypothesize that:

H1: Companies with less leverage are more likely to use historical cost model.

Ball (2006) and Jermakowicz and Gorn Tomaszewski (2006) shows that revenues are volatile consequence the introduction of fair value due to external economic factors control the companies: changing market prices of assets (Ronen 2008; Whittington 2008).

This volatility is one of the main arguments against fair value method (Enria, et al.2004) volatility direct capital cost (Fama 1977).

Agency theory shows that managers must provide holders of debt next low volatility of earnings (Watts and Zimmerman 1990).

Muller et al. (2008) show that there is a link between the adoption of fair value beneficial and cost of capital. We hypothesized:

H2: Companies with less variability of revenues reported are more likely to use historical cost model.

Romanian companies can list domestically or abroad where additional investments can boost Romanian market entities play a global role by reporting at fair value (McCollum 2006). Thus we hypothesize:

H3: Romanian companies unlisted on the international stock market are more likely to use historical cost model.

Agency theory finds the information asymmetry as one of the key factors that allows management to pursue objectives that are divergent from the interests of shareholders (Watts and Zimmerman 1990). Managers to protect the company's shareholders choose models cost value fair and efficient. We consider efficient historical cost. We issue the hypothesis:

H4: Small companies without being listed on the exchange stock market are more likely to use historical cost model.

Investment firm have lower cost of information on local real estate markets in relation to non-local markets (Muller et al., 2008) .We hypothesize:

H5: Companies with nationwide operations more likely to use historical cost model.

We get a research from BVB (Bursa de Valori Bucureşti) Bucharest Stock Exchange at 3/11/2016.

BET Index Composition[2] 3/11/2016

SSymbol	Company	Shares	Ref. price	FF	FR	FC	Weight (%)
TTLV	BANCA TRANSILVANIA S.A.	3,026,003,679	22.4300	00.90	00.863000	11.000000	21.45
FFP	FONDUL PROPRIETATEA	11,193,423,051	.0.7450	11.00	00.625000	10.000000	19.57
SNP	OMV PETROM S.A.	56,644,108,335	00.2550	0.30	11.000000	11.000000	16.27
SSNG	S.N.G.N. ROMGAZ S.A.	385,422,400	26.8500	00.30	11.000000	11.000000	11.66
BRD	BRD - GROUPE SOCIETE GENERALE S.A.	696,901,518	10.5800	00.40	11.000000	11.000000	11.08
EL	ELECTRICA SA	345,939,929	12.3000	00.50	11.000000	11.000000	7.99
TGN	S.N.T.G.N. TRANSGAZ S.A.	11,773,844	2266.0000	00.50	11.000000	11.000000	5.88

[2] http://www.bvb.ro/FinancialInstruments/Indices/IndicesProfiles.aspx?i=BET

TEL	C.N.T.E.E. TRANSELECTRICA	73,303,142	229.5500	00.50	11.000000	11.000000	4.07
SNN	S.N. NUCLEARELECTRICA S.A.	1,221,041	.5.4900	00.20	11.000000	1 11.000000	1.24
BVB	BURSA DE VALORI BUCURESTI SA	7,674,198	227.2000	11.00	11.000000	11.000000	0.78
FF = Free Float Factor	FR = Representation Factor	FC = Price Correction Factor		FL = Liquidity Factor			
Index capitalization: 26,626,283,028.62 RON Index Divisor: 4,029,956.1575							

We note that 40% of companies listed on BVB are investment funds and properties. More than 50% of Romanian companies are using historical cost.

3. Conclusions

Romanian companies use historical cost if they are unlisted on the international stock market H3 or they are small and unlisted on stock market H4, or with less variability of revenues reported H2, or with nationwide operations H5, or with less leverage H1

We remark that 40% of companies listed on BVB are investment funds and properties. More than 50% of Romanian companies are using historical cost.

Listing status of a Romanian company is affected by the company's investment property valuation foundation selection.

Romanian companies have chioces to list domestieally or internationally.

If a company is unlisted international, it is better to use historical cost accounting as a basis valuation.

Small companies with nationwide operations and unlisted on the exchange stock market are more likely to use historical cost model.

If a company has less variability of revenues reported, it is better to use historical cost accounting as a basis valuation.

If a company has less leverage, it is better to use historical cost accounting as a basis valuation.

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FAIR VALUE ILLUSTRATED IN OMFP 1802/2014

Valentin Gabriel CRISTEA[*]

Abstract

The fair value of assets is calculated from the evidence of market data through an assessment by authorized appraisers, according to law. The fair value of tangible assets is calculated based on their market value, based on information that we would use market participants in setting asset price. The fair value is determined by reference to one of the following:

a) market value, for those financial instruments for which a reliable market easily identify.

b) a value resulting from models and generally accepted valuation techniques for financial instruments that can not easily identify a reliable market, so these models and valuation techniques to ensure a reasonable approximation of market value.

Keywords: *fair value, market value, acquisition cost, production cost, weighted average costing method.*

1. Introduction

This study introduces the accounting regulations of OMPF 1802[1] (2014) of Romania.

As FVA represents a major component of International Financial Reporting Standards (IFRS), the findings provide insights on global challenges to the international accounting convergence.

To advance convergence between national and international standards, OMFP 1802 (2014) is an internal standard issued to comply with IFRS 13.

1.1. The question of the research topic

We remark that important cultural and legal differences in property investments made by Chinese and Western companies. In China, nobody has the right to land ownership because it is an active state. It may be intangible value associated with land that welcomes rather than the building itself, which stands as a physical object that depreciates mostly by aging. "There are still some issues that have an impact on the background check calendar periods and contractual transaction costs" admits Deloitte[2] (2011) that while transparency in contracts for real estate investment market in China has improved in recent years.

The lack of accurate property sales and leasing, transaction data, the lack of statistics on supply and demand for investment goods and the lack of centralized data on real estate investments are some problems described above. This does empirical evaluation of Chinese companies applying either for real estate investments on historical cost or fair value accounting FVA and to ask a question. This is noticed in Romanian companies. The question of research topic is expressed as:

Features Romanian companies using fair value accounting are much different than those that use historical cost accounting according to OMPF 1802 (2014)?

This paper is introduced in three sections: Section 1 is Introduction, Section 2 provides literature review, data assumptions and research methods and conclusions as Section 3.

2. Literature review, data assumptions and research methods

The financial statements show the economic phenomena in words and numbers. Description of annual financial statements must be complete, neutral and without errors.

A complete description contains all information necessary for a user to grasp the phenomenon described and explanations.

The acquisition cost is the price plus related expenses minus discounts due to the cost of acquisition. The acquisition cost of assets includes the purchase price, import duties and other taxes, without the legal entity that can recover from the tax authorities, the transport costs, handling and other expenses directly attributable to the acquisition of goods. The cost of acquisition is reflected by commissions, notary fees, costs of obtaining permits and other non-recoverable expenses, directly attributable goods. Transport costs are the cost of acquisition when supply function is outsourced.

The production cost is the purchase price of raw materials and consumables together with other expenses directly attributable to the asset in question.

The cost of production or processing of inventory and cost of production of assets includes direct costs related to production, such as: direct materials, energy consumption for technological

[*] PhD Candidate, Faculty of Economic Science, "Valahia" University of Targoviste (e-mail: **valentingabrielc@yahoo.com**).

[1] http://contabilul.manager.ro/dbimg/files/ORDIN_1802.pdf

[2] Deloitte 2011, *China real estate investment handbook,* Deloitte Touche Tohmatsu, Beijing.

purposes, direct labor, other direct costs of production, the cost of designing products and the share of indirect costs of production apportioned rationally.

The items in the financial statements will be based on the principle of purchase or production cost.

Upon entry into entity, assets are estimated and recorded in the accounts at cost, which is determined as follows:

- the cost of purchasing goods purchased for consideration;
- the cost of production for goods produced in the entity;
- the amount of the contribution determined after evaluation of goods representing company capital;
- the fair value for assets obtained free of charge or addition to inventory found.

The amount of contribution and the fair value substitute the acquisition cost.

At the end of the period the balances differences account accumulate the stocks at record prices. These accounts should reflect, as appropriate, acquisition cost or production cost.

The acquisition cost or production cost of stocks in the same category and all fungible items is determined by one of the following methods:

- WAC weighted average costing method;
- the first-in-first-out FIFO;
- last in first out method LIFO.

The weighted average costing method (WAC) requires determining the cost of each item on the weighted average cost similar items in storage at the beginning period and the cost similar items purchased or produced during the period.

The weighted average cost related items in stock at the beginning of the period and the cost of similar items purchased or produced during the period determined periodically or after each reception. The calculation period shall be the average length of storage.

According to the first-in first-out (FIFO) the output assets from management are estimated at the acquisition or production cost of first entry. While the batch is exhausted, emerged from managing assets estimated at the acquisition or production cost of the next batch in chronological order.

According to the last in-first-out method (LIFO) the output assets from management are estimated at acquisition or production cost of entry. While the batch is exhausted, emerged from managing assets estimated at the aquisition or production cost of the previous batch in chronological order.

Notwithstanding the assessment based on the principle of purchase or production cost, entities may revalue tangible assets existing at the end of the financial year so that they are carried in the accounts at fair value, with mirroring results of this reassessment in prepared financial statements for that year.

Differences in price over the cost of acquisition or production are highlighted separately in accounting, is recognized in cost of the asset.

A process may result in the simultaneous production of several products, for example, in the case of obtaining products are produced or where there is a main product, and the other side. If the conversion costs can not be identified separately for each product, they are allocated according to a rational and consistent basis. For example, the allocation is based on the relative sales value of each product either at the stage of production where products become separately identifiable, or at the completion of the production process. By their nature, byproducts mostly immaterial. They are often measured at net realizable value. This is determined by the cost of the main product. Therefore, the carrying amount of the main product is not materially different from its cost.

When certain general -administration- costs or costs of designing products are identified with links on some stocks they are included in the cost of stocks.

If service providers have inventories, they estimate the costs of their production. They consist of labor costs, other costs of personnel directly engaged in providing the service, including supervisory personnel and attributable overheads. Labour and other costs relating to sales and general administrative personnel are not included but are recognized as expenses in the period they are incurred. Cost of inventories of a service provider does not include profit margins or non-attributable overheads that are often incorporated into prices charged by service providers.

The cost of production of goods is a reasonable proposition in fixed or variable overhead costs indirectly attributable to the item in question, whether they relate to the production period. Overheads are included in cost of inventories that are incurred in bringing the inventories to the location and shape. The cost of production distribution costs not included.

If after the initial recognition as an asset, the value of an asset is determined based on the asset revaluation, revaluation gains attributable to the asset will instead cost of acquisition / production cost or assigned values before any other asset.

In these cases, depreciation rules will apply taking into account the value of its assets, calculated after revaluation.

When making revaluation of tangible assets, the difference between the value resulting from the evaluation based on the cost of acquisition or production cost and value resulting from revaluation must be disclosed under the revaluation reserve as a sub-element separately in capital and reserves - account 105 Revaluation reserves.

There are some basic assessment rules.

Current assets are assets generating future economic benefits and are held for a period exceeding one year. They are valued at acquisition cost or

manufacturing cost, observing the provisions of subsection present.

The acquisition cost or production cost or revalued amount, in cases where the provisions of subsection 3.4.1 of OMPF 1802/2014. Revaluation of tangible assets, the fixed assets whose use is limited in time is reduced by value adjustments calculated to systematically amortization of the value of such assets over their useful economic use .

Future economic benefits from an intangible asset include revenues from sales of products or services, cost savings or other benefits resulting from the asset by the entity. For example, use of intellectual property in a production process will reduce future production costs rather than increase future revenues.

The cost of a separately acquired intangible assets consists of:

- the cost or acquisition, including import duties and non-refundable purchase taxes, after deducting trade discounts and rebates; and
- any directly attributable cost of preparing the asset for its intended use.
- Examples of directly attributable costs are:
- staff costs due to bringing the asset to its working condition;
- professional fees arising directly from bringing the asset to its working condition; and
- costs of testing whether the asset on its proper functioning.

Current assets are valued at acquisition cost or production cost, as applicable, with respect to the following: value adjustments are made to current assets in order to present them at the lower market value or another minimum amount attributable to them at the time balance sheet.

If they are active nature assemblies or housing complexes which originally were intended for sale and which later changed its destination and will be used by the entity for a long period or be leased to third parties accounting records transfer of stocks to tangible assets. This transfer is performed upon the change of destination, the values at which assets were accounted for cost-represented.

Fair value is the price received from the sale of an asset or paid to transfer a liability in a transaction settled between market participants at the measurement date.

Fair value is the price that would be received to sell an asset in a transaction regulated main market, if any, or most advantageous at the measurement date, in the current market conditions, ie an exit price, regardless of whether the price is directly observable or estimated using another valuation technique.

Full description of an asset group containing at least a description of the respective assets, a numerical description of all assets and indicating initial cost or fair value.

The fair value of assets is calculated by evidence of market data through an assessment by authorized appraisers, according to law.

If no data on the market of fair value because of the specialized nature of the assets and reduced frequency of transactions, fair value may be determined by other methods used by appraisers approved according to law.

Evaluation of tangible assets on the balance sheet is carried at the costs incurred during the period to improve and increase the performance of the asset or restructure the operation to which it belongs restraint, without amortization and adjustments accumulated impairment, or revalued amount, being the fair value at revaluation date without any accumulated depreciation and any accumulated impairment losses.

On leaving the entity, the assets is estimated and subtracted from the value of their input management or value which are accounted for. In this regard, the revalued amount to tangible assets which were revalued or fair value for short-term securities admitted to trading on a regulated market.

For liabilities, plus any difference observed between asset value and book value are recorded in accounting on account of suitable debt.

Notwithstanding the assessment based on the principle of purchase or production cost, entities may revalue tangible assets existing at the end of the financial year so that they can be presented in the accounts at fair value, reflecting the results of this reassessment in the financial statements made for that year.

Depreciation of tangible assets thus calculated shall be recorded in the accounts revalued from the financial year following that for which it was conducted revaluation.

Revaluation of property and equipment is carried at fair value at the balance sheet date.

Revaluations are performed regularly, but the carrying amount should not differ materially from that which would be calculated using the fair value at the balance sheet date.

The fair value of tangible assets is calculated based on their market value, based on information that we would use market participants in setting asset price. It is assumed that market participants act in order to obtain the maximum economic benefit.

If the fair value of tangible assets can not be determined, shown in the balance sheet value of the asset will be its revalued amount at the date of the last revaluation, minus the cumulative value adjustments.

The fair value is determined by reference to one of the following:

- market value, for those financial instruments for which a reliable market easily identify.

If the market value is not readily identifiable for an instrument but will be identified for its components

or for a similar instrument, it will be derived from that of its components or similar instrument;

- a value resulting from models and generally accepted valuation techniques for financial instruments that can not easily identify a reliable market, so these models and valuation techniques to ensure a reasonable approximation of market value.

Financial instruments that can not be measured reliably by any of the methods described above are evaluated according to the principle of purchase or production cost, if the assessment is possible on this basis.

Entities will be estimated in the consolidated financial statements of financial instruments, including derivatives, at fair value.

Goodwill is the difference between the acquisition cost and fair value at the date of the transaction, the portion of net assets acquired by an entity. He is recognized on consolidation.

Goodwill arising on the acquisition of a foreign entity and fair value adjustments to the carrying amounts of assets and liabilities arising on the acquisition of that foreign entity should be treated as assets and liabilities of the foreign entity.

In the debit of account 103 Other items Equity record: adjustment of the fair value reserve as a result of unfavorable differences in measuring financial assets available for sale in the consolidated annual financial statements.

In the credit of account 501 Shares in affiliates are recorded: adjusting the fair value reserve as a result of unfavorable differences in measuring financial assets available for sale in the consolidated annual financial statements.

An entity identifies a biological asset if and only if fair value or cost of the asset can be measured reliably.

Entities will use information regarding the combined assets to estimate the fair value of biological assets.For example, the fair value of vacant land and land improvements may be deducted from the fair value of the combined assets to determine fair value of biological assets.

If a financial instrument is measured at fair value, any change in value, favorable or unfavorable, are included in the income statement, except next to such a change is directly in equity:

- the financial instrument is a hedging instrument and recognized in the group after hedging rules that allow some or all of the changes in value is not recorded in the income statement; or
- the change in value relates to an exchange difference arising on a monetary item that forms part of an entity's net investment in a foreign entity.

Change the value of a financial asset available for sale, is not a derivative, it comprises directly in equity - 1038 account differences fair value of financial assets available for sale and other equity.

Concessions, patents, licenses, trademarks, rights and similar assets representing intake, purchased or acquired in other ways, are recorded in accounts of intangible assets at cost or value of the consideration, as applicable. In this case, the contribution is assimilated fair value.

Monetary items are money held and assets / liabilities receivable / payable in fixed or determinable.

Monetary items has as main feature the right to receive or obligation to pay a fixed or determinable number of units of currency. For example: pensions and other employee benefits to be paid in cash; Provisions that will be settled in cash; and cash dividends that are recognized as a liability. Similarly, a monetary item is a contract to receive or deliver a variable number of equity instruments of the entity or a variable amount of assets in which the fair value to be received or delivered equals a fixed or determinable monetary unit.

Benefits form the entity's own shares or other equity instruments granted to employees are recorded separately and accounting compensation expense 643

proprii- in equity instruments, in return for equity accounts -1 031 Employee Benefits proprii- form of equity instruments at fair value

those equity instruments from the date of granting of those benefits.

Grants related to assets are awarding grants whose primary condition is that the recipient entity to buy, build or purchase assets.

A government grant takes the form of a non-monetary transfer, for example, an item of property. In this case, the grant and assets are carried at fair value.

Government grants, with non-monetary grants at fair value, will not be recognized until it is certain that the entity will meet the conditions of granting them and the grants will be received.

Grants for activities with non-monetary grants at fair value are recorded in the accounts as investment grants and are recognized in the balance sheet as deferred income - 475 Investment subsidies account. Deferred revenue is recorded as current income in the profit and loss account during the recording of depreciation or scrapping or disposal of assets.

Financial instruments are valued at purchase price or production cost in the following cases:

- For each class of derivative financial
- instruments: The fair value instruments, if such value will be determined by any of the methods listed in. 121 par. (1) a) "market value, for those financial instruments for which a market can easily identify credible. If the market value is not readily identifiable for an instrument but can be identified for its components or for a similar instrument, it can be derived from that of its components or similar instrument "and information about the extent and nature of the instruments;

- Financial assets recorded at a value higher than their fair value: carrying amount and the fair value of individual assets or appropriate groupings of those individual assets; and the reasons for not reducing the book value, including the nature of the evidence underlying assumption that the carrying amount will be recovered.

Financial instruments are measured at fair value when the significant assumptions underlying the valuation models and techniques where fair values have been determined in accordance with pt. 121 par. (1) b) "value and models resulting from generally accepted valuation techniques, financial instruments for which can not easily identify a reliable market, provided that such valuation models and techniques to ensure a reasonable approximation of market value '; for each class of financial instruments, fair value changes in value included directly in the profit and loss and changes in fair value included in reserves.

The provisions of subsection 3.4.2 Fair value measurement of financial instruments are applied to the annual consolidated financial statements. If financial instruments are measured at fair value, this is presented and justified in the notes to the consolidated financial statements.

If you opted for revaluation of tangible assets or valuation of financial instruments at fair value provisions of Section 3.4 shall apply alternative valuation at fair value of OMPF 1802/2014.

Non-monetary items purchased with payment in foreign currency and carried at fair value - for example: revalued tangible assets - will be presented in the financial statements at this level.

The historical cost is an accounting convention involves recording assets at their purchase or production while the claims and liabilities are recorded at their nominal value.

In the notes must be presented at historical cost value of revalued assets and the amount of cumulative value adjustments; or at the balance sheet value of the difference between unrealized gains and representing the historical cost and, where appropriate, the cumulative amount of the additional value adjustments. separately for each item in the balance of nature revalued property and equipment when making revaluation.

We get a research from BVB (Bursa de Valori Bucureşti) Bucharest Stock Exchange at 3/11/2016 We remark that 40% of companies listed on BVB are investment funds and properties. More than 50% of Romanian companies are using historical cost.

3. Conclusions

We conclude that the fair value of assets is calculated from the evidence of market data through an assessment by authorized appraisers, according to law. The fair value of tangible assets is calculated based on their market value, based on information that we would use market participants in setting asset price. The fair value is determined by reference to one of the following:

a) market value, for those financial instruments for which a reliable market easily identify.

b) a value resulting from models and generally accepted valuation techniques for financial instruments that can not easily identify a reliable market, so these models and valuation techniques to ensure a reasonable approximation of market value.

Then entities will use information regarding the combined assets to estimate the fair value of biological assets.For example, the fair value of vacant land and land improvements may be deducted from the fair value of the combined assets to determine fair value of biological assets.

If a financial instrument is measured at fair value, any change in value, favorable or unfavorable, are included in the income statement, except next to such a change is directly in equity.

Finally, financial instruments are measured at fair value when the significant assumptions underlying the valuation models and techniques where fair values have been determined in accordance with pt. 121 par. (1) b) "value and models resulting from generally accepted valuation techniques, financial instruments for which can not easily identify a reliable market, provided that such valuation models and techniques to ensure a reasonable approximation of market value '; for each class of financial instruments, fair value changes in value included directly in the profit and loss and changes in fair value included in reserves.

The provisions of subsection 3.4.2 Fair value measurement of financial instruments are applied to the annual consolidated financial statements. If financial instruments are measured at fair value, this is presented and justified in the notes to the consolidated financial statements.

Using a research from BVB (Bursa de Valori Bucureşti) Bucharest Stock Exchange at 3/11/2016, we note that 40% of companies listed on BVB are investment funds and properties. Over 50% of Romanian companies use historical cost.

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KNOWLEDGE *VERSUS* CREATIVITY: WHICH OF THEM REALLY MATTER?

Daniele GIAMPAOLI
Massimo CIAMBOTTI

Abstract

It is common opinion that knowledge management practices and creativity are very important factors for firms facing a turbulent and dynamic environment. Knowledge and creativity in fact are a helpful support for managers that have to make decisions under uncertain and complex conditions: they are not only complementary but also synergic in the problem solving process.

This paper aims to shed light on the benefits that knowledge and creativity are able to produce for organizational decision making, underlining differences and analogies between them. Only once certain aspects have been clarified it will be easier to judge the opportunity of investing in KM infrastructure or, in the case it already exists, what kind of changes are needed to improve creativity and/or decision-making speed.

Keywords: *useful knowledge, knowledge management, creativity, problem solving, performance.*

1. Introduction

Nowadays there is no doubt about the importance of knowledge within firms, while knowledge economy states it is the most valuable resource in order to create a sustainable competitive advantage. Global and dynamic markets make knowledge value even more important because it is strongly connected to another important resource, that is time (Ragab and Arisha, 2013). One of the reasons that could explain the differences between firms' performance is the way knowledge is managed. That's why in the last few years knowledge management (KM) discipline and many papers and journals (*Journal ok Knowledge Management, Journal of Intellectual Capital, Knowledge Management Research and Practice*, etc.) have been increasing.

Recently some empirical studies assessing the impact of KM on firm performance have appeared (Andreeva and Kianto, 2012; Kamhawi, 2012; Lee *et al*., 2012). The overall conclusion is that KM has some kind of impact on performance but scholars do not agree as to whether this impact is direct or mediated by some other variables (Andreeva and Kianto, 2012).

Creativity has recently been identified as the most important attribute for firms in order to be successful but Schumpeter (1934) had already defined it as the core of capitalism: "*This process of creative destruction is the essential fact about capitalism*". That is perhaps why creativity has received more and more attention from scholars. However, to date, only few empirical studies have investigated the relationship between creativity and firm performance (Gong *et al*., 2013; Khedhaouria *et al*., 2015; Lee *et al*., 2012; Weinzimmer *et al*., 2011) and there still is not conclusive empirical evidence showing that creativity impacts firm financial performance (Weinzimmer *et al*., 2011).

KM and creativity, as such, should provide as many more benefits as many more knowledge-intensive are the activities which will benefit from them. Considering that decision making (DM) and problem solving (PS) are very knowledge-intensive activities and roughly equivalent (Huber and McDaniel, 1986), they should be able to greatly benefit from effective KM practices (Ragab and Arisha, 2013) and employees' creativity.

2. Knowledge and useful knowledge

KM aims to optimize the management of the most important resource, that is knowledge and potential knowledge. But in order to reach this goal we need first to understand better what knowledge is. To answer the question "*What is knowledge?*" is all but easy. To define how and what we know is very difficult both at an individual and a collective level. In fact, knowledge is a polyhedral concept that has involved intellectuals of past and modern eras, from Socrate to Popper, and unanimous consensus on its meaning does not exist yet. Nowadays knowledge is still object of study of many disciplines as philosophy, psychology, economics and so on.

For a better understanding of the concept of knowledge it is useful to adopt the following distinction. There are at least three types of knowledge (Vassallo, 2006):

1. direct knowledge (e.g.: "*I know daniele*");
2. know-how (e.g.: "*I know how to cook*");
3. know-what (e.g.: "*I know that Colosseum is located in Rome*").

We know something or someone directly when we have had a direct contact with them. In this sense it is possible to say we know our friends, our home, our favourite songs and so on directly. Know-how

consists in the competence to perform a specific task: e.g. Daniele is capable of playing piano, swimming, painting, etc. Know-what consists in knowing that a proposition is true, e.g. Daniele knows that his favourite pizzeria is closed on Thursday, Sir Arthur Conan Doyle is the author that invented the character of Sherlock Holmes, the King is the most important chess piece and so on.

As far as relations among the three types of knowledge are concerned it immediately comes to mind the Greek concepts of Epistème and Techné that roughly correspond to the concepts of know-what and know-how. Some examples will help us to clarify their link. If we are capable of doing certain things probably we have some propositional knowledge concerning those things: if we are chess master we also know that each player has two rocks, two knights, two bishops, etc. We also know that bishops can make only diagonal movements while rocks move horizontally or vertically. One thing that should be noted is that the more propositional knowledge (know-what) we own the more know-how. In a chess match between two amateur players it is sufficient to know the basic rules of the game to win the match. A deeper knowledge (e.g.: how to castle, how to move *en passant*, etc.) will be probably more helpful and better used in a match between two chess masters.

The historian economist Mokyr to investigate the role of knowledge during the Industrial Revolution resorted to the concept of "useful knowledge", by defining the latter as knowledge concerning natural phenomena potentially manageable as materials, energy, artefacts and so on. The scholar distinguishes propositional knowledge (know-what) concerning natural phenomena from prescriptive knowledge (know-how) that he calls techniques or set of instructions directed to realize some kind of product. Knowledge lies both in the human mind and other storing devices (Mokyr, 2004). It is possible to define the aggregated propositional knowledge of a society as the ensemble of the whole knowledge stored in human minds and any other storing devices. We can say that society knows something when at least one of its members knows it. According to Mokyr (2004) propositional knowledge represents the support for techniques used when economic production takes place. Both past intentional research and the outcomes of human curiosity flow into the ensemble of propositional knowledge. Consequently part of propositional knowledge does not represent the epistemic base of any techniques and therefore is not useful. However exactly as some parts of DNA that for the moment do not codify any proteins, possible environmental alterations could activate some kind of useful knowledge previously inactive (Mokyr, 2004). The presence of a knowledge base offers many opportunities but it does not guarantee that someone will take advantage of them. For this reason both culture and institutions will have a key role. Culture affects preferences and priorities while institutions will determine incentives and penalties to increase the ensemble of techniques and partially the costs to access propositional knowledge. The greater the epistemic base is from which techniques draw, the easier the techniques will grow and expand. On the contrary a low understanding of the dynamics and reasons a techniques is based on will implicate diminishing returns of further improvements. In extreme cases the epistemic base of a particular techniques is so limited that we only know that it works. These techniques are generally an outcome of lucky and accidental discoveries (Mokyr, 2004).

According to Mokyr (2004) what has to be noted of the Industrial Revolution is not the reason why it happened but the fact that it was able to continue beyond the 1820s. In the past there had already been periods during which macro-inventions proliferated, particularly in XV century, with melting iron and navigation improvements. However the revolutionary potential of these inventions vanished before their effect could address economy towards sustainable growth. This was probably due to the limited epistemic base of technology which crystallized the new level of technical knowledge without stimulating a continuous flow of micro-inventions. Actually to introduce a new technology it was sufficient that someone was aware about a certain statistical regularity in order to exploit it (Mokyr, 2004). Finally it has to be underlined the fact that at the same time of the Industrial Revolution, a revolution of information technology also took place. A great amount of tacit and verbal knowledge begun to be codified in scientific texts and drawings. There was a change in the speed and efficiency by which knowledge spread. A lot of tacit knowledge spread thanks to the constant movement of qualified workers around different areas.

However, knowledge domain is limited and as such is not always able to answer our questions. Each time our thoughts and questions go beyond the boundaries of acquired knowledge maps, intuition, creativity, the ability to correctly evaluate the little available information and obviously to make the right decision, will be the only real instruments we could rely on in order to reach our goal. In this sense, for every new problem we will able to solve new knowledge will be created.

Some emblematic examples concerning the benefits of the combined effect of knowledge and creativity in solving problems or reaching our aims are the following: John Harrison (1693-1776) an artisan watchmaker who applied his knowledge to solve the problem of longitudinal calculation by creating the sea clock; John Bradmore (d. 1412)

combined his medical and metalworker knowledge to create a specific tool directed to extract an arrow penetrated in the face of Henry V of England; René Laennec (1781-1826), a French physician who after seeing children playing with a strange object foresaw that it would have been possible to apply the same technique in the medical field: that is how he invented the stethoscope.

Mokyr (2004) highlights the very important role that knowledge and even more knowledge sharing have on technological and economic development of society. At the same time the examples of Harrison, Bradmore and Laennec suggest that in order to successfully win some challenges knowledge could not be sufficient per se. Therefore we will be able to arrive where nobody else has been before only if we rely on the synergy between knowledge and creativity. Furthermore it seems clear that creativity deploys its greatest potential when it rests on strong epistemic basis. Harrison, Bradmore e Laennec were all very skilled in their respective fields.

3. Knowledge management

The main theories addressing the role of knowledge and its management within firms are the Resource-Based View (Barney, 1991) and Knowledge-Based View of the firm (Kogut and Zander, 1992; Spender and Grant, 1996). According to Resource-Based View (RBV) competitive advantage and better firm performance are due to a different resource endowment of the firm because they are rare, difficult to imitate and not easy to substitute (Barney, 1991). Scholars supporting RBV agree about the fact that resources able to reflect the aforementioned characteristics are those with high informative content, that is intangible resources. If RBV focuses on firm resources, the Knowledge-Based View of the firm (KBV) highlights the importance of one resource in particular that is knowledge and processes through which knowledge is created, shared and utilized so becoming an economic value source for firms. According to KBV knowledge is the main source of value because all human productivity depends on it and tangible products are only a kind of knowledge materialization. From this perspective different inter-firm performances are due to a different way by which knowledge is created, shared and utilized (Kogut and Zander, 1992; Spender and Grant, 1996). So, the ability of using knowledge at the right time in the right place represents a strategic asset for organizations, and KM processes can help the organization to deal with a continuous changing environment.

KM can be defined as "a conscious strategy of getting the right knowledge to the right people at the right time and helping people share and put information into action in ways that strive to improve organizational performance" (O'Dell *et al*., 1998). The notion of "right knowledge", "right people" and "right time" underline the need of identifying useful knowledge among the huge amount of information that an organization produces daily, who has such knowledge and finally how and when it should be transferred to those who will have to use it.

Several empirical studies have shown that great investments in KM don't necessarily bring a better performance (Kulkarni *et al*., 2007). Considering the definition of knowledge and knowledge management adopted, the above leads us to suppose that non all firms are able to develop a good capacity to transfer the right knowledge to the right people at the right time, or to use their own knowledge to solve problems and make decisions effectively.

KM has a key role for decision making, a very knowledge-intensive activity (Ragab and Arisha, 2013) and generally considered the core of management. According to Huber and McDaniel (1986) decision making and problem solving are roughly the same thing, so in this paper they are considered as one. Many of the different definitions of knowledge found in literature emphasize the functionality of knowledge, that is its usefulness in solving problems and making decisions that allow people to reach their goals. Some definitions of knowledge found in literature are the following: "Knowledge is organized information applicable to problem solving" (Woolfh, 1990); "Knowledge is information that has been organized and analyzed to make it understandable and applicable to problem solving or decision making" (Turban, 1992); "Knowledge is reasoning about information and data to actively enable performance, problem-solving, decision making, learning and teaching" (Beckman, 1997); "Knowledge is the raw material, work-in-process, byproduct, and final outcome of decision-making" (Davenport and Holsapple, 2006).

In their empirical study Massingham and Massingham (2014) found that the most persuasive argument in order to convince managers in investing in KM practices are surely the benefits gained from problem solving.

Knowledge is needed every time we look for a solution, that is to say when we have a problem to solve. According to Gray (2001) knowledge generate economic value when it is utilized to solve problems, exploring new opportunities and making decisions. Consequently PS becomes the way thanks to which it is possible to link firm knowledge to firm performance (Gray, 2001). Through PS activities an organization will improve the understanding of the surrounding environment increasing its absorptive capacity (Gray and Chan, 2000). Moreover, the time the organization spends in problem solving will increase the stock of knowledge available, allowing

the organization to adapt better to the environment (Gray and Chan, 2000).

Various philosophers have conceived the activity of scientific research in terms of problem solving (Blackwell, 1980; Goldman, 1983). In particular Blackwell (1980) claimed that scientific research starts with a problem and the will to solve it. According to René Descartes problem solving is the only way human beings can put order in the world and reach the truth. Wittgenstein states that knowing consist in an action driven by the will to change the state of thing. The assertion "I know" is strictly connected to "I can" but also to "I understand". Finally, according to existentialists the only way we can build up our knowledge is by taking action and reaching our goals.

4. Problem solving, knowledge sharing and creativity

From a cognitive perspective PS consists of information analysis and transformation, aimed to reach a specific goal regardless the difficulty of the decision to make (Lovett, 2003). According to Teece *et al*., (1997) the ability to learn through problem solving activities is one the most important strategic dynamic capabilities. Organizational learning consists in a change of the organizational knowledge base. Successful firms will be able to learn through problem solution and to transform new ideas in action faster than their competitors.

Considering the complex environment firms have to face and the complexity of problems they have to solve, the most effective way of organizing the search of solutions is the heuristic one. In heuristic search "an actor or a group of actors cognitively evaluate the probable consequences of design choices rather than relying solely on feedback after design choices are made" (Simon, 1991). This kind of theory-driven search speeds the problem solving process as it provides a base for evaluating information and, consequently, allows managers to select trials to do that maximize the probability of quickly discovering an effective solution (Nickerson & Zenger, 2004).

If cognitive skills of individuals were unlimited they could quickly absorb all useful knowledge to solve problems. Unfortunately human cognitive abilities are limited and so, the distinct sets of useful information and knowledge they need to solve complex problems will probably be scattered in the mind of many individuals (Nickerson and Zenger, 2004). Consequently, knowledge sharing and transfer are two fundamental aspects that we need to consider when examining the efficacy of heuristic research. As Reiter-Palmon and Illies (2004) claim the more information the more creativity of solutions. According to Cohen and Levinthal (1990) the prior possession of useful (relevant) knowledge and skills is necessary in order to create new associations and links and allow creativity to emerge.

However knowledge and information per se are not sufficient to develope problem solving skills because the advantage of having more information will be capitalized only if individuals are able to recognize useful information and integrate them in a new way with existing knowledge (Reiter-Palomon and Illies, 2004).

Bartol and Shrivastava (2002) define knowledge sharing as the spread of personal knowledge within an organization so that all employees can take advantage from it. According to Dawson (2000) knowledge sharing is the most important phase of knowledge management. Knowledge sharing allows firms to avoid to "reinventing the wheel" and it is a key process in converting individual knowledge in organizational capabilities. The most restricting factors for knowledge sharing are, a lack of an appropriate organizational culture that stimulates collaboration, physical distance among people, status differences, the fear of losing the benefits related to one's own knowledge and, finally, the lack of faith (Szulanski, 1996). Knowledge sharing among core employees is surely very useful for achieving a sustainable competitive advantage but it is also possible to take advantage of knowledge sharing among non-core employees (Cabrera and Cabrera, 2005) because every employee has the potential to impact firm performance. Moreover thanks to the acquisition and sharing of knowledge and information cognitive abilities of individuals and groups are amplified and, this, in turn, leads to a better ability in solving complex problems beyond individual capability (Mumford *et al*., 1991). Literature has identified several organizational variables to have a positive impact on knowledge sharing within organizations (Cabrera and Cabrera, 2005). On this occasion we feel the need to examine the following in depth: work design, organizational culture and structure.

Work design is an important tool to encourage knowledge flows. Working in teams gives employees the opportunity to work side by side and at the same time share knowledge and information. When teams have real problems to solve and are responsible for results, each employee is more likely to collaborate and share their knowledge (Cabrera and Cabrera, 2005). According to Hasgall and Shoham (2008) organizations should allow employees to organise as a group, have access to information and resources and use all available communication means because every employee and manager has the personal knowledge and capabilities to solve problems according to their position. Cross-functional teams strongly contribute to firm's success. Also community of practices may be very effective in leveraging knowledge sharing.

Within community of practices as emergent and social activities, people working on similar problems self-organize in order to help each other and share their experience.

Organizational culture has been identified as a key element able to make the difference between the success and failure of KM initiative. It is defined as the basic assumptions shared within an organization. These assumptions have been learned through problem solving activities aimed to adapt the organization to the external environment, and are taught to new members as the correct way to solve those problems. According to Davenport and Prusak (1998) a knowledge-friendly culture is one of the most important factors that impacts on KM and its outcomes. Organizational culture is very important to stimulate collaboration among employees and nurture knowledge flows. Moreover, organizational culture gives employees the ability to self-organize their own knowledge and create networks to facilitate solutions for problems and share knowledge (O'Dell and Grayson, 1998). Organizational culture may influence knowledge sharing in two different ways: first, by creating an environment in which there are strong social norms concerning the importance of sharing knowledge among employees (Cabrera and Cabrera, 2005); second, by creating a culture of caring and/or of trust and cooperation. There is a wide consensus about the fact that employees will be more willing to share their knowledge in an open and trusting culture (Davenport and Prusak, 1998). The promotion of specific values such as tolerance toward mistakes, common goals and a confident environment, will encourage specific behaviour that has an impact on KM benefits (Davenport and Prusak 1998).

Another important dimension identified as very important for knowledge sharing is organizational structure (Daft, 2008). Organizational structure is a key element in order to allow knowledge to flow, and to be utilized within organization. Decentralization refers to the extent decision making authority is dispersed throughout the organization (Daft, 2008). Decentralization of power stimulate spontaneity and experimentation and at the same time allows creativity to flourish (Cheng and Huang, 2007). According to Baum and Wally (2003) to decentralize operations management yields front-line environmental information potentially useful in strategic decision. Many scholars assume that it is difficult to create knowledge in centralized organizations (Stonehouse and Pemberton, 1999) because bureaucracy and formal communication inhibit experimentation and freedom of expression (Bennet and Gabriel, 1999; Cheng and Huang, 2007). On the contrary, a flexible organizational structure should facilitate knowledge sharing and collaboration within the organization.

It is important to underline that when problems have already been faced and solutions exist, people and organization need only to use their own past knowledge. Instead, when facing new problems, people and organization will have to go beyond their knowledge maps and find a new path that will allow them to find new solutions. That is why PS involves a great deal of creativity (Weisberg, 2006).

The concept of creativity as a human mental activity process was defined by Henry Poincaré as the ability to link existing elements with new and useful connections. As Amabile (1988) argues the definitions of creativity based on its products instead of its processes are more appropriate because of the difficulties in observing and measuring the last ones. Measurements focused on products are surely easier and more effective (Amabile, 1988). Consequently the definition of creativity adopted in this paper is the following: "creativity is the production of novel and useful ideas by an individual or small group of individuals working together" (Amabile, 1988). Guilford's (1950) concept of divergent thinking is probably the second most widespread definition of creativity. Divergent thinking deals with the creation of ideas resulting from given information and focuses on the variety and the number of results (Guilford, 1950). However, all definitions of creativity fall in two camps. In the first there are definitions of creativity that consider a person or an action as creative, only if some socially valuable product is generated: e.g. the solutions of a very complex problem or work of geniuses. This is called big C creativity. In the second camp all the other definitions of creativity fall, that socially valuable things are not required: e.g. the activities people engage in every day as to avoid a traffic jam by finding an alternative route. This is little c creativity (Sawyer, 2006).

It is very important for researchers to pay attention to the role that knowledge and experience have on creativity (Woodman *et al*., 1993). According to Amabile (1988) to enhance creativity of the problem solver both knowledge (domain-relevant skills) and cognitive abilities (creativity-relevant skills) are indispensable. In fact even if an individual has an high level of knowledge and competence he will not be able to reach a good creative performance without the right cognitive abilities (Amabile, 1988). Also motivational factors are very important. The motivation level of the problem solver can make the difference between successful and unsuccessful creative efforts. No knowledge, competence or creative thinking will ever compensate for a lack of motivation in pursuing a specific goal. Motivation toward a goal determines the extent to which knowledge, competence and cognitive abilities will be engaged in creative performance (Amabile, 1988).

Considering an organizational context Woodman *et al*. (1993) define creativity as the creation of a new and useful product, service, idea or procedure, by individuals working together in a complex social system. Management scholars showed that organizational creativity cannot be explained through an individual approach. If we want to understand how the most important innovations have been developed inside organizations we have to examine some aspects such as work design, collaboration, organizational culture and structure other than contextual factors such as market and norms (Sawyer, 2006). Because organizational creativity it is not the amount of each individual creativity, in order to make a creative organization is not sufficient to hire creative people (Sawyer, 2006). Organizational creativity is a complex and emergent property that depends both on its employees and organizational structure. Both managers and employees should learn to take risks thanks to a trustworthy, free, tolerant and creative environment. Even if employees are very creative they will not be able to express their ability in a stifling organizational structure (Sawyer, 2006).

Employees creativity efforts will bring great benefit to firm performance. Baer and Oldham (2006) assume a positive association among creativity, firm performance and competitiveness. Some researchers argue that organizations able to stimulate creativity will generate a competitive advantage (Woodman *et al*., 1993) and that competitive advantage will lead to improvements in revenue growth and profit growth (Geroski, 2000). Some empirical research show that increased organizational creativity results in a better organizational performance (Lee *et al*., 2012). The few empirical studies investigating the relationship between creativity and financial performance found a non-significant (Von Nordenflycht, 2007), if not completely absent (Khedhaouria, 2015), effect. Results seem to be coherent because creativity (the generation of new and useful ideas) is different from innovation (the successful implementation of ideas).

Recently scholars have begun to suppose that the very important aspect to consider is the firm's capacity to put creativity into practice and not creativity itself (Weinzimmer *et al*., 2011). Action orientation is defined as the ability to make decisions and implement cognitions, emotions and behaviour in order to reach specific goals (Jaramillo and Spector, 2004). Others use the concept of realized absorptive capacity, that is the ability to transform (convert) and exploit (apply) new knowledge to better firm performance (Gong *et al*., 2013). Transformation deals with the ability to convert new knowledge and combine it with existing knowledge while exploitation refers to the ability to apply converted knowledge to commercial ends. The few available empirical results seem to support the above hypothesis (Gong *et al*., 2013; Khedhaouria, 2015; Winzimmer *et al*., 2011).

Then, similarly to the psychology literature also strategy literature has to take into account company ability to enact creativity, because creativity impact on performance depends on it (Weinzimmer *et al*., 2011).

What is written above suggests considering creativity as raw material that has to be refined and implemented (Puhakka, 2012), and that creativity is only indirectly related to performance through increased innovativeness, risk-taking and proactiveness. It should be noted that on one hand creative ideas need to be implemented in order to improve performance and, on the other hand, the implementation of non-creative ideas does not give any kind of competitive advantage over competitors (Gong *et al*., 2013).

5. Knowledge Management, creativity and performance

KM practices improve firm performance and several empirical results seem to support this hypothesis (Lee *et al*., 2012). Some scholars assume there is a direct relationship between KM and performance but this could oversimplify the real nature of this link. This assumption could lead to believe that simply investing in KM will directly increase firm performance (Kamhawi, 2012). Actually, great investments in KM don't necessarily bring a better performance (Kulkarni *et al*., 2007). Therefore it is not clear from the current literature if KM practices impact directly on performance or if their effect goes through stages or intermediate levels of outputs. One might expect that KM practices are able to impact many aspects of organizational performance such as quality, innovation or productivity. Even if in very few cases KM has showed to have a direct impact on financial performance (Andreeva and Kianto, 2012) it is common opinion that KM can impact on financial performance only indirectly (Demarest, 1997).

The assumption of a positive association between creativity and firm performance is widespread (Baer and Oldham, 2006). However some scholars argue that the generation of creative ideas cannot directly improve firm performance until the time they are developed and implemented. In other words, it is firm ability to take action that determine the extent to which creativity will impact firm performance (Weinzimmer, 2011). Previous research investigating creativity impact on performance have considered it as a multidimensional phenomenon (Von Nordenflycht, 2007) without distinction between organizational and financial performance. However, considering the doubts, the lack of empirical results and in order to achieve a better understanding about the link

between creativity and performance, the authors of the present paper think it should be better to analyse the impact that creativity (creative problem solving) has on organizational performance and the impact it has on financial performance separately.

6. Conclusion

From literature review it seems there are some evident analogies between knowledge and creativity that we think is worth noting.

Knowledge is considered raw material useful for solving problems (Davenport and Holsapple, 2006). Similarly to other resources what really matters to achieve a sustainable competitive advantage is the ability to use knowledge in an effective and efficient way.

Like knowledge, creativity is considered raw material to define and implement (Puhakka, 2012) and what really matters for a better firm performance is the ability to use it (Weinzimmer *et al*., 2011). Several researchers stress the functional side of creativity that is its usefulness in solving problems and reaching goals (Amabile, 1988), while Joly (1993) states creativity itself is the ability to set and solve problems.

From our perspective the most important difference between knowledge and creativity is that the latter will allow us to go beyond acquired knowledge maps and reach new goals. So, similarly to knowledge, for creative ideas to actually improve a firm's performance they have to be implemented (Gong *et al*., 2013; Khedhaouria *et al*., 2015; Weinzimmer *et al*., 2011).

Furthermore it is a widespread belief that both KM and creativity are able to improve the whole firm's performance, but there are still some doubts about the distinct effects on organizational performance and financial performance.

Moreover, it is not clear if their impact on performance is directed or mediated. Firms' ability to use knowledge and creativity seems to mediate their impact on performance (Kogut and Zander, 1992; Spender and Grant, 1996; Weinzimmer *et al*., 2011).

Now it does not seem so surprising the fact that studies on KM and creativity very often focus on the same organizational variables (work design, organizational culture, decentralization, etc.). This is probably due to the fact that factors enabling knowledge sharing are the same for enhancing creativity and the speed of decision-making. However, even if employees and managers are able to reach their goals or solve problems, it is not possible to assess if they have relied on their knowledge rather than their creativity, nor if the way in which knowledge is managed actually enhances creativity and/or the speed of decision making. Finally the examples of John Harrison, John Bradmore and René Laennec show that knowledge and creativity other than being complementary give rise to a synergy in the problem solving process. In fact, in order to create new knowledge we need creativity. At the same time creativity deploys its greatest potential when it rests on strong epistemic base. Knowledge and creativity seem therefore destined to be linked in a never ending relationship and a deep understanding of their benefits will be possible only by considering the synergy knowledge and creativity give rise to.

Therefore there is a strong need of empirical evidence to prove the above hypothesis because only once these aspects have been clarified it will be easier to judge the opportunity of investing in KM or, in the case it already exists, what kind of changes are needed to improve creativity and/or decision-making speed. In fact, depending on the adopted strategy and the competitive environment it could be necessary to invest more resources on creativity than on speed (and vice versa) if not on both.

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ENTREPRENEURSHIP IN TERMS OF THE LEVEL OF ECONOMIC COMPETITIVENESS

Elena Mihaela ILIESCU[*]

Abstract

Considering that from a qualitative point of view, human activity in general, has recorded a significant leap along with the debut of entrepreneurial activities, from the "creative destruction" perspective through competition of Joseph Scumpeter until present, entrepreneurial theory and practice reveals a generally accepted point of view: entrepreneurship, regardless of the form under which it is carried out, represents the engine for the market economy system, the determining factor of competitiveness growth and sustainable economic growth.

Once aware of the positive impact it has on the economy and society, entrepreneurship has and is being promoted at a national level, European and global by creating, coordinating and implementing a strategic framework, legislative and financially favorable.

However, the socio-economic data analysis shows that, economies having an analog development level, record different entrepreneurial rates, that similar entrepreneurial activities have a different impact on economic development or that, as the economies record a higher development level, the interest for initiating new businesses declines.

From this perspective, the purpose of this paper is to underline and promote the entrepreneurship's role as a fundamental source for increasing growth potential and national and regional development in the long term, and to highlight, based on empirical data, the interdependency, the qualitative and quantitative correlation between the entrepreneurial rate and the competitiveness level of a country.

Keywords: *entrepreneurship, economic development, entrepreneurial rate, sustainability, Global Competitiveness Index.*

1. Introduction

Sustainable economic growth, a complex process, multidimensional, which generates the general progress of humanity as a result of positive changes both from the macroeconomic results' point of view and from the social structures, national institutions and population attitude, represent an essential for the struggle to solve the current economic, social and environmental problems (social inequalities, poverty, global warming).

From this perspective, studies, based on empiric data, reflect the same conclusion: the volume, the structure, the quality and the intensity of entrepreneurial activities decisively affect national economies competitiveness and increasing competitiveness represents a key factor for economic development. Under these circumstances entrepreneurship and economic competitiveness represent topics that are intensely debated and under the attention of economic analysts and decision makers, being thus promoted at a national, European and global level through the creation, coordination and implementation of a strategic framework, legislative and financially favorable.

Thus, the entrepreneurial theory and practice reveals an overall accepted aspect: entrepreneurship, regardless of the form in which it is performed, is represents the engine of the market economy system because, through "its creative destruction" results in progress, continuous modernization of the society, which creates the prerequisites for growth, development and thus for an increase in economic competitiveness. This happens because, increasing employment and accessing new markets, increase in productivity and innovation, economic growth, increase of social cohesion by reducing poverty and exclusion are undeniable results of the entrepreneurial process.

Reality has shown, however, that similar entrepreneurial initiatives induced different social and economic effects, which led to the conclusion that the effectiveness of the entrepreneurial activities is not only influenced by the main vector, the entrepreneur, but also by a number of other factors, some controllable, others not. Since it is well known that, in terms of the exogenous factors category , economy's state and the socio- political conjuncture are decisive aspects, we conclude that the opposite is true - the level of competitiveness of the national economy influences the extent, the structure and typology of the entrepreneurial process in a country.

In conclusion, between entrepreneurship and economic competitiveness there is a mutual causal relationship.

Given this "spiral" generated by the entrepreneurial process, the ranking of national economies according

[*] Lecturer PhD, Faculty of Economic Sciences, "Nicolae Titulescu" University of Bucharest (e-mail: **mag_mihaela@yahoo.com**).

2. The semantic approach of concepts entrepreneurship and economic competitiveness

If, in regards the importance of the entrepreneurial activities in literature the views are similar, the situation isn't similar regarding the concept's etymology. Therefore, entrepreneurship, as will be seen in the following lines, passed from a semantic point of view, through intermediate stages, that gradually led to the formulation of a complex definition, complete and enlightening.

Thus, the introduction in literature of the term entrepreneurship is attributed to the French economist **Richard Cantillon** (1680-1734), in his paper "Essay on the general nature of trade"; the paper considered by William Stanley Jevons, as being "the cradle of political economy".

In Cantillon's view, the entrepreneur was an intermediary between capital and work force, a speculator who undertakes risks, without bringing into question the innovative element.

Subsequently, JB Say has helped popularize the term but from the perspective of the creators of new organizations[1].

Adam Smith, in his paper "Wealth of nations" does not use the term "entrepreneur", but a similar concept of "entrepreneur"(undertaker), a concept that encloses the persons founding an organization for commercial purposes. For Smith, entrepreneurs are those who react to economic changes and convert the demand into offer[2].

In 1890, Alfred Marshall, in his reference paper "Principles of Economics" in analyzing the role of entrepreneurship he brings into question, besides providing goods and innovation, the progress.[3]

The conceptual framework is complemented by **Joseph Schumpeter** (1883-1950), who revolutionized the entrepreneurship theory with his paper "Theory of Economic Development," where he defined the entrepreneur as an innovator, leader, an agent of change[4]. Furthermore, Schumpeter used the term "creative destruction" to express the fact that some economic agents are removed and replaced by those who bring new and more efficient methods and techniques[5]. Entrepreneurship is thus presented as the main engine of the economic system.

Currently, although there is no single point of view in regards to the definition of entrepreneurship, it prevails the idea that entrepreneurship is the process whereby a legally constituted entity, with activities in various fields, generates added value through the action of innovative people, capable of capitalizing opportunities and also of undertaking the responsibility of immanent risks.

Once aware of the positive impact of entrepreneurship on the economy and society, entrepreneurship has been and is promoted at a national, European and global level through creating, coordinating and implementing a favorable strategic, legislative and financial framework, adjusted the level of economic competitiveness.

The concept of competitiveness is mainly linked to productivity and economic performance, but, in recent years the focus is on a new look - sustainability. Taking into account all relevant factors and the relationships between them, sustainable competitiveness represents the set of institutions, policies and factors that make a nation to stay productive in the long term, while ensuring social and environmental sustainability[6].

A paper of reference, recognized as the world leader, in terms of comparing the factors affecting competitiveness, is the Global Competitiveness Report, developed and published annually by the World Economic Forum. This represents a ranking of the most competitive 140 countries in the world based on the Competitiveness Global Index, indicator that resulted from the aggregation off three categories of factors (key factors of competitiveness, growth factors of efficiency and factors of innovation and business sophistication, broken down into twelve pillars of competitiveness - institutions, infrastructure, macroeconomic environment, health and primary education, higher education and training, efficiency of commodity markets, the effectiveness of the labor market, development of financial markets, the level of technological readiness, market size, the sophistication degree of business and innovation.

Based on these factors, Michael Porter, professor at Harvard University and expert of international business strategies, identified three development stages of national economies, according to the level of economic competitiveness[7]:

– **Economies based on production factors**, with low income (in 2003 reporting was done on GDP / capita <$ 6,800), where the primary factors of production, especially cheap labor force and natural resources are the main sources of competitive advantage. Within these economies, for improving the business environment, the focus is on improving

[1] Tino Sanandaji, Nima Sanandaji, *SuperEntrepreneurs And how your country can get them*, Centre for Policy Studies, April 2014, Printed by 4 Print, 138 Molesey Avenue, Surrey, pp. 4-8.
[2] Idem.
[3] Văduva Sebastian, *Entrepreneurship. Practices applied in Romania and other countries in transition*, Economic Publishing, Bucharest, 2008.
[4] Idem.
[5] Tino Sanandaji, Nima Sanandaji, op. cit., , pp. 4-8.
[6] Foundation Post - Privatization innovation and entrepreneurship pillars of competitiveness , 2013 , p. 17.
[7] Michael E. Porter, *Building the Microeconomic Foundations of Prosperity: Findings form the Microeconomic Competitiveness Index* , in Global Competitiveness Report 2002-2003, World Economic Forum, Geneva, Switzerland, 2003, pp. 32 – 34.

the infrastructure and the legislation, reducing the entry barriers in business and strengthening the antitrust policies, as a result aspects like encouraging clusters and venture capital enterprises, cutting-edge technology, research and innovation do not constitute priorities.

- **Economies based on investments**, with average income (in 2003 reporting was done on a GDP / capita between hard $ 6,800 and $ 20,000), where the increased efficiency due to increased industrialization and to economies of scale represent the determining factor for increasing competitiveness. Once overcome the challenges of economies based on production factors, in this stage of development, to improve the business environment, are concerned aspects such as fostering the modernization of the financial sector, encouraging clusters and the research- development sector, increasing technologization, efficiency and quality of the productive sector.
- **Economies based on innovation**, with high income (GDP / capita> $ 20,000), where the ability to achieve innovative products and services to the limit of global technology using the most advanced methods becomes the dominant source of the competitive advantage. At this stage, the tertiary sector develops, focusing on research –development, which increases thus the potential for innovation.

Porter's model reflects therefore from a theoretical standpoint, the mutual influence of the two key indicators of economic development – competitiveness and entrepreneurship, two variables extensively studied, analyzed and debated.

3. The correlation between entrepreneurship and economic development - comparative empirical analysis

The applicability and practicability of Porter's model is demonstrated by its use in the development of the most known annual survey on entrepreneurship, The Global Entrepreneurship Monitor.

Subsequently, the methodology was completed, perfected, so that, in The Global Competitiveness Report 2015-2016, the typology of national economies is presented in the table below:

Table 1: Stages of development of national economies in terms of the degree of influence of the pillars of the global competitiveness index and the GDP / capita

Competitvity level	*GDP per capita (US $)*	**Key factors of competitiveness**	**Factors increasing the efficiency**	**Innovation and business sophistication factors**
Level I: economy based on factors	***< 2000***	***60%***	***35%***	***5%***
Transition from Level I to Level II	2000 – 3000	40 - 60%	35 - 50%	5 – 10%
Level II: Economy based on efficiency	***3000-9000***	***40%***	***50%***	***10%***
Transition from Level II to Level III	9000-17000	20 – 40%	50%	10 – 30%
Level III: Economy based on innovation	***>17000***	***20%***	***50%***	***30%***

Each of the three factors of competitiveness is therefore necessary increasing the level of development of an economy, but, as the economy progresses, the business sophistication degree increases, innovation acquiring an increasingly important.

According to the assessments presented in the Global Competitiveness Report 2015-2016[1] and used in developing The Global Entrepreneurship Monitor, a total of 38 countries have economies driven by innovation, the most advanced being Switzerland (for the sixth consecutive year), Singapore, Finland, Germany, USA, Sweden, Hong Kong, Netherlands, Japan and Britain which ranks top ten in the world rankings according to the general index of competitiveness[2]. Among the European Union member states, 21 states are part of the innovation-driven economies. Other 31 countries of the 140 countries assessed are classified as economies driven by efficiency (Albania, Bosnia and Herzegovina, Bulgaria, Ukraine, Namibia, Serbia, South Africa, Thailand), in the third category, the economies driven by factors, being present 35 countries, but not in Europe (Bangladesh, Cambodia, Cameroon, Ethiopia, Pakistan, Senegal, Tajikistan, Uganda, Zimbabwe). Beside these three categories, as could be observed in

Table 1, there are two other groups of states that have levels of competitiveness in transition phases - either between stages 1 and 2 (a total of 16 economies, such as Moldova, Morocco Nigeria, Iran, Venezuela, Vietnam, Mongolia, Saudi Arabia,

[1] Klaus Schwab, *The Global Competitiveness Report 2015–2016*, World Economic Forum, Geneva, 2015, p. 38.
[2] Klaus Schwab, *The Global Competitiveness Report 2015–2016*, World Economic Forum, Geneva, 2015, p. 38.

Algeria, Azerbaijan) or stages 2 and 3 (a total of 20 economies - Romania is included among them, along with other countries in the region such as Poland, Croatia, Montenegro, Turkey, Russian Federation, Mexico, Brazil, Lebanon, Argentina, etc.).

In terms of the Global Competitiveness Index, Romania ranks 53 (4.32 points out of 7), climbing six positions compared to last year, surpassing countries such as Hungary, Bulgaria and Slovenia. Although our country has a good place in terms of the macroeconomic environment (34th place) and market size (ranked 43), the situation is not favorable in terms of business growth (88th place). Before Romania are countries like the Czech Republic (31), Poland (41), Russia (45) and Turkey (51).[3]

In order to simplify the exemplification of the correlation between the typology of national economies in relation to the stage of economic development in terms of competitiveness and entrepreneurial rates; we will consider further on, five stages of development, as follows: stage 1for level I - factor based economies, stage 2 for economies under transition from level I to level II, stage 3 for level II - economies based on efficiency, stage 4for economies under transition from level II to level III and level III and stage 5 - economies based on innovation.

Also, given that economies with a similar development level have different entrepreneurial rates, that similar entrepreneurial activities have a different impact on national economies or that, as the economies register a higher development level the interest for initiating a business declines, a differentiated analysis of entrepreneurial activities is required, depending on the duration of the operating activities, the manifestation forms, incitement factors or the structure of the active population involved, the spirit and entrepreneurial education of the area, in general.

Accordingly, further on we will relate to the empirical data presented in the Global Entrepreneurship Monitor since, for elaborating the annual studies, a multidimensional methodology is applied, detailing the entrepreneurial rates according to a wide range of influence factors. Thus, depending on the duration, the differentiation between Early Stage entrepreneurial activity (TEA) and Establishes Entrepreneurial Activity (EBO) can be made. Under these conditions the TEA rate under formation or new (with a lifespan less than 3.5 years) from the total adult population (18-64), while EEA rate indicates the proportion of those owning an organization older than 3.5 years, from the total adult population. The analysis takes into consideration also the manifestation of a new form of entrepreneurship, Employee Entrepreneurial Activity that refers to the entrepreneurial employees who are also currently involved in the development of such new activities, and also, the ration of discontinuation of the early businesses.

As it can be seen detail in Table 2, in average, for the case of economies based on production factors, the early entrepreneurship outweighs the consecrated entrepreneurship and, of nearly three times higher than the average innovation-based economies. Moreover, the fact that they drop nearly a third of new businesses, proves that the business environment in these countries still isn't auspicious, favorable to investors.

The very low rate of entrepreneurship among employees, shows a low tolerance of employers to the employees proactive attitude, which underlines, once more, underdeveloped economies' deficiencies in terms of economic education and entrepreneurial culture.

Table 2: Stage 1 - Economies based on factors

Country	Early-stage Entrepreneurial Activity Rate (TEA)	Employee Entrepreneurial Activity Rate (EEA)	Established Business Ownership Rate (EBO)	Discontinuation of Businesses Rate (% of TEAB)
Burkina Faso	29.8	0.6	27.8	8.1
Cameroon	25.4	0.7	12.8	9.0
Senegal	38.6	2.3	18.8	13.3
Philippines	17.2	2.3	7.3	12.2
India	10.8	0.3	5.5	2.3
Medium rate	**24,36**	**1,24**	**14,44**	**8,98**

Source: The Global Competitiveness Report 2015–2016 și 2015/16 Global Report, Global Entrepreneurship

As shown by the figures in Table 2, the situation does not change substantially in economies under transition from level I to level II.

[3] http://ccir.ro/2015/09/30/raportul-competitivitatii-globale-2015-2016-2/, accessed on 15 April 2016

Table 3: Stage 2 - Economies under transition from level I to level II

Country	Early-stage Entrepreneurial Activity Rate (TEA)	Employee Entrepreneurial Activity Rate (EEA)	Established Business Ownership Rate (EBO)	Discontinuation of Businesses Rate (% of TEAB)
Vietnam	13.7	0.6	19.6	3.7
Botswana	33.2	1.6	4.6	14.7
Iran	12.9	1.0	14.0	6.7
Kazakstan	11.0	0.9	2.4	3.1
Average rate	**17,7**	**1,025**	**10,15**	**7,05**

Source: The Global Competitiveness Report 2015–2016, 2015/16 Global Report și Global Entrepreneurship Monitor, 2016

For economies based on efficiency, as for those based on innovation, reducing the early entrepreneurship rate, without being a accompanied by an increase in the consecrated entrepreneurship rate, shows that these economies are characterized by a high level of social security for the population that, under these conditions is no longer interested in initiation a business, on their own.

Table 4: Stage 3 - Economies based on efficiency

Country	Early-stage Entrepreneurial Activity Rate (TEA)	Employee Entrepreneurial Activity Rate (EEA)	Established Business Ownership Rate (EBO)	Discontinuation of Businesses Rate (% of TEAB)
Egypt	7.4	1.3	2.9	6.6
Morocco	4.4	0.4	5.2	2.2
South Africa	9.2	0.3	3.4	4.8
Tunisia	10.1	1.9	5.0	7.2
China	12.8	1.4	3.1	2.7
Indonesia	17.7	0.2	17.1	3.7
Thailand	13.7	0.7	24.6	3.4
Barbados	21.0	1.1	14.1	3.8
Colombia	22.7	2.3	5.2	7.2
Ecuador	33.6	0.9	17.4	8.3
Guatemela	17.7	1.2	8.1	4.0
Peru	22.2	0.7	6.6	8.8
Puerto Rico	8.5	0.6	1.4	0.9
Bulgaria	3.5	0.4	5.4	1.4
Macedonia	6.1	2.3	5.9	2.3
Average rate	**14.04**	**1.04**	**8.36**	**4.49**

Source: The Global Competitiveness Report 2015–2016, 2015/16 Global Report și Global Entrepreneurship Monitor, 2016

Table 5: Stage 4 – Economies under transition from level II to level III

Country	Early-stage Entrepreneurial Activity Rate (TEA)	Entrepreneurial Employee Activity Rate (EEA)	Established Business Ownership Rate (EBO)	Discontinuation of Businesses Rate (% of TEAB)
Lebanon	30.1	3.3	18.0	10.6
Malaysia	2.9	0.3	4.8	1.1
Argentina	17.7	2.4	9.5	6.3
Brazil	21.0	1.0	18.9	6.7
Chile	25.9	5.2	8.2	8.5
Mexico	21.0	1.2	6.9	6.4
Panama	12.8	0.5	4.2	2.2

Uruguay	14.3	4.2	2.1	4.7
Croatia	7.7	4.9	2.8	2.9
Hungary	7.9	2.1	6.5	2.8
Latvia	14.1	3.3	9.6	3.4
Poland	9.2	4.0	5.9	2.7
Romania	10.8	4.6	7.5	3.3
Average rate	**15.03**	**2.85**	**8.07**	**4.74**

Source: The Global Competitiveness Report 2015–2016, 2015/16 Global Report și Global Entrepreneurship Monitor, 2016

We note that for the case of innovation based economies, the entrepreneurial spirit development and the increase in the Entrepreneurial Employee Activity Rate, due to a change in employers attitude, that support in this stage new ideas and constructive initiatives of their employees.

Table 6: Stage 5 - Economies based on innovation

Country	Early-stage Entrepreneurial Activity Rate (TEA)	Employee Entrepreneurial Activity Rate (EEA)	Established Business Ownership Rate (EBO)	Discontinuation of Businesses Rate (% of TEAB)
Australia	12.8	8.5	8.7	4.5
Israel	11.8	6.5	3.9	4.6
Korea	9.3	2.4	7.0	2.0
Taiwan	7.3	4.1	9.6	3.8
Belgium	6.2	6.1	3.8	1.9
Estonia	13.1	6.3	7.7	2.0
Finland	6.6	5.8	10.2	2.7
Germany	4.7	4.5	4.8	1.8
Greece	6.7	1.0	13.1	3.4
Ireland	9.3	6.6	5.6	3.1
Italy	4.9	1.4	4.5	1.9
Luxemburg	10.2	6.4	3.3	4.2
Netherlands	7.2	6.3	9.9	2.1
Norway	5.7	9.9	6.5	1.6
Portugal	9.5	4.0	7.0	3.2
Slovakia	9.6	3.6	5.7	5.4
Slovenia	5.9	5.6	4.2	1.8
Spain	5.7	1.1	7.7	1.6
Sweden	7.2	6.4	5.2	2.7
Switzerland	7.3	6.5	11.3	1.7
United Kingdom	6.9	4.1	5.3	2.3
Canada	17	7.1	8.8	5.0
USA	27	7.0	7.3	3.6
Rata medie	**9.21**	**5.27**	**7**	**2.91**

Source: The Global Competitiveness Report 2015–2016, 2015/16 Global Report și Global Entrepreneurship Monitor, 2016

But, in all stages of development high differences are recordes between the entrepreneurial rate within the same level of development, as follows:

- Burkina Faso, a country placed in the group of factors based economies record high rates, for both early entrepreneurship (29.8) and for the consecrated (27.8), while India records a rate of consecrated entrepreneurship of 5.5;
- In the category of effiency based economies, the early entrepreneurship rate is of 4.4 in Morocco, while in Ecuador was of 33.6, Colombia of 22.7;
- In the innovation based economies category, the early entrepreneurship rate is higher that the one of the consecrated in countries like Israel (11.8 compared to 3.9), Ireland (9.3 compared to 5.6), etc.

All these cases that contradict the prevailing developments, reinforce the idea that there are no theories, laws generally applicable to characterize the economic and any other activities where the focus tis on he induividual, the active and determinant factor. Therefore, in the entrepreneurial activities analysis and in especially in establishing policies and strategies to stimulate it, should be taken in account the subjective character of decisions and of economic agents reactions such that, the tools for analysis and action to be adapted to the level of development of the analysed area, to the customs and period and area specifics.

3. Conclusions

The comparative analysis of the theories, but mostly of the empirical data concerning entrepreneurship, competitiveness and economic development as a culmination of the positive dynamics of the two processes multi-criteria confirms the interconnection, interdependence of them, thus being impossible to establish a relationship of cause and effect.

Given that the triad entrepreneurship - competitiveness - economic development is essential to human progress, this connection should be in decision makers' attention, at a national and international level, so that to formulate and implement realistic policies and strategies, viable, adapted to the circumstantial situations.

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THE ROLE OF THE INSTITUTE OF FISCAL CONSTITUTION IN THE SYSTEM OF PUBLIC BUDGETS IN THE CZECH REPUBLIC

Richard POSPÍŠIL*

Abstract

In the long run, public budgets in a great majority of developed economies suffer from recurring deficits and an increasing public debt. However, the condition of public finace deteriorated even in times of economic conjuncture, so the onset of the crisis in 2008 caught most of the developed world without financial reserves, or the so-called fiscal cushion. Thus most EU countries now fail to fulfill both the Maastricht Convergence Criteria and the Fiscal Compact Treaty, even if these are binding legal norms of the EU. Despite this, some EU countries voluntarily accepted a sort of financial debt cap, which the government of the Czech Republic accepted in February 2015 in the form of the so-called financial constitution, which contains a whole range of mechanisms at all levels of public budgets and public expenditures with a public debt in the amount of 55% of the GDP. The goal of this contribution is to analyze the content of the financial constitution, assess its structure and the aspects of its process application, and through selected public budgets also its possible influence on the whole economy. The content of the financial constitution shall also be compared to similar mechanisms abroad, especially in the neighboring countries.

Keywords: *financial constitution, public budgets, public finance, deficit, GDP.*

1. Long-term sustainability of public finance

A great many developed economies within the EU annually suffer from chronically repeated deficit of public finance resulting in an increasing public debt. The costs related to servicing such debts have brought some countries to the verge of bankruptcy, and only international loans provided by the European Commission and the International Monetary Fund, or the use of resources of the European Stabilization Fund saved them from going bankrupt. The increase of public debt measured by its debt-to-GDP ratio also concerns the Czech Republic, even though in comparison to most EU countries the Czech Republic shows only a small debt.

The admission of a member country of the EU into the eurozone is, besides the compliance of legal regulations of the given country with Articles 130 and 131 of the Treaty on the Functioning of the EU and the Status of the European System of Central Banks and the European Central Bank (ECB), conditioned by the achievement of a high degree of sustainable convergence. The degree of sustainable convergence is assessed in compliance with the Maastricht Convergence Criteria. These include HICP inflation (price stability), government budget deficit (long-term sustainability of public finance), government debt-to-GDP ratio, exchange rate stability, and long-term interest rates. These criteria are mentioned in Article 140 of the Treaty, and specified further in Protocol 13 on the Convergence Criteria added to the Treaty. Besides three criteria which are mainly focused on the area of currency policy, the crucial criterion is long-term sustainability of public finance[1].

The criterion of a long-term sustainability of public finance means that the given country is not subject to the decision on an excessive budget deficit. The criterion has two parts[2]:

- **The criterion of public deficit** means that the ratio of planned or real deficit of public finance to the gross domestic product in market prices shall not exceed 3% except those cases when the ratio has either dropped significantly or continued dropping to a level close to the reference value, or its having exceeded the reference value was only exceptional and temporary, and the ratio remains close to the reference value. Public deficit means a deficit related to the central government including regional and local authorities and social security funds, with the exception of commercial operations defined in the European system of macroeconomic accounts,
- **The criterion of public debt** means that the ratio of public debt in market prices to the gross domestic product shall not exceed 60% except those cases when the ratio is adequately decreasing and approaching the reference value. Public debt means the gross sum of debts in nominal values at year's end, consolidated within and between individual

* Assoc. Prof., PhD, Faculty of Arts, Palacký University of Olomouc, Czech Republic (e-mail: **richard.pospisil@upol.cz**).

[1] MF ČR, *Vyhodnocení plnění maastrichtských konvergenčních kritérii a stupně ekonomické sladěnosti ČR s eurozónou – 2014*, [cit. 19.3.2015]. Available at: http://www.mfcr.cz/cs/zahranicni-sektor/monitoring/maastrichtska-kriteria-a-sladenost-cr/2014/vyhodnoceni-plneni-maastrichtskych-konve-19965

[2] ČNB, Kritéria konvergence, [cit. 19.3.2015]. Available at: http://www.cnb.cz/cs/o_cnb/mezinarodni_vztahy/cr_eu_integrace/eu_integrace_04.html

branches of the state sector.

The criterion of the condition of public finance sets the conditions for maximum amount of the total deficit and debt of the government institutions sector. Currently, the Czech Republic is meeting this criterion. Failing to meet this criterion results for all member states of the EU in taking up the excessive deficit procedure (*Excessive Deficit Procedure, EDP*), in which the Czech Republic found itself between December 2009 and June 2014. The current goal of the fiscal policy of the Czech government (see Government Policy Statement) is to continue meeting this Maastricht criterion in the future. To be more specific – the government's fiscal strategy approaches a deficit of 2.2% of the GDP in 2015, 1.4% in 2016 and 1.1% in 2017. The main risk for this development is the not yet stable situation in the eurozone and its possible impact on the economic development of the Czech Republic.

The so-called Fiscal Pact was accepted together with the Maastricht criteria in 2012, which is an intergovernmental treaty of 25 countries of the EU on a legally enforceable stricter budget discipline of the signatories. Its full name is the "Treaty on Stability, Coordination, and Governance in the Economic and Monetary Union". The pact was meant to save the euro which suffers from an imbalanced combination of a united monetary policy controlled by the European Central Bank and independent fiscal (budget) policies which are controlled by individual countries.

The main goal of the Fiscal Pact is the requirement for the annual structural deficit not to exceed .5% of the GDP. Countries with a debt significantly lower than 60% of the GDP, which is the case of the Czech Republic, may have a deficit of up to one percent. This rule, also referred to as the debt brake, shall be introduced into the national constitutions or laws.

The ratio of the government debt to the GDP in the Czech Republic has always been under 60%. Thanks to a relatively small government debt in the past the Czech Republic has not had problems meeting this indicator, even if its debt had increased significantly between 2009 and 2012. The debt in 2014 is expected to be 43.8% of the GDP, i.e. 2.0% lower than in 2013. The decrease of the relative level of debt is caused by a gradual dissolution of financial reserves created in the previous years, and sharing liquidity of public subjects. In the mid-range horizon the relative level of government debt should continue to drop slowly until it reaches the level of 41.7% of the GDP by 2017. Long-term risks for the future development are mainly posed by expected negative impacts of aging of the population. If there are no structural changes in the pension and health care systems, it will be necessary to count with a further increase of the debt-to-GDP ratio in the long run. The following table shows the development and prediction of fulfillment of the criterion of long-term sustainability of public finance in the Czech Republic:

Table 1: Fulfillment of the criterion of long-term sustainability of public finance in the Czech Republic 2011 – 2017

	2011	2012	2013	2014	2015	2016	2017
Balance of the sector of government institutions							
Value of criterion	-3.0	-3.0	-3.0	-3.0	-3.0	-3.0	-3.0
Czech Republic	-2.9	-4.0	-1.3	-1.5	-2.2	-1.4	-1.1
Debt of the sector of government institutions							
Value of criterion	60.0	60.0	60.0	60.0	60.0	60.0	60.0
Czech Republic	41.0	45.5	45.7	43.8	42.3	42.1	41.7

Source: ČSÚ[3] and MF ČR[4]

2. Proposal of Financial Constitution

The concept of financial constitution is by no means something completely new. A form of debt brake has been discussed in the Czech Republic for several years, and that with a much lower public debt-to-GDP ratio. In February 2015 the government passed a constitutional bill on budget responsibility and bill on the rules of budget responsibility, and also passed a bill changing some laws related to accepting legal regulations concerning budget responsibility. However, passing the act on budget responsibility will not be easy since it is a constitutional act, which has to be passed by a qualified majority, which means five fifths of all deputies and at the same time five fifths of present senators. The president cannot veto this bill.

The Act on the Rules of Budget Responsibility is a general legal regulation to further regulations in the budget area, which is why it only contains basic requirements, which are further specified by a special legal regulation, e.g. the Act on Budget Rules of Regional Budgets, or the Act on Departmental, Area, Company, or Other Insurance Companies.

From the viewpoint of practical budget-fiscal measures at all levels of public budgets, the most important is § 13 of the bill. On reaching a debt of at least 55% of the nominal GDP in compliance with Article 4 of the Constitution Act on Budget

[3] ČSÚ, *Hlavní agregáty sektoru vládních institucí*, [cit. 21.3.2015]. Dostupné na: http://apl.czso.cz/pll/rocenka/rocenkavyber.gov_a?mylang=CZ

[4] MF ČR, *Fiskální výhled ČR (listopad 2014),* [cit. 22.3.2015]. Dostupné na: http://mfcr.cz/assets/cs/media/makro-fiskalni-vyhled_2014-Q4_Fiskalni-vyhled-listopad-2015.pdf

Responsibility dealing with the way how public institutions should proceed while enforcing these measures[5]:

- The government shall pass and submit to the Chamber of Deputies a proposal for a medium-term outlook of the state budget and state funds' budgets, which lead to a sustainable condition of public finance; in case the state budget bill or state fund budget bill are submitted without actually fulfilling this condition, the government shall withdraw such a bill and immediately submit a new one,
- The government shall submit to the Chamber of Deputies proposals of balanced budgets of health insurance companies; deficit proposals can only be submitted in case that the deficit could be paid using no more than 1/3 of the financial balance of a particular insurance company from the past, or using a returnable financial aid,
- A local government unit (LGU) shall pass their budget for the coming year as balanced or surplus budget; the budget of an LGU can only be passed as a deficit one if it is possible to pay the deficit using financial means from the previous years or using a returnable financial aid. Using a contractually secured loan, credit or revenue from selling municipal bonds of the LGU is only possible to pay a deficit arising from pre-financing projects co-financed from the EU budget,
- Public institutions which were not mentioned above must not, for a period during which the debt represents at least 55% of the gross domestic product, establish new contractual commitments except commitments regarding projects co-financed from the EU budget or commitments necessary to fulfill a court verdict or a public authority decision, leading to an increase of the debt of the sector of public institutions for a longer period than one calendar year.

New regulations shall pertain to the whole sector of public institutions, which in the Czech Republic includes approximately 17,500 subjects of public administration. It means:

- Organizational units of the state (283),
- State-funded organizations (123),
- State funds (6),
- Public research institutions (67),
- Public colleges (26),
- Public health insurance companies (7),
- Basic and higher local government units (6,247 + 14),
- Organizations funded by local government units (9,819),
- Voluntary unions of municipalities, so-called micro-regions (735),
- Regional territorial units - NUTS II (7),
- Corporate entities founded and financed by a public institution or controlled by a public institution entitled to nominate or remove its managers.

At the same time the salary base for the calculation of salaries of constitutional officials should decrease by one fifth, and there will be no funds for the remuneration in the sector of public institutions. The government shall also be allowed to decide on a lower increase of pensions being paid than as stipulated by law. The proposal of the department also counts on establishing a three-member National Budget Council. Its goal will be to evaluate the fulfillment of budget goals, monitor the economy of public institutions, and prepare a report on the sustainability of public finance. Besides this, there should be a seven-member Committee for Budget Prognoses which should evaluate the prognoses of the Treasury Department.

These regulations shall not apply in the following instances:

- In case of a serious worsening of the economic development for the duration of 24 months from the first day of the calendar month following the calendar month during which the Czech Statistical Authority in its quarterly national budgets publishes an inter-quarterly decrease of the gross domestic product, taking into account price-related and seasonal influences and the number of workdays in the last quarter, by at least two percent, or an inter-yearly decrease of the gross domestic product taking into account price-related influences in the last quarter by at least three percent,
- In case of an emergency, threat to the state, or state of war,
- For the duration of emergency measures declared by the government in order to increase the defenses of the state in case of a worsening of the state's defenses, or
- For a period of 24 months from the first day of the calendar month following the calendar month during which the department publishes the fact that the sum of the necessary expenditures of the state budget to remove the effects of a natural disaster which affected the territory of the Czech Republic and the expenditures resulting from the fulfillment of international treaties and other international commitments of the Czech Republic has exceeded three percent of the nominal gross domestic product.

3. Debt Brake for Municipalities and Regions

With special emphasis, the Act on Budget Responsibility deals with the economy of local government units, stipulating their basic form in § 19 of this act:

[5] Compare Moderní obec, *„Finanční ústava“ se začíná rýsovat*, [cit. 24.3.2015]. Available at: http://moderniobec.cz/financni-ustava-se-zacina-rysovat/

4. Shall the debt of a local government unit exceed 60% of its average income in the previous 4 budget years as of the balance date, such a local government unit shall be obliged to decrease this debt in the next calendar year by at least 5% of the difference between its debt and 60% of its revenue in the previous 4 budget years,

5. Shall the local government unit not decrease its debt, and its debt as of the next balance date exceeds 60% of its average revenues in the previous 4 budget years, the (Treasury) Department shall in the next calendar year decide in compliance with the Act on Budgetary Rules and Changes on suspending the transfer of its share in tax revenue,

6. The revenues of local government units for the purpose of this act are understood to be the sum of all monetary payments accepted into the budget in the given fiscal year, consolidated in compliance with a different regulation,

7. A debt of a local government unit for the purpose of this act is understood to be the value of unpaid obligations ensuing from issued bonds, accepted credits, loans and returnable financial aids, realization of fulfillment ensuing from pledges and issued bills of exchange.

As of December 31, 2013 92% of Czech municipalities had fulfilled the above-mentioned debt rule, i.e. they had a debt of up to 60% of their average revenue in the previous four budget years. As of the same date approximately 500 municipalities, i.e. 8% of the total number, had exceeded this limit. Only 198 municipalities (3.2%) had exceeded 100% of their average revenue in four budget years. Over 84% of the municipalities in question had a pledge on shared taxes of less than 5% of their total revenue, and in case of 93% of municipalities it should be less than 10% of their revenues. Almost 80% of those municipalities whose ratio of suspended tax revenue against the total revenue would exceed 10% would be able to finance this debt by means of the balance in their accounts, and over a half of them even for one or more election terms.

Higher local government units – regions – are a bit better off. As of the above-mentioned date none of them had breached this rule, with the average debt indicator showing 19.99%[6].

4. Mechanisms of the Debt Brake in Selected Countries

Certain forms of the debt brake are implemented in most countries of the EU. They were mostly accepted as prevention against a country's falling into a debt spiral, using a loan to pay off another, and thus facing the imminent risk of government bankruptcy, which some southern countries of the EU have in fact been through.

Slovakia

Slovakia has had a cap against a dangerous increase of indebtedness since March 1, 2012. The Constitutional Act has four main provisions: constitutional limitation of the public debt with a cap of 60% of the GDP, the establishment of the Council for Budget Responsibility, rules for transparency of public finance, and rules and limitations for the economy of local governments.

Shall the debt exceed 50% of the GDP, sanctions will be triggered and intensify with every increase. At 50% debt the Treasury Secretary must explain the reasons for it and propose measures to change it. At 53%, a package of measures is accepted and government salaries are frozen. At 55%, an automatic 3% expenditures freeze for the next year takes effect (except for European funds).

At 57%, the government shall propose a bill for a balanced budget, and on reaching the cap, i.e. 60% indebtedness, the government shall ask the parliament for confidence. The Council for Budget Responsibility shall have three members for seven years, whose mandate shall not be extendable. They shall be assisted by a team of analysts. This law creates mechanisms and tools for the prevention of indebtedness.

The rules of economy of local governments were reached through compromises. The government gave up a tax mix, thus the state shall not save the local governments in case of insolvency, but shall ensure financial means during the transfer of new competencies. A penalty has been implemented for those local governments which exceed a 60% debt of their normal revenue from the previous year, which is a provision similar to a provision which will also be effective in the Czech Republic in the future. An audit shall be performed in the whole public service to find out what kind of competencies local governments have and how they are secured. The state shall not transfer competencies to local governments without adequate funding.

Spain

Spain was the first state in the eurozone to implement the institute of debt brake. In September 2011 Spain introduced limits of budget deficit and public debt into the constitution. Spanish amendments to the constitution do not contain any exact limits as it is in Slovakia. However, an implementation act, which shall take effect in 2020, is a part of it. This act sets the cap of budget deficit

[6] RYŠAVÝ, I. (2015) „Finanční ústava“ se začíná rýsovat, *Moderní obec*, 3: 2015, p. 10.

at .4% of the GDP and sets criteria for gradual decreasing of the debt. The debt volume in relation to the GDP must not, according to constitutional norm, exceed the Maastricht criteria set for the eurozone countries, according to which public debt, as the sum of the state debt and debts of local governments, must not exceed 60% of the GDP, and the budget deficit must not exceed 3% of the GDP. Spain expected that by accepting this golden rule of budget stability it would appease skeptical financial markets. The state debt in the year of accepting this amendment reached almost 69% of the GDP and the budget deficit approached 6%[7].

Switzerland

The Swiss debt brake is a rule which restricts expenditures in order not to exceed the volume of structurally modified budget revenues. It means that expenditures must respect revenues, but not in the strict sense of annual balance. The Swiss federal budget may be adopted even with a deficit. There is no verisimilitude to the Maastricht criteria for maximum deficit: theoretically, its volume can be as large as they wish.

However, expenditures must respect the trend of revenue development. Expenditures of the federal government have a cap which is calculated as the function of budget revenues and the current position of the economy in the course of the economic cycle according to the following simple formula:

$$Expenditures = Revenues * K,$$

Where

$K = Z / Y,$

Z = trend of the gross domestic product,

Y = current value of the gross domestic product.

Thus if coefficient K is greater than 1, it means that the economy is below its potential, thus it is possible to allow expenditures greater than revenues. On the contrary, if the economy is "overheated" and $K < 1$, a surplus budget is required.

The goal is to keep the total expenditures of the federal government relatively independent of the economic cycle, thus the growth of expenditures reflected the trend, long-term growth of the economy. Tax revenues shall fluctuate depending on the economic cycle, which means that it is not necessary to raise taxes in the period of recession and thus deepen it. So the Swiss debt brake is not procyclic, as it does not worsen the course of a recession. On the contrary, it helps balance recessions in the spirit of Keynes' teaching. However, shall the government follow the traditional orthodox policy of balanced budgets in every budget year, the debt brake will not rule this policy out.

The Swiss implementation regulation regarding the debt brake also works with a compensation account which adds the values of deficits and surpluses once the final balance for the particular year is known. Deficits in this account must be taken into account while calculating a new expenditure cap for the coming years. If the deficit exceeds six percent of the expenditures, the surplus amount must be eliminated during the nearest three annual budgets by decreasing the expenditure caps.

We need to note that the Swiss federal budget does not distinguish standard and investment expenditures in terms of the total expenditure cap. This is intentional since it is not possible to simply claim that macro-economically speaking standard expenditures are "bad" while investment expenditures are "good". Any kind of investment in infrastructure regardless of future usefulness does not have to be better than standard expenditures on salaries or the running of the country[8].

The complete text of the Swiss debt brake is found in Article 126 of the Swiss Confederation:

8. *The Confederation shall keep its revenues and expenditures balanced in the course of time.*

9. *The cap for total expenditures, which is supposed to be passed within the budget, is based on expected revenues considering the economic situation.*

10.*Exceptional financial requirements may substantiate an adequate increase of the cap as stipulated in Paragraph 2. The Federal Assembly shall decide on every cap increase by an absolute majority of all (not only present) votes.*

11.*If the total expenditures of the federal budget exceed the cap as stipulated in paragraphs 2 or 3, it will be necessary to compensate for these expenditures by savings.*

12.*Details are to be stipulated by law.*

The Swiss debt brake was first applied relatively recently – as late as 2003. While being used, it succeeded to decrease the growth of public expenditures from an average 4.3% to 2.6%, and the total Swiss state debt decreased from 53% of the GDP to 36.5% of the GDP[9].

[7] EUROSKOP, *Španělsko chystá dluhovou brzdu*, [cit. 27.3.2015]. Available at: https://www.euroskop.cz/8953/19506/spanelsko-chysta-dluhovou-brzdu

[8] GEIER, A. (2011) The Debt brake – the Swiss fiscal rule at the federal level, *Working Paper of FFA No 15*.

[9] KOHOUT, P. *Nová ústava - Jak funguje švýcarská dluhová brzda*, [cit. 27.3.2015]. Dostupné na: http://www.novaustava.cz/clanky/jak-funguje-svycarska-dluhova-brzda

Poland

The Polish Constitution, effective since October 1997, stipulates such a provision, which makes the government take measures in case that the public debt reaches 55% of the GDP. Shall the debt reach 60% of the GDP, the constitution forbids the government to render loans and state guarantees, and thus further indebt the country.

This relatively less developed country has been experiencing a constant economic growth for over two decades, and is the only economy of the EU that avoided a deeper recession during the financial crisis.

A 17-year tradition of constitution-embedded anti-debt rules also probably contributes to the fact that Poland strongly supports German requirements of budget discipline and savings. The constitutional restriction of future indebtedness of both Germany and its states was passed by the German parliament in June 2009. The states will not be allowed to create new debts starting 2020, and only a deficit up to .35% of the GDP will be allowed starting 2016.

5. Conclusion

The need to introduce debt brakes throughout the member states of the EU ensues from the wording of the Fiscal Pact, which adds to the Maastricht Convergence Criteria the limit of the structural deficit of public finance, and which has been adopted by 25 states of the EU including the Czech Republic as of today. However, it will become a legally binding norm for the Czech Republic only after its entering the eurozone. The institute of debt brake, or the fiscal constitution, has been adopted by the individual countries voluntarily, since the condition of public budgets of most countries of the EU is not sustainable in the long run, and the need for fiscal correlation toward public debts is clear and objective, and is the subject of societal consensus.

Taking into account the fact that in case of the Czech Republic it is just the first proposal of a fiscal constitution, or debt brake, and might eventually become effective as of January 1, 2016, the Czech Republic will not be among the first countries to have adopted it in their legal system. However, its content is fully comparable to similar institutes abroad. The financial constitution of the Czech Republic respects the limit for long-term sustainability of public finance, mainly the limit of the state debt in the amount of 60% of the GDP. Thus it takes effect with the public debt reaching 55% of the GDP in order to have enough time to adjust the development of public budgets and public finance. The financial constitution also concerns basically all levels of public budgets, not only the state budget, but also the budgets of local governments, i.e. budget of local government units, even if those periodically show better fiscal condition than the state budget.

An inseparable question while discussing the concept of fiscal constitution are also wider issues of the macro-economic development. This concerns not only the nominal amount of deficits and the public debt, but their relative relation in respect to the GDP. It is namely this economic recovery and the growth of the GDP which lead to a better tax revenue of the state, a more favorable debt service, a smaller demand for public budgets, lower unemployment, and other positive impacts on the economy of the civil service and local governments.

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SOVEREIGN DEBT RESTRUCTURING AND "VULTURE FUNDS"

Emilia Cornelia STOICA

Abstract

Defining sovereign debt - debt issued or guaranteed by a public entity: central and / or regional public authorities, central banks, public institutions or enterprises - must include the risks that its management may generate, mainly the risk of default. If an medium period of time - 3-5 years – the macroeconomic growth of a state, and as the result the increase of the public revenues constantly lies below the growth of sovereign debt, these will cause an insolvability risk to cover it, and that state should proceed to restructure its debt.

Financial stability of public authorities and sovereign debt occurred since the beginning of the creation of democratic states, and instruments for debt restructuring have been continuously adapted to economic and social conjuncture. Initially, states faced a necessity of funding were borrowed from foreign governments and / or large consortia bank, and when their debts had to be restructured it has been created the international institutional framework to negotiate between debtor countries and public creditors - Paris Club - and to coordinate negotiations between public authorities and major debtor consortia - London Club.

In the last decade 'vulture funds' occurred, which are hedge funds acquiring from the secondary financial market debt the securities, including public debt, to a much lower share nominal value. Subsequently, vulture funds claim states issuing debt repayment at values close or equal to the face value - in this way can make a profit of more than 100% of the financial investment they made it on the secondary market. If these countries do not comply, generally being unable to honor their public debt, vultures funds act the countries in international courts, which usually prevails because vultures funds' action is legal under current conditions.

Keywords: *sovereign debt, restructuring, vulture fonds, secondary market, securities.*

1. Introduction

Financial stability of the public sector has become in recent years one of the acute problems facing not only the countries that record low income per capita, but also developed countries and sovereign debt, which has grown rapidly, threatens even macroeconomic development.

In this respect, the restructuring of sovereign debt is intended to ease the pressure on public finances in these countries and thus to allow public authorities to develop and implement policies both economic and especially social – e.g.education, health, social insurance - and environmental protection, suitable to overcome the economic crisis and relaunch growth.

For the restructuring process of the sovereign debt to be effective, the use of some specific instruments must be accepted by all stakeholders, mainly the private and international creditors, and to reach such an understanding it is required international legal framework accepted by all jurisdictions which may be involved in the recovery of claims by various investors from independent states. Therefore, in recent years the involvement of speculator creditors has become a very serious problem that must be solved by international bodies that have to assume the responsibility for the equilibrium of the global financial system, i.e. the international financial institutions such as the International Monetary Fund and the World Bank, along with economic and social international or regional union, as the United Nations, European Union etc.

More private entities owning hedge funds attack the heavily indebted countries with relatively low per capita income, these funds being now known under the nickname of "vulture funds". To counteract their actions there were developed many comprehensive analysis and there werw proposed measures both to reform the sovereign debt and their restructuring, measures to reduce the risks of public debt crises, along with the development and implementation of fiscal policies aimed to support economic and social development of the indebted countries.

2. Sovereign debt ~ public debt

2.1. Definition of the sovereign debt

By definition, public debt consists of all loans made by the public sector - bank loans and bond issues made by public authorities, treasury bills, debts contracted by other public entities ... - to fund public spending, in the absence of a sufficient level of the public revenue, that comes essentially from fiscal fees and taxes[1].

Public debt can be an important factor of affecting the sovereignty of a state, being generally

[1] Beitone A., Cazorla A. (2007), lexique des sciences économiques, 2é Ed. Armand Colin, Paris, pp 136-137, http://www.memoireonline.com/04/12/5782/m_Les-determinants-de-lendettement-exterieur-de-la-RDC3.html

associated with a high risk of political dependence, caused by economic dependence.

In the Treaty establishing the European Union (Maastricht 1992) there is the specification that the public debt means total gross debts, expressed in nominal value, registered at the end of the financial year and consolidated for all sectors that make up the general government, i.e. central government, regional and social security funds, excluding commercial operations, as as they are defined in the European Integrated System of Economic Accounts.

Although many analysts distinguish between the concept of public debt and sovereign debt, the two terms are often confused. For example, the English the term *government debt* means debt contracted by the central authority and the term *sovereign debt* denominates the public debt denominated in foreign currency, while in French the term *dette souveraine* designates the dette debt contracted or guaranteed by the government or central bank[2].

In a recent report by Eurodad[3] it is presented that in the last sixty years, over 600 sovereign debts have been restructured, the bulk of the restructuring debts being made in the Paris Club, aiming the official bilateral debt. The need to restructure public debt rose as the financial markets were deregulated, and a very strong bad example is the Greek debt restructuring in 2012, which took into account the amounts that exceeded 200 billions euro in private debt, but the indebtedness of Greece has not been resolved due to this restructuring, because the operation was has been performed too late and there was a minority of creditor who refused to accept the terms of restructuring.

2.2. Borrowing evolution of sovereign states

The indebtedness of many countries has reached dangerous dimensions, even catastrophic, because the financial crisis and subsequent economic crisis, which started since 2007 following the falling real estate market in the United States and the fraudulent handling of the American and European financial markets, in this case the crisis being known as the US subprime crisis. Because of globalization, whose benefits are considered unquestioned until then, many developing countries in the world, among which may include Romania, were also affected economically, although their level of debt was low.

Before the economic crisis, the emerging countries were able to stabilize its obligations deriving from the public debt through a sustained macroeconomic growth and due to the access to credit on favorable international conditions - interest and other costs, convenient repayment scheme. But now, all States, especially developing countries, are facing increasing pressures regarding the need to increase public spending for infrastructure funding, in terms of higher interest rates on the international financial markets, at the same time with an aging population and and thus the obligation to finance higher expenditures of the social insurance system.

In a developing country, where the financial sector is sized in correlation with the national economy, a large public debt is also manifested through a large volume of government borrowing, which crowding out the privat sector loans, mainly those addressed to the real economy sector, which negatively affect private initiative.

Today, when most states recorded substantial public debt, the international financial system should give states the opportunity of a sustainable level of debt and create the institutional and instrumental framework for sustainable public debt management, including avoiding risk of insolvency. In tha category of these instruments are obviously those for sovereign debt restructuring, which were developed and implemented as occurred various economic or financial crises in emerging countries from various meridians of the globe.

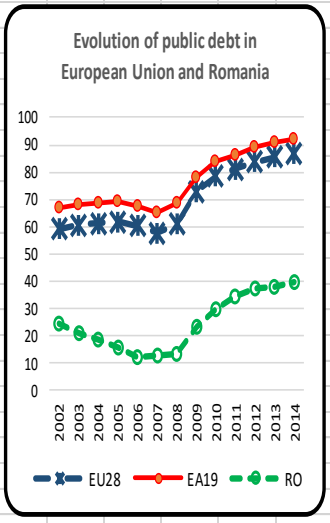
Thus it was established the Paris Club, which carries the favorable negotiations between debtor countries and their public claims against and London Club, which coordinates negotiations indebted states with large private financial institutions, primarily large banking companies.

Eurodad found that many states are vulnerable to exposure to public debt, state belonging to all groups of countries: high, intermediate and low per capita income.

General government gross debt - % of GDP

	1995	2000	2005	2010	2014
EU28	***:***	***:***	***61,8***	***78,4***	***86,8***
EA19	***70,8***	***68,0***	***69,2***	***83,8***	***92,1***
EL	98,9	104,4	107,3	146,2	178,6
IT	116,9	105,1	101,9	115,3	132,3
PT	58,3	50,3	67,4	96,2	130,2
CY	47,9	55,1	63,2	56,3	108,2
IE	78,5	36,1	26,1	86,8	107,5
BE	130,5	108,8	94,6	99,6	106,7
ES	61,7	58,0	42,3	60,1	99,3
FR	55,8	58,7	67,2	81,7	95,6
UK	48,2	38,9	41,5	76,6	88,2
AT	68,0	65,9	68,3	82,4	84,2
SI	18,3	25,9	26,3	38,2	80,8
HU	84,5	55,1	60,5	80,6	76,2
DE	54,8	58,9	66,9	81,0	74,9
MT	34,4	60,9	70,1	67,6	68,3
NL	73,1	51,4	48,9	59,0	68,2
RO	*6,6*	*22,4*	*15,7*	*29,9*	*39,9*
BG	:	71,2	26,6	15,5	27,0

http://ec.europa.eu/eurostat/tsdde410



Thus, following the recent statistical information, ie March 2016, government debt

[2] Rodica Zafiu, "Păcatele Limbii: Datorii suverane », România Literară, http://www.romlit.ro/datorii_suverane

[3] European Network on Debt and Development is a specialized network of European Union in analysis and advocacy on development funding policies., www.eurodad.org

recorded by all countries, as a percentage of national GDP, it appears that the most indebted country is Japan (229.2%), Greece is in second place, relatively distant, with 179.0%, followed by Italy (132.5%), Portugal (129.1%), Belgium (106.1%) etc., and the United States (102.98% Eurozone (93.5% and the European Union (87.2%) in all of them. The situation in these countries and unions, in terms of financial stability is different, for example Japan, whose public debt is mostly domestic, does not think about restructuring, while Greece is continuously threatened with insolvency.

Romania has a debt of 39% of GDP, comfortably below the 60% threshold set by the Maastricht Treaty, but public debt developments is worrying because in a span of five years (2009-2014) rose by over 25 percentage points, without this growth to be reflected in macroeconomic development and / or social.

In recent years, public debt in the Eurozone and in many developed countries in this area was approached or even exceeded 100% of GDP, which shows a major threat to European financial stability. To get out of this situation, European states would have to choose between implementing a Keynesian interventionist policy or a liberal one, promoting the restriction of public spending in order to reduce the budget deficit and hence the borrowing of the public sector. Both policies are difficult to implement, given that all European countries have faced a greater or lesser extend negative effects of the financial and subsequent economic crisis.

3. Sovereign debt management

3.1. Economic and financial policies appropriate management of sovereign debt

Keynesian policy means stimulating demand by financing budgetary expenses for business expansion, but on the one hand results the increasing demand for public finance through enhanced indebtedness and, on the other hand, increased interest rates, which enlarges the implicit public debt, negatively affecting financial stability still further. A restrictor policy of the budget spending affects first public investment, considered the engine of development, and if it relates to cutting operating costs of the public sector - as applied in 2010 in our country - lead to lower demand in the market economy, discouraging businesses SMEs, reducing employment and, finally, with decelerating macroeconomic development, decreased the public revenues from taxes and increasing the deficit.

Public debt was boosted also by the economic crisis and the bailouts of large banks and other financial firms involved in the capital market. Also, Euro zone countries had access to low interest loans - offered by the European Central Bank, controlled by Germany - but without economic growth it was emphasized public debt and financial instability has increased.

Before the start of the subprime crisis, the public debt of the developed financial was placed on the financial markets, their risks being reported as very low by international financial rating agencies. Leading creditors were the central banks, multinational financial corporations, public funds and so on.

With the advent of the need for debt restructuring contracted by Latin American countries in the 80s of last century, the international financial institutions agreed securitization mechanisms of bank loans, which resulted in placing the sovereign debts on international financial markets, where the investors are very different, among them being now many hedge funds.

In this context, the public debt restructuring has become more complicated because of creditors that showed clear interests to achieve bigger net benefits. Thus it was highlighted the lack of due process international applicable to declare and amicable resolution of the public debtors insolvency, designed to protect populations of the involved communities.

Currently there are many cases where owners of financial funds that were set up as creditor of sovereign states indebted do not accept to negotiate their debt restructuring and appeal to different legal jurisdictions to recover the face value, plus interest and court costs, states' public debt related. These funds are known as vulture funds nickname, because their behavior is similar to that of a bird of prey.

3.2. Debt restructuring and its specific tools

Debt restructuring appears necessary especially in crisis as a result of a case of default, with the partial or total suspension of the payment of debt service. Nowadays, in such a situation occur IMF, Paris Club or the Troika[4] to restructure the sovereign debt of an European country, in order to restore its solvency, but imposing restrictive economic and social conditions indebted country and its population.

Sovereign debt restructuring[5] implies the existence of a legal framework in which to establish the exchange of financial instruments expresseing that liability - be they loans or bank-type securities issued in financial markets - against liquidity or other

[4] Currently Troika designate the International Monetary Fund, European Central Bank and the European Union (typically a representative in the European Parliament.

[5] http://www.lafinancepourtous .com/Decryptage /Dossiers /Aggravation-de-la-crise-en-Europe/L-interdependance-entre-crises-bancaires-et-crise-de-la-dette-publique

financial instruments agreed by the parties involved in the restructuring.

Debt restructuring can be achieved through three types of actions:

- debt refinancing, which means to decrease the interest rate in order to reduce public debt services and the establishment of distant maturities debt outstanding loans;
- reducing the public debt (i.e. it's nominal value) of outstanding loans;
- debt redemption against liquidity, when the government takes advantage of a favorable moment, for example, the sharp depreciation of the national currency against the currency of the contract.

The concrete way for restructuring it is negotiated between the debtor State and its claims against, together with international financial institutions - the IMF, the ECB, the European Commission etc. - within the Paris Club framework.

Over time, debt restructuring of states with the difficulty was carried out in applying various tools to financial stabilize the country and integrate it between Member states forming economic union within a where it is geographically placed. A good example of how that worked sovereign debt restructuring in the initial phase is the process of solving the debt contracted by Germany[6] between the two world wars and immediately after World War II, as well as the compensations for damages made by this country during the last world conflagration.

Thus, the creditors states as: United States, Great Britain, France, Belgium and the Netherlands, accepted a substantial reduction of over 60% of Germany's debt and reparations have been postponed sine die. In addition, Germany could repay into its national currency, which allowed it to avoid exchange rate risks and thus many related expenses. In this way, Germany has been able to achieve rapid reconstruction of the country, can in a short period of time once again become a major economic power both in Europe and globally.

Another significant example of sovereign debt restructuring can be signaled after about 40 years, in 1991, when Poland had managed to escape the bloc of communist countries, leaving the Warsaw Pact[7] and the Western European countries of were deployed to favor government anti-communist Lech Walesa. Sovereign debt contracted by Poland, which totaled on that date both the debt contracted and the costs accumulated over the years, has been reduced by 50%, allowing new democratic authorities Polish authorities to implement transition policies from centralized economy to an functioning market economy, in the perspective of integration in the European Community.

The cases presented shows some similarities, which refers to situations of conflict or tension between the political regimes in the states whom it has accepted restructuring. In other cases, the solutions proposed for restructuring, including fiscal-budgetary restrictions imposed on the indebted country by international institutions financing - IMF, World Bank, Paris Club, United States - they did not prove to be as beneficial.

For example, states in South America, as were Bolivia, Argentina, Chile etc. who have experienced sovereign debt crisis, it has the required the implementation of a fiscal austerity policy that guarantee the smooth placing of the debt restructuring, but the austerity hasaccentuated the fall of the national economy, which has led several states to change the political regime and has caused serious tensions among the population.

3.3. Hedge funds ~ vulture funds

The mechanisms of the hedge funds are diversified, correlated with the concrete risk-based facing creditor and the specific economic environment where can operate the fund from multiple perspectives: the macroeconomic and financial situation; fiscal, banking and market capital legal and regulatory framework; organization and operation, including permissiveness toward corruption of public utorităţilor.

These mechanisms are achieved through:

- lending to companies with lucrative activity to obtain leverage by which the financial profitability increase faced to the economic one due to the indebtedness, when the current benefits allow the debtor to cover expenses resulting from loan;
- overdraft sale (short selling), ie the sale of debt securities against cash, pending subsequent redemption at a lower price;
- development and issuance of financial derivatives: options, futures or forward contracts in order to cover the risk or speculative;
- the arbitration is to exploit differences between prices of financial products on the market: bonds, currencies, contracts, for example by buying financial assets considered undervalued and selling discovered subsequent action;
- the exploitation of the primes securities in the proposed merger-acquisition processes.

Most hedge funds are managed by independent entities, which carries considerable wealth from these speculations, also financial institution with a good reputation in the financial market, but they at least for now not resorted to recovery sovereign debt by triggering enforcement proceedings.

The recent financial crisis has shown clearly the destabilizing effect of public debt securitization

[6] Germany creditors conference, London 1953.

[7] Warsaw Pact (1955-1991) was a military pact, but also cooperation and mutual assistance between Eastern European countries under Soviet influence, set up primarily to counteract the potential influences of NATO countries (Atlantic Treaty North).

and the sale on the secondary market are carried out under face value – when there are involved old claims, the purchase price may being ten to twenty times lower than the nominal value - to remunerate the risk of default.

Hedge funds are placed mostly in tax havens or areas bounded «offshore», as Iles Cayman, Jersey, etc.

Although there is no a clear definition of tax haven, it can be described[8] as a territory - independent state or area as part of an independent state - where bank secrecy is strictly enforced, and taxes on income, profits and assets are low or zero, especially for non-residents; the access to the residence of the economic agents or their accounts is easy; fiscal or judicial cooperation with other countries is poor or nonexistent.

In the «offshore» areas, where there are installed primarily financial companies as: banks, insurance companies and management funds, the normal rules do not apply to those activities, what makes these areas often considered to be tax havens.

Vulture funds[9] are the hedge funds express created, generally, in order to cover the claims relating to debts contracted and outstanding maturity of public authorities, public institutions or private enterprises, i.e. sovereign debt.

These funds are commercial entities whose main business is to redemption on a financial secondary market the debts of the firms in the imminent insolvency situation or the sovereign debt of the states, developing states and / or recorded high levels of indebtedness, at a price lower than the face value of the original debt.

Subsequently, those funds claime in court the initial nominal value of securities, including the interest and other related costs for the entire period between the moment of claiming, also the sovereign debt and court costs.

The vulture funds calls also to other instruments to recover the amount of the claims that they have purchased, such as enforcement of financial or non-financial assets held by debtors abroad.

8. Conclusion

The analysis of public debt should not be limited to the quantitative aspects - measured according to the criteria enshrined in the EU Treaties, as a percentage of GDP - but it is necessary to consider several factors, such as the establishment, respectively income and public spending, the pace of change, the destination of borrowed funds, the effectiveness of the actions financed by debt and public debt structure based on several criteria: the currency of denomination, maturity, interest rates and other costs, type of creditor etc.

The lack of any international regulations that can be applied indebted and / or insolvent states is currently an aspect still more negative than the abusive behavior of some of the sovereign debt of creditor.

Besides, to overcome the shortcomings of the jurisdictions' behavior which apply the 'pari passu'[10] for the benefit of hedge funds and without considering the impact on the people of the countries which have to pay these claims, it should be to establish rules obliging all creditors at internationally level, without considering whether they are the majority or the minority to respect the decisions for restructuring sovereign debt.

In this regard it has been several attempts to adopt common international resolutions against vulture funds. For example, in September 2015, many countries of the world voted for an UN resolution, but six major countries (USA, Canada, Germany, Japan, Israel and the UK), although they agreed with the substance of the resolution, voted against .

One measure that could be generalized against vulture funds has been applied in Belgium, who refused to talk and to receive them on its territory. Moreover, in Belgium was created in 1990 the Committee for the Cancellation of Third World Debt[11] (CADTM), which is an international network of individuals and local committees from Europe, Africa, Latin America and Asia. This committee works in coordination with other organizations and movements pursuing the same goal: the development of alternatives to meet the needs of the population, ensuring freedom and fundamental rights.

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[8] OECD definition, cited by Lafinancepourtous.com
[9] Gail Hurley, Dresser les vautours: rapport d'eurodad, Eurodad, Août 2008.
[10] In accordance with the principle of 'pari passu', all creditors should be treated equally.
[11] https://fr.wikipedia.org /wiki/Comit% C3%A9_pour_l %27 annulation_de_la_dette_du_tiers_monde

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THE PROMOTION OF THE ACCOUNTING SERVICES WITHIN THE LIMITS OF PROFESSIONAL ETHICS

Mihaela SUDACEVSCHI*

Abstract

The marketing services involve using specific methods and techniques of marketing, adapted to the process of provision of services. Thus, the marketing services are focused on attract clients and establish preferential relations with customers and obtain their loyalty. In the case of accountants, the marketing must provide a description of the services offered by professional accountant, and the description must concords to reality. This paper aims to describe how accountants can promote their activity and, in the same time, to respect the ethical rules

Keywords: *accounting services, professional accountant, promotion, marketing, professional ethics.*

Introduction

On the background of the globalization process of the economy, the accounting companies need to develop an increasingly range of services. In addition, the competitive environment is getting stronger and, to maintain their old customers and to acquire new customers, the accounting companies must develop their marketing strategies, with which help could make known their specialized services. The global economic vision combines elements that have been progressively created, borrowing and transforming concepts, ideas and factors accordingly to the existing conjectural features.[1]

A service is an activity performed or an intangible benefit offered to a customer and, therefore, it doesn't result from the purchase of a physical object. Regarding of accounting services, they have developed continuously, in the same time with business environment and, as a result, the major accounting companies had adapted their capacity and expertise to the information needs of their customers and to the services required by them.

Particularities of marketing for services

Promotion policy has an important and even decisive role for the process of selling products and services, especially on the markets characterized by a strong competition.

The promotion process consists of an ensemble of activities, performed to make known a service to potential customers, the ultimate goal of these activities being a successful market launch of the service and the sales increasing.

The promotion mix of services has several forms and there is a wide range of promotional tools, which have different objectives:

Advertising – means the impersonal presentation of a product, service, brand or of a company, for providing information to the customers about the services offered and to convince them to purchase these services. On long term, the advertising aims to change the behavior of regular customers and turn them into customers with a high degree of fidelity to the company's offer.

The advertising influence the consumers behavior regarding their commercial choices. Moreover, by definition, the basic role of the advertising is not to spread information, but to induce a certain consumer attitude and a certain consumer decision on the products and services advertised.

According to the Law of Advertising (Law no. 148/2000), the advertising is defined as: "any presentation of a commercial or industrial activity, craft or freelance activities, aiming to promote the sale of goods and services or rights and obligations". This rule is completed by the Directive of Unfair Commercial Practices (Directive 2005/29/EC), by which the European Commission establishes and impose the Community rules, valid across the EU, against misleading advertising and the aggressive practices.

Sale promotion – means activities designed to stimulate the growth of products and services sales.

Promotional events – are activities such as fairs and exhibitions, where the professional accountants have the opportunity to present the specialized services packages which they provide. This kind of promotion could be made by the leaflets and booklets distribution, organizing conferences, spot advertising screenings and so on.

* Associate Professor, PhD, Faculty of Economic Studies, "Nicolae Titulescu" University of Bucharest, Romania (e-mail: **msudacesvschi@univnt.ro**).

[1] Viorica M. Stefan – Duicu, Adrian Stefan – Duicu – "Trans – boarding the Doctrinal Phenomenon within the Management Sciences towards a Creative Dimension", Global Economic Observer Journal, 2014, No.1, Vol 2, p. 202 – 208.

Trademarks. The brand or the trademark may be the element on which a company could individualize it and it is able to create its own portfolio of loyal customers. Thus, the brand can be a symbol of a company, to which accedes customers, depending on the quality of services offered to them. Each company's goal is to provide tailored services to each customer. At the same time, the company aimed to transform its brand into an element which ensures the coincidence between the product and the individualized consumers expectations.[2]

Promotional strategy - consists in setting the promotional goal and resources and setting the concrete ways of promotional action, according to the categories of targeted customers and its purpose.

Marketing services can involve two different aspects of an offer:

- The main service, which means the main offer takes the form of a service. The main service corresponds to the first vocation of the company.
- The component "services" that accompanies the sale and consumption of all products (goods or services) and so-called associated service (such as after-sales service for cars).

We can also distinguish between the expected basic services, which are common to a category of offers, and the additional services, that are potential differentiators. Moreover, additional services and basic services are not fixed.

There is a continuum between goods and services, in the sense that the offers are generally mix of goods and services.

On the one hand, goods are more often accompanied by associated services: advice of sellers, financial services, after-sales service etc. Moreover, many services cannot be provided without hardware support.

But, certain services are completely immaterial as the medical visit, the advice of a lawyer or accounting services. These represents an activity performed or intangible benefits offered to a consumer and therefore do not result from the process of buying a physical object.

For this type of services, which do not involve the acquisition of some goods that define and determine them, the marketing activity is more difficult, because it involves persuading potential customers to purchase these services, only by the description of the services. The description should be clear and concise and should reflecting the benefits that the acquisition could bring to the client, without prejudice for competitors and without exaggerating claims for services offered.

Characteristics of the marketing for accounting services

Promoting of the financial and accounting services must respect the limits of professional ethics, as required the rules of professional organizations. Promoting services must respect the principle of professional correct behavior and not to compromise the profession. According to the National Code of Ethics for Romanian Professional Accountants, the publicity means to communicate to the public the information about the accounting services offered and the skills that has a professional accountant, in order to get works contracts.

The advertisement is the communication to the public of the activities performed routinely by the professional accountants. This communication doesn't intend to promote neither the professional accountant, nor its company.

Follows from this that, both, the publicity and the advertisement, are just ways to inform the potential clients about the existence of the company or about the services provided by the professional accountants, without allowing the specific offers that consists in the tariff reductions or fees reductions. Also, isn't allow the comparisons between the members of the same professional organization or between their activities.

The promotional message, which is included in promotional campaigns should be as realistic as possible and must avoid the exaggerated promises, since it can turn into disadvantage, causing the lack of confidence from the potential customers.

The marketing mix involves combining, in different proportions, the marketing variables, which ensure the success of the activities performed. In the field of financial and accounting services, the marketing variables are: the type of offered service, the price of services, the promotion of services, and, especially, the modality to provide services and the professional accountant's qualification and skills. Therefore, in the area of accounting services marketing, a special place is taken by the individual promotion of professional accountant. This has a significant impact on the image and reputation of the accounting profession generally, and, as a result, promote the services offered by professional accountants turns in promoting the accounting profession.

Code of ethics in the marketing of accounting services

Ethics – are moral principles and values that govern the actions and decisions of an individual or group.[3]

[2] Raboca Horia Mihai, "Măsurarea satisfacţiei clienţilorserviciilor publice", Editura Accent Cluj - Napoca, 2008, ISBN: 978-973-8915-71-8.

[3] Eric N. Berkowitz, Roger A. Kerin, Steven W. Hartley, William Rudedius, et al. – "Marketing", 5th ed., Burr Ridge, IL: McGrow – Hill Irwin, 1997, p. 102.

Various aspects of advertising and promotion often involve ethical considerations. Ethical issues must be considered in integrated marketing communications decisions. And advertising and promotion are areas where a lapse in ethical standards or judgement can result in actions that are highly visible and often very damaging to a company.[4]

Ethics in marketing of accounting services means an honest and proper presentation of the services offered by professional accountants, without exaggeration or distortion of their expertise level. National Code of Ethics for Romanian Professional Accountants allows advertisements in the press, about the professional activities performed by accountants. These advertisements must have the appropriate format and a sober and informative character. It is estimated that this approach of advertising will avoid unrealistic promises and the gap that may arise between the promises contained in the promotional message and the result of evaluation made by customers.

As a result of the conditions imposed for promoting accounting services, the methods commonly used by professional companies to promote their activities, consists in presentations of professional topics or in the publishing of articles (based on updated information), in the wide circulation journals or in the electronic publications with high visibility. Thus, the specialists prove their good training. In the same time, customers, who are looking for a specialized, competent, professional, but especially, qualified service, could obtain easier the needed information, without having to absorb large amounts of technical data.

Another promotion technique for accounting services, assumed by the National Code of Ethics for Professional Accountants consists in participation of professional accountants to radio and TV economic broadcasts, participation at conferences and seminars in the field of accounting, as well as at the events organized by Chamber of Commerce. Thus, the professional accountants have the opportunity to promote their services and, on the other hand, the opportunity to collaborate with other professionals (accountants or other professional area specialist). These meetings with different specialists – in HR, IT or lawyers – could also offer the opportunity to offer in the future full services, alongside them.

In recent years, in the marketing activities for the accounting services, online marketing has gained more and more field. Creating an own website, where to be made the presentation of the company, the presentation of the offered services and other general and specialized information, dedicated to existing and potential clients, it is one of the solutions to promote. But online marketing is done in many forms with different names, specialist making a clear difference between Search Engine Marketing (SEM), Search Engine Optimization, Email marketing, Social Media Marketing – based on the activities developed on the social media applications and World of Mouth Marketing – that has a strong impact on the market of services.

Online marketing is the form of presentation of the product or service, using the Internet and having as final aim – the sale. Thus, the difference between online marketing and the classic marketing is that a large proportion of activities involved in marketing strategy are developed in Cyberspace. This means that market research and its analysis, the promotion of services and even their distribution can be done by the Internet.

The target of online marketing for financial and accounting services is to ensure a constant communication with customers and to offer them services adapted to their activities. However, the process of development the use of electronic services should be done in the same time with the development of legislation and ethical rules. The updated legislation and the ethical rules ensure the integrity, accuracy and authenticity of information, by preventing and detecting the unauthorized creation, modification and destruction of information. [5]

Marketing strategy for accounting services

The marketing strategy, applied by a profesional organization to promote the specialized services offered, must conform to the conditions of the three key – components[6] of marketing environments, in which companies operates:

- Macro environment – is represented by the social, legal, economic, political and technological components; the role of the organization which applying the marketing strategy is to analyze this factors and their impact on its business.
- Micro environment – is composed by students, educational institutions, employers, suppliers and competitors (at the national and global level) and other interested parties.
- The internal environment – represented by the human resource, the financial resource, the material resource and the infrastructure.

Understanding how these factors respond to the actions of the organization and the way that they affects its activity, will help in developing feasible marketing plans, which will create both revenue and

[4] George E. Belch, Michael A. Belch – "Advertising and Promotion. An Integrated Marketing Communications Perspective", 5th ed., McGrow – Hill Irwin, 2001, p. 765.

[5] C. Maican – "Internet si E-Business", Ed. Infomarket, Brasov, 2005.

[6] Marin Toma, Jaques Potdevin – "Elemente de doctrina si deontologie a profesiei contabile", Editura CECCAR, Bucuresti, 2008.

fame for the professional organization, to help it in the promoting activity in the future. By creating a reputation and a brand, the professional accountancy organization will be well known in the market and will be recognized by the quality of services offered and the professionalism of its members. The intellectual property is very important for every professional organization and is a powerful factor in promoting.

Strategies of marketing for services are different from those for products, since the services have specific characteristics: intangibility,[7] inseparability, perishability, variety, responsibility of confidentiality and two-way information flow.

Intangibility. The services are not material objects and therefore they cannot be seen, touched, felt as goods can be. So, what is an insurance, otherwise a commitment between two partners for the future? Similarly, in case of accounting records, performed by a professional accountant. There is nothing in this service tangible, palpable, visible whereas a car, a TV set, a clothes are objects we can touch, see and try. The intangible nature of services makes their appreciation more difficult for customers. The intangibility of the service also makes more difficult the communication around the product and the justification of the price. An intangible product cannot be patented and defend its offer copies face of competing. It is a strategic problem for many service companies. According to many specialists in services, intangibility is the key distinction between goods and services, from which all other differences are developing.

Inseparability between consumption and production of the services has meant both simultaneity and physical proximity. That means that it is impossible to store the service or roll out the production in response to changes in demand and, in the same time, the customer must be present during the service's production at the place of production. The services are first sold and then produced and consumed, while goods are produced, sold and then consumed. For this reason customers must be convinced of the quality of services they purchase from their description by the promotion because they cannot be proved.

Perishability is a feature of services, which means the services cannot be stored for later sale. It is therefore important to exist a simple distribution channel, so that the service be created on demand, depending on the needs of economic entities who seek professional accounting services.

The variety. Services can be diverse. The quality and the type of a service can vary considerably, depending on the service producer, customer and time.

Responsibility of confidentiality - refers to the professional accountant responsibility towards its clients. The accountant has the obligation to ensure both the highest quality services, and the confidentiality of the activities developed by clients. The professional accountant will not disclose information about the services, only in cases where it was authorized or there is a legal or professional obligation to publish that information. Compliance with this professional rule turns into an advantage, because the customers appreciate ethics and morality characteristics of the accountant. This situation will increase the reputation of professional accountant and the reputation of company.

Two-way information flow. This means that the professional accountant obtain on a continuous basis information about the activities of its clients, he knows how much grows their activities and therefore he can offer more services and diversified. Basically, informing clients about the services they can still purchase is part of the marketing activity for the professional accountant.

Online Marketing Strategy for an accounting services company involves promoting services that satisfy customer requirements, achieving performance in accounting and reflect the real image of the company. However, according to the website www.contzilla.ro results of a survey developed among readers of the website (probably most of them are persons who working in the accounting field or searching the quality accounting services) on 1 October 2015, results that about a third of the readers do not believe in the online promotion of the accounting services that would bring results. (Table no. 1)

Tabel no. 1

What do you think about online promotion for the accounting services?	
30,17%	I do not think it brings results
29,31%	A good opinion
25,86%	A very good opinion
14,66%	I have no idea

All these features make it more difficult for the customer the evaluation of the quality of service that request it.

Conclusions

Advertising has a strong economic impact on companies as it is a key element of any business strategy[8]. It allows traders to present their goods and services and is an important element for commercial success. It can also enhance competition by

[7] J. Lendrevie, J. Levy, D. London – "Mercator", 7e edition, Ed. Dalloz, Paris, 2003.

[8] The Communication "Protecting businesses against misleading marketing practices and ensuring effective enforcement", ec.europa.eu

providing customers with better information and the possibility to compare products.

Efficient marketing is essential for long-term success of the professional organization. A promotional campaign is important in informing the public about activities developed by the professional organization Services have diversified a lot lately, and marketing has become an important science. So there are basis for the development of accounting marketing, but always in the limits of ethical rules.

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COMPREHENSIVE APPROACH OVER THE PROFESSIONAL JUDGMENT OF THE FINANCIAL ANALYST

Viorica Mirela ŞTEFAN-DUICU*

Abstract

The professional judgment is emblematical at a decisional level. This paper aims to highlight the valences of the professional judgment of the financial analyst by describing the components of its activity and also through highlighting the typologies of the mechanisms involved. Within this paper we have presented the types of financial analysts, the responsibilities that guide the professional judgment and also the interdependent elements of their activity.

Keywords: *professional judgment, financial analysts, abilities and requirements, responsibilities, economics.*

1. Introduction

The understanding of the professional judgment and the decision making process it is likely to demonstrate the reasoning limits, the effect of decisions taken under uncertainty, the way in which problems are being addressed and the concentrated role of intuition.[1]

Dr. Scott P. McHone states that "the professional judgment is based on the foundation of a set of rules and regulation that have been adopted for a certain profession."[2]

"The professional judgment and the decisional process are the essence of a lot of professions. Through understanding and communication of the role of decisional factors, valuable contributions are brought both in the domain and the extended professional community".[3]

The professional judgment consists mainly of mental and voluntary habits but it also can be found in the posture of a tacit and perceptive role.[4]

This type of judgment is a process that is based on our experience and varies from technical judgments towards deliberative judgments.[5]

2. The judgment of the financial analyst

In the CAEN catalogue of jobs we find the financial analyst with code 241305.

This job can be carried in various domain companies: banks, consultancy, production, sales, marketing, insurance, stock market etc. and covers a wide area of responsibilities.

The financial analysts is a specialist that evaluates and oversees the financial activities of a company in order to issue a subsequent report of the status in which the company finds itself.

The financial analysts work in organizations such as managerial and financial consultancy firms, insurance companies, commercial banks, investment banks, mutual funds management and brokerage companies, etc.

2.1. Categories of financial analysts

The job of a financial analyst knows a large variety in the organizational domain, being used in a different context, being related to a large variety of financial analysts, depending on the domain and the specificity of the activity carried out. We find in the current practice the following categories of financial analysts:

a) Investments analysts

The investments analysts are found in each organization that invests their client's or own funds on the capital market.

The investments analysts analyze the financial statements of the involved companies by determining their fair value in order to forecast its future financial performance. They use different advanced financial models that aid them in obtaining important information for their periodical reports issued in order to evaluate the issued bonds on different companies. The investment analysts recommend to investors decision factors regarding their investment.

At an international level, the investments analysts have the following descriptions: Investment Analysts, Research Analysts, Fixed Income Analysts, Equity Analysts and Securities Analysts.

b) Portfolio managers/ Directors of investments

* Assistant Lecturer, PhD, Faculty of Economic Sciences, "Nicolae Titulescu" University (e-mail: **chirita.mirela@gmail.com**).

[1] H.A. Simon & Associates, „Decision making and problem solving. Research briefings", Report of the research briefing panel on decision making and problem solving, National Academy Press, Washington, DC, 1986.

[2] Dr. Scott P. McHone, „Personal versus Professional Judgment", Liberty University, Virginia, pg. 3.

[3] K. Smith, J. Shanteau & P. Johnson, „Psychological investigations of competence in decision making", Cambridge University Press, 2004, pg 4.

[4] H. Margolis, „Dealing with risk: why the public and the experts disagree on environmental", The University of Chicago Press, Issues 35, 1996.

[5] J.C. McDavid, I. Huse & L.R.L. Hawthorn, „Program evaluation and performance measurement. an introduction to practice", Second Edition, SAGE Publications, University of Victoria, Canada, 2013, pg. 455.

Portfolio managers/ Directors of investment are specialists that have the responsibility to directly administrate, in accordance with the strategic objective of the investors, the composing elements of a portfolio that consists of pension funds, mutual funds etc.

Portfolio managers/ Directors of investment carry their activity within mutual funds administration companies, investment funds administration companies etc.

They are found under the following international names: Portfolio Managers, Money Managers and Investment Managers.

These types of analysts know that"applying concepts from game theory and information economics allows assessment of the consequences of lack of coordination and information problems on macroeconomic variables such as unemployment, inflation, instability growth."[6]

c) Analysts of investment bankers

The analysts of investment bankers are the financial analysts that work in the banking investment domain that direct the capitalization projects of the target companies through issue of titles (shares, bonds) the through listing it on the specialized markets.

The analysts of investment bankers also have an important role within the transactions carried by mergers and purchases, as a consultant.

To manage the credit risk, the analyst knows that"banks should identify the sources of the risk and to monitor their exposures. These activities mean a better knowledge of the existing and potential clients and their financial situations."[7]

These categories of analysts comes in direct contact with the organizations that carry underwriting services (the process in which bonds are purchased from issuers by the investment bankers and subsequently sold to interested investors) and consultancy services (transactions advisory services – companies known as Big 4 – Ernst & Young, KPMG, Price Water House Coopers, Deloitte, etc.).

d) Rating analysts

Rating analysts render rating services by which they evaluate the capacity of certain entities (Companies, Government, etc.) to issue bonds in order to accumulate funding for significant development projects. Subsequent to the carried analysis a certain rating is given to each bonds in relationship with their quality, the risks and benefits a potential investor is looking at.

e) Credit analysts

Credit analysts are usually identified in the commercial banking domain. They analyze the credit demands destined to the corporate sector and recommend the granting or not for the above mentioned credits.

f) Independent analysts

Except the category of financial services, various companies recruit financial analysts with a diversified package of responsibilities (carrying of financial planning, analysis of certain indicators, the analysis of certain products and services profitability analysis etc).

As a user of financial and accounting information, the financial analysts is the person that monitors the financial evolution of the company, the compliance with the initial planning, increase of the company's productivity and supervise the realization of the material objectives in accordance with well-defined methodologies.

This type of analysts setts the nature of the company's problems, identifies the typology of causes and seeks to propose proper solutions and eliminate the useless processes. The analyst supplies to the managerial team information as reports, analysis, presentations etc.

Subsequent to his report, it can be found in which extent the company is solvable on the financial market, if it has the capacity or incapacity to pay its debts in due time, dues that represent the feedbacks received from natural and juridical persons with who the company had agreements over the time etc.

2.2. The abilities needed by the financial analyst

The activity of a financial analyst requires a complex range of abilities, namely:

- the ability to analyze, consolidate, interpret and present reports and complex financial statements and/or forecasts;
- abilities to work with databases (advanced PC operating skills, solid knowledge of the MS Office Pack (Word, Excel, PowerPoint, Access);
- Self-evaluation abilities and continuous development;
- The ability to plan, implement and administrate financial information;
- Knowledge of processes, principles and standards for financial analysis and integrated reporting;
- Multitasking and information synthesis capabilities;
- Strategic acting abilities;
- Communication abilities (flexibility, open, positive thinking);
- Integrity and devotion;
- Personal qualities (creative thinking, team player);
- To treat the organization personnel with kindness and professionalism;

[6] M. Z. Grigore, "Information economics, instrument of analysis in new microeconomics." Lex ET Scientia International Journal 16.2 (2009), pg. 354-365.

[7] M. Sudacevschi, Credit Risk Management In The Commercial Banks In Romania. Management Intercultural, 2014, 30: 248-253.

- Advance knowledge of an international language (English, French, Dutch, etc.);

2.3. Requirements related to professional training for financial analysts

In order to respond to the exigencies of this job, Master studies come to aid, also individual training and internationally recognized certifications (CFA – Chartered Financial Analyst, ACCA – Association of Chartered Certified Accountants).

The CFA title is considered to be very important and is provided along with an international level of prestige. CFA Romania is the investment professionals' association, most of them being owners of Chartered Financial Analyst certified (qualification administered by the CFA Institute – USA).

The CFA program is post-university and it is focused on training and testing of candidates in the fields of ethics and professional standards, portfolio management, analysis of the financial statement, economy, analysis and evaluation of various financial and investment instruments.

Candidates for the CFA title need to pass a 3 exam serious in a period of 3 to 7 years and need to have a 4 years relevant experience in the financial domain and it is needed them to adhere to a strict code of ethical and professional standards. Each exam implies about 250-300 hours of individual study.

Currently, according to CFA Romania Macroeconomic Confidence Index, November 2014, "CFA Romania has over 160 member, most of them owners of the Chartered Financial Analyst title or candidates for one of the 3 levels of examination that leads to granting this title. Professional that are members of the CFA Romania work for banking institutes, insurance companies, securities brokers, pension funds, consultancy companies etc. Globally, there are over 110 Thousand owners of this title". [8]

Another important certification is provided by ACCA, a professional organization located in UK and started its activity in 1904 as an association of accountants of London that expanded internationally becoming, in 1996, the Association of Chartered Certified Accountants (ACCA). This organization is recognized in all members of EU and the United Nations Organization.

Currently, ACCA is the most important global organization of accounting professionals, counting over 170 thousand members and students from 180 countries, having a network of 91 offices globally. Through its training programs, in accordance with the International Education Standards issues by IFAC (International Federation of Accountants), through its reputation, influence and dimension, ACCA has become the global leader of forming the accounting profession. [9]

ACCA has established a local office in Romania. The Association organizes exams for obtaining the ACCA qualification of a diploma in Financial Management, as an international Audit Certificate.

"One of the main advantages of the ACCA qualification is the variety and level of specialization of their subjects. Although, in many aspects is similar to an MBA, ACCA is more than that, not being equaled as resources and recognition at a global level", states Andrea Manea, leader of ACCA Romania, Bulgaria and Moldova. [10]

The ACCA programs present a higher relevance as it benefits of a valuable recognition from employees, granting a free practice right at a professional level in all the countries in which these standards are recognized and applied.

The ACCA professional organization is recognized by the World's Bank and USAID (US Agency for International Development), institutions that have used the ACCA programs as reference standards in the process of global harmonization of the accountant profession.

ACCA organizes four session per year (March, June, September and December) in which up to four exams can be attended. In order to prepare for these exams, students can benefit from companies that supply courses or they can prepare individually.

From employees we find companies from the wide specter of domains: market shares, banks, production, marketing, consultancy, sales, distributions, financial investments etc.

2.4. Research regarding the responsibilities of the financial analyst's responsibilities within the context of the Romanian economy

In order to present a professional framework for the activity of the financial analyst, we have started an investigation regarding the responsibilities of the financial analyst profession in the context of Romanian economy.

In order to obtain a trustworthy assembly of results we have studied 40 job descriptions of the financial analyst within companies from Romania. The first idea that came from our research is that the responsibilities of the financial analysts is divided into two major categories: general and specific.

Analyzing the job profile of the financial analyst, from the general responsibilities we find most often:

- Compliance with the internal set of regulations;
- Compliance with the quality and environmental policies at the working site;
- Carrying their professional activities in compliance with the ethical norms;
- Compliance with the legal requirements related

[8] www.cfasociety.org - CFA Romania Macroeconomic Confidence Index, November 2014.
[9] www.accaglobal.com
[10] A. Manea, reprezentant ACCA Romania, Bulgaria și Moldova.

to the security and protection at the working site in order to diminish the exposure to dangers that can lead to accidents;

- Coordination, motivation and monitoring the performance and efficiency of the subalterns in order for them to fulfill their general objectives;
- Periodical collaboration with the other departments of the company for the completion of analysis and financial reports;
- Issuance of the financial reports
- Attendance to the elaboration of market studies, feasibility studies and other types of analysis needed in their activity;
- Continuous informing on news in the domain;
- Sustaining an opinion related to the development perspectives of the company;
- Tracking of processes in order to be fulfilled efficient and effectively, usage of resources, solving or recommending alternatives in the reorganization of the decisional process priorities;
- Accomplishment of tasks provided by the direct superior;
- Proposal of solutions for issues that appeared in the working process;
- Usage of resources in accordance with the assembly of the objectives.

We have studied the specific responsibilities of the activity carried the financial analyst and structured into categories these responsibilities that have a prioritized character in the work processes, presenting the following categories of specific responsibilities:

Responsibilities related to budgets

- Monitoring the results of the activity, analysis and comparison of these results with the allocated budget and the proposal of measures to correct the unfavorable situations;
- Analysis of expenses and issuance of recommendations for the optimization of costs on various activities and products;
- Attendance to the realization of forecasts for the following periods and for long term regarding incomes and expenses based on the analysis of processes from the previous periods.
- Contribution to the processing of financial and statistical data in order to issue and reviews the company and departments' budgets in accordance with the management's requirements;
- Identification and analysis of problems and deficiencies related to income and expenses of the financial departments; establishment of a approach method from the methodological provisions within the company and recommendation of alternatives;

Responsibilities related to the analysis of the financial balance

- Development of a financial strategy for the company;
- Evaluation of the financial instruments and the identification of opportunities related its placement;
- Elaboration of financial analysis reports and issuance of conclusions based on them;
- Application of financial analysis through elaboration of analysis, evaluations, computation of indicators for segments, products, services, markets etc.;
- Updating the monthly business plan.

Responsibilities related to the investing activity:

- Identification of the profitable and the risky investments;
- Participation to the elaboration of market studies, feasibility studies and other types of analysis needed for financing file;
- Tracking of the international capital markets and identification of possible influences and fluctuations in the market in which the company operates;
- Analysis of the portfolio services 'profitability.

3. Conclusions

The conclusions of our research over the professional judgment in the Romanian companies related to the financial analysis executes its professional judgment through the responsibilities incumbent, refer to the fact that the profession of a financial analyst implies carrying complex activities, varied, the vision of this job picturing a high level of importance in the professional environment, citing within the financial analyst's posture a constructive structure and a high level of professional training that will satisfy the informational needs and requirements related to the continuous development of the accounting area and the economic and financial area within a company.

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ROLE OF THE SALESPERSON IN "TOTAL DESIGN"

Nelu DORLE*

Abstract

Sales Management has known, during the last decades, a fulminating increase in the degree of complexity, enriching itself with new relationship strategies among the different components of the management system. These aim at new perspectives on the relationship between production and sale, between factory and market, and finally on the relationship between manufacturer and salesperson. The traditional view on designing a product is improved by means of the "Total Design" system, which targets a more ample perspective of the product and its fields of reference, in the sense that it gives greater importance to marketing and the requests of customers in the production design. And in this respect, the salesperson as a main link between the two economic spheres, gains a fundamental role.

Keywords: *management, Total Design, market research, marginal rate of substitution, sale.*

Introduction

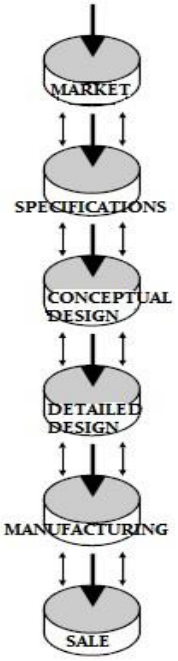
This study refers to the role of the salesperson in the management system of product manufacturing. The complexity of the relational systems during the contemporary crisis period imperatively imposes the starting of revalorization strategies of the income-expense relationship, which results in labor reorganization and even in the reorganization of the economic system. In this regard, large organizations – companies that manufacture services or supply products – have in their operation politics permanent innovative systems of selling their own products, which equals in permanently "reinventing" sales marketing. The fact in itself may be achieved mainly under the favorable conditions of a so-called "total design" process, which is described in the latest scientific researches in the field of management. Going beyond the traditional vision of designing a product, corroborating the specific requirements in different fields (from engineering and technological components to aesthetic aspects), which blends into the image of the product, "total design" targets an ampler perspective regarding the product and its fields of reference. Marketing and the requests of the customers have a great importance in this regard. The salesperson has the first contact with these requests trough his market prospecting and qualification activities. Thus, the concept of "Total Design" becomes one of the secrets of success, reliability, finally, one of the imperatively needed pillars in economy.

Out study aims to demonstrate, calling on practical field research from within two auto brand agencies, the multifaceted role of the salesperson not only in sales management, but also in product manufacturing, the salesperson thus becoming an integrating element in the global system of total design. The research is part of an ampler study of different innovative sales strategies in the automotive field, largely elaborated based on own experience, but not without a serious documentation of specialty literature.

Actual content

The concept of *"Total Design" was first brought up by Purgh in 1991: "Total Design is the systematic activity necessary, from the identification of the market/user need, to the selling of the successful product to satisfy that need – an activity that encompasses product, process, people and organization."*[1]

Total Design starts from the ***sales market***, from the analysis of the market as a decisive factor in the development of the product, followed then by different stages connected to ***specifications, conceptualization, detailed design or manufacturing***. The general stages of such a design can be found in the attached image (Image 1), which highlights the fact that the market dictates the evolution of the product.



This is why the salesperson is, in this process of "Total Design", a key element. As the vector of bonding in the sale-purchase process, he/she starts and insures the flow of the "Total Design" system, first of all by being given certain functions of

* PhD Candidate, Technical University from Cluj-Napoca, Faculty of Machine Manufacturing, Engineering and Management, project manager, Prof. Dr. Eng. Liviu Morar.

[1] John Clarkson, Claudia Eckernet - Design Process Improvement: A review of current practice – Springer Science & Business Media, 2005.

prospecting the needs that occur on the market, of their qualification according to the needs of the market, in order to subsequently finalize the act of selling under optimum conditions.

Market research from the perspective of Total Design

Most specialty studies find that a project is born from a need that must be solved, thus giving a meaning to the utility of the product. Even more, this utility has great chance of being solved, creating its own market. But before reaching this objective, the salesperson has to go through certain stages of prospecting, promoting, identifying the needs, presentation-negotiation, stages that are equal, at least in the initial phase, with the classical sale technique, especially known as "Sales Steps". This means the identification of the customers' requests, by means of different stages of market diagnosis (for example, by questioning or collecting information), stage in which the salesperson registers the "gross requests" of the prospects, which will then be taken over to the next stages of the total design. The categorizing of the customers will be taken into consideration according to the fields of activity in which they operate, thus specialty salesman will be called on for each field.

The market is continuously transforming and evolving and its requests and particularly its claims change from day to day. If, for instance, in 2003 a car was sold by means of a used, almost destroyed flyer and despite this, the customer created an exaggerated impression about the car he wanted, as the particular information about the products was not available for everyone and the variety of the products was poor, but today the salespersons are confronted with the reverse relationship of the image of the customer related to the product. However the market, today, offers a large range of products and multiple leverages of knowing these products, by means of mass-media, websites, and targeted exhibitions. Furthermore, the technological development in the last decades brings forth the need of having certain products that offer a maximum level of comfort, which corresponds to the digital modernism, a fact that reverberates in the industrial design of the product. As a result, the market gave birth to the informed and exigent customer, who is difficult to influence, who has complex needs and is able to make the choice. In this case we cannot use old sales or presentation strategies of the finished product. Today's customer is a click away from information, and this click is often in his hands by means of different hand or pocket gadgets (Smartphone, tablet, laptop etc.). The salesperson, after market research, captures the information needed for the development of the products that are about to satisfy the needs of the customers, information underlying the process of "Total Design". From this arises one of the fundamental roles of the salesperson in creating a dynamic market.

Total design involves also techniques and strategies of verifying the manner, in which a salesperson protects and treats the market, so that the collected information influences in an optimal manner the development of the products. Thus, in the new managerial activities one introduces the principle of feedback, achieving a permanent connection between the work of the salespersons and of the manufacturers, a sort of a continuous flow, which supports the quality of the sale and the prosperity of the market. In this respect, the practice of evaluation was developed by means of the "Mystery Shopper" procedure. Theoretically, this means sending certain false customers in order to evaluate the approved salesperson. The questions asked represent standard questionnaires, specialized on the field of the salesperson's competence, elaborated by the manufacturer. These are analyzed in terms of certain hypothetical questions addressed to the "false customers" after contacting the salesperson.

For example, here is a questionnaire of a Mystery Shopper, within the evaluation of a sales representative in the automotive industry:

- *After telling him what you wish, the sales advisor immediately started asking you questions in order to determine your needs?*
- *How many questions were you asked by the advisor in order to find out your needs, from the list below?*
- *Did the sales advisor ask you whether you replace a current car or not?*
- *Did the sales advisor ask you what elements lacked from the cars you drove so far?*
- *Did the sales advisor ask you if there are any aspects/performances that should not be missing from the car you wish to buy?*
- *Did he ask you any questions related to the needs of you family in terms of the car?*
- *Did the sales advisor ask you how many members your family has?*
- *Did the sales advisor ask you how many kilometers would you cover during a year?*
- *Did the advisor ask you if you use the car more inside the city or more for longer trips?*
- *Did the sales advisor ask you if you have a set budget for this acquisition?*
- *Did the sales advisor ask you about the payment methods preferred by you (own resources or financing)?*
- *Did the sales advisor ask you how long are you willing to wait for the delivery of the car or when you wish to have it?*
- *What other questions did the advisor ask you in order to find out your needs?*

– *Did the sales advisor confirm your main needs, thus making sure that both of you have an agreement on the needs? (For example: "from what we discussed, I understand that you are interested in the price, fuel consumption ... is that right?").*

Thus the truthfulness of the information is insured, which corresponds to the needs of the market and, as a result, the good operation of the total design cycle. So here's the capitalization of the information reversibility through a "back-loop": the information goes through a clear rout from the salesperson to the producer and from the producer to the salesperson.

Case study for highlighting the role of salesperson in total design

To test the effectiveness of the concept of "total design", a thorough research of the sales process was used, by reference to the market needs, within a vehicle distributor in a continuously changing market in Northern Romania, but a market with a modest financial power. We speak about the market of Ford in 2006, in Satu-Mare County.

It was found that car sales in that period was in its infancy, the market not having yet a pronounced dynamic of well defined networks of distribution of new products on the market (the market was focused mainly on the segment of used vehicles, second-hand cars, and furthermore the stores for new vehicles were located in unsuitable locations, which were not standardized according to Western market). In this arid context, the sales were difficult to achieve, thus any leverage, essentially strategic, was welcomed. Here is an example, the case of a customer with a considerable financial power in the local market, a case that reflects the effective the role of the salesperson in "Total Design":

One of the large auto parts manufacturers in the Satu Mare market wanted to buy a batch of cars with a certain configuration. The problem occurred when the customer wanted for the first equipment level of the Ford Focus sedan the following: *Climatronic air conditioning*. In this case the attempt to substitute this need was not possible, the customer arguing that if this system is not available as requested then he would switch to another car manufacturer. To resolve the issue he followed a process of feedback from the sole importer in Romania at that time, SC Romcar SRL. This first step was left without positive results, as the decision maker in this case was not the importer, but the manufacturer Ford Europe itself. Thus, the product manufacturer was contacted directly. After an analysis of several days and understanding the need for satisfying the customer - the manufacturer has approved to introduce on the lists of optional the "Climatronic Air Conditioning System" equipment for the Trendline equipment level, so for our case the situation was remedied and the result of Total Design, i.e. finished product delivery to the end customer, according to his/her requirements, proved to be a real success.

We observe the essence of approaching a behavior in the terms of Total Design versus Classic Design. For the design of the finished product, in addition to requirements imposed by the market in general, the specific needs were also taken into consideration, needs of the end customer. In this case, the finished product, the Ford Focus at the Trendline equipment level and with the optional "automatic air conditioning system", has found its place in the market. In the case of Classic Design the final product would have been segmented into pieces that are not necessarily interrelated and the back-loops would not have worked in a customer-oriented manner. (Image 1)

Understanding the importance of Total Design will lead us toward a clearer view of the sales process, a process to which any product designed at a moment in time is subjected to or should be subjected to. The value of the design is specifically given by the capitalization of the finished product. In this regard, we must eliminate any barriers (e.g. shortcomings of the product) and they must be sent towards decision makers of the design and construction of that product.

Another case targets the stage of setting the requests of the customer, according to the "Total Design" system, this time within the Volkswagen market, in Maramures, in the year 2014.

It was found that the process of establishing the customer's requests does not necessarily come from the cusomer verbalizing his/her desire. A specialist sees beyond the initial desire.

Customer X originally asked for a Volkswagen Tiguan equipped with a 2.0 L engine with power of 140 hp - and a manual gearbox. During the process of determining customer's needs, the salesperson noticed that for the customer a diesel engine with superior power (170 hp) and an automatic gearbox would be more suitable. The deduction made after assessing the customer's profile: he used to drive an Opel Antara with a 150 hp engine and he mentioned certain situations where, due to motorisation, he was forced to cancel his intentions to pass cars in traffic. In the same time he motivates his initial choice with the desire not to exceed a certain threshold of financial investment. The solution of the problem was found in giving up some additional equipment features (for instance panoramic sunroof) and equipping the car with motorization adequate for the level of the client's needs. This process of replacing certain features with other more convenient ones, is the subject of what is known, in technical terms, as ***an indifference curve***. In specialty papers, such as Engineering and Management of Production Systems, this situation is determined by the flexibility of the customer within the benefits that are

about to be acquired. We speak about the so-called "***marginal rate of substitution***."[2] A customer's consumer program or consumer recipe represents the specification of different quantities of various goods (or part of the same good), thus ensuring his/her satisfaction regarding that need. This recipe can be made up of various components that can be interchanged or can be quantitative. This consumer program is influenced by social status and family situation, by the phenomenon of "inducing" orientation needs through mass-media, advertising, publicity consumption.[3] By analogy one can say that in the given situation, the customer stayed in the comfort zone of request satisfaction, of favored utility, giving up some features that will be compensated by stronger motorization. Thus, by inducing an idea of compensation between features, this customer X has ordered and received the car that was later proved to be the sum of all components and configurations that satisfied his needs in this area.

The process of determining the customer's needs in correlation with the sales process is necessarily made by means of the principle of interdependence between ***feature - advantage - benefit***. Ultimately the customer's need translates customer into a benefit resulting from the advantage created by a certain some characteristic of the product. This benefit is what the customer buys. In our case the exchange rate will not be money for the car, but money for the amount of benefits given by the purchased product. An example in this regard is the question in the questionnaire: "How many kilometers will be covered annually?" Thus to a customer who covers 30,000 km / year will be given the explanation that a diesel engine will have a lower operation cost, costs coming from lower fuel consumption and engine reliability. These are features. The benefits bought by the final user are: lower running costs per kilometer, greater autonomy of the car, rarer refueling, diminished devaluation compared to gasoline engines.

Returning to the process of identifying customer needs, we see that the many parameters that corroborate in achieving verbalized needs can often be substituted. Thus the loop and branching theory in Total Design is verified. Even if a product has already been designed and it is not "initially" completely in agreement with the customer's request, this product can be converted into the desired shape through the *indifference curves* and the *marginal rate of substitution*.

Thus it is observed that "Total Design" involves the shaping of sales strategies focused on customer needs, strategies that are based on the "*confidence climate*", about which Geroge Butunoiu[4] accurately speaks in his study in sales process. The author mentions that this principle must be fully assumed by the salesperson, especially since one can see in the salesperson-customer communication the persistence of doubts regarding the exacerbated interests of the salesperson to sell his merchandise. Hence the increasing need to offer the customer the safety of a well operating work ethics.

Forming *the trusting climate* targets above all the confidence in the salesperson as a representative of the company, but the quoted expert stresses the fact that "*we speak about the customer's trust in the one he talks to, first of all as a person and then as a representative of the company*" and this in the virtue of the fact that "*a sale is a concrete, interpersonal act, between two people, not an abstract one, between two abstract entities such as companies.*"[5] In this respect, certain communication methods are thorized, which are applied more as "psychological tricks": "the technique of the limping duck"[6] (consisting in giving the customer advise, which appearantly brings disadvantage to the salesperson, sometimes exagerated by means of the "honesty crisis"[7], a technique through which the salesperson turns the customer away from his/her initial requests, arguing his decision by correctling setting the customer's needs and by recapitalizing the selection criteria of the products. Under this aspect, the interior motive of "Total Design" is limited to the eloquent assertion of the same author, according to which "*a good salesperson does not sell only a product, he sells a solution*"[8]

Conclusions

The role of the salesperson in the Total Design system is generated by the salesperson's ability to find solutions for the customers' requests, by discovering and applying "cooperative strategies"[9], based on positive influence tactics (recommendations, promises, conessions). Furthermore, by means of these strategies, the customer's trust is earned, which a fundamental goal in the salesperson-customer relationship that basically determins the company's ownership. The trust sought by the customer is based on the belief in the effectiveness of the desired product, but most

[2] Ioan Abrudan, Ioan Candea – Engineering and Management of Production Systems, Publishing House Dacia 2002, pages 84-85.
[3] Ibidem.
[4] George Butunoiu, ***Sale Techniques,*** Publishing House All Eduaţional, Bucharest, 1995, page48.
[5] ibidem, page 49.
[6] ibidem, page 50.
[7] Ibidem.
[8] ibidem, page54.
[9] Ştefan Pruteanu, ***Negotiation and Transaction Analysis,*** Publishing House Sagitarius, Iaşi, 1996, page179.

often, it is reflected on the person who mediates the achievement of the product. And this, in view of the fact that, in general, the customer needs, even if unconsciously, to trust the salesperson, first as a person, since as George Pruteanu states, "*a sale is a concrete, interpersonal act, between two people, not an abstract one, between two abstract entities.*"[10] Of course this author's vision today seems overcome by technological developments and online transactions, but even in this context, confidence in the company's representative does not deny its fundamental role in winning over customers.

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[10] apud. George Butunoiu, ***Sale Techniques,*** Publishing House All Eduaţional, Bucharest, 1995, page 49.

SALES STRATEGIES CENTERED ON ELABORATING QUESTIONS

Nelu DORLE*

Abstract

Making a good sales approach depends largely on the strategy established by a salesperson, depending on the type of customer, the circumstances, and his/her psycho-linguistic availability. The sales strategies based on the science of reasoning, on the oratory and persuasive ability include skills related to communication, on which one of the most important is the development and asking of questions. The science related to the salesperson's ability to handles questions in a sales interview gives the true measure of his/her professionalism. Elaborated based on the taxonomy of the sales steps and depending on customer objections, questions may constitute a basic premise in the development of sales strategies and techniques

Keywords: *sales strategies, attitude during questioning, functions of the questions, additional incentive, involving question.*

Introduction

The role of questions in sales is fundamental, given that it is essentially linked to the attainment of communication, both on an informational level, as well as in the empathic, attitudinal one, this time involving a psychological factor. This study aims to analyze the premeditated method and drafting of questions in the communication between salesperson and customer, so that these questions acquire the maximum effect desired by the salesperson. Referring to the specialty literature (marketing and psychology), the paper presents a synopsis of the types of attitudes adopted by the salesperson and of the functions of the questions in the sales interview, followed by the analysis of the various categories of questions commonly used in this area, from the perspective of the field research.

Under this aspect one can easily see that the technique of the questions plays a role in initiating, processing and completing a sale, giving it specific functions for each moment / step of the sale.

The entire sales process depends on the way in which the questions are developed and managed, starting from the "hogging" of the customer to gaining his/her confidence, from stimulation of the to the targeting of his/her wishes and needs, from achieving assurance to purchasing the products. A question well asked can lead to the selling of the product, while the absence of a question or even a misguided question can lead to customer loss and inefficiency.

Actual content

Specialty studies (the ones referring to psychology of communication[1], as well as the ones related to sales management[2]) present a large variety of questions and techniques of elaborating effective questions in the specific act of sales communication.

Each question is asked with a specific purpose, with the intention of accumulating information about the customer and his/her needs and to reach the point in which the sales process is irreversible. Other questions however aim to control and direct the discussion, to stimulate the customer and form his/her convictions. But for this, the salesperson goes through an entire range of questions which represent the same amount of objectives to reach. From this point of view we can state that questions have certain functions in the salesperson-customer communication.

The research of practice shows that a professional salesperson does not necessarily emphasize on giving an absorbing, persuasive speech, but rather on asking adequate questions, through which he/she can find out the customer's needs and even more, he/she can direct the communication and negotiation onto the desired track. Contrary to the prejudices related to the "oratorical" skill, which is essential to a salesperson, we can state without any doubt that a good speech in this field targets the pillars of certain well-thought and optimally asked questions, taking into consideration the person, the time, the space, the type of relationship, etc.

* PhD Candidate, Technical University from Cluj-Napoca, Faculty of Machine Manufacturing, Engineering and Management, project manager, Prof. Dr. Eng. Liviu Morar.

[1] Jean-Claude Abric, ***Psychology of Communication. Theories and methods,*** Publishing house Polirom, Iaşi, 2002.

[2] Ştefan Pruteanu, ***Negotiation and analysis of transaction,*** Publishing house Sagitarius, Iaşi, 1996.

The salesperson's attitude in the context of addressing the questions

The specialty studies from the field of psychology define attitudes as "a mental and neurological and physical state determined by experience and which exercises a dynamic influence on the individual, preparing him/her to act in a specific manner in front of a certain number of objects and events". Another definition presents attitudes as "taking of positions of an individual in relation to an object" or "attitudes are certain predisposition actions".[3]

In interpersonal relationships, attitudes differ from case to case, however certain dominating types are shaped, which are generally valid: interpretation attitude, evaluation attitude, help or counseling attitude, questioning or investigating attitude, attitude of comprehension.[4]

In the salesperson-customer communication, the attitudes most frequently adopted by the salesperson are the help or counseling attitude and the questioning or investigation attitude, depending on the moment of the sales process.

The first step in approaching potential customers is without doubt the manifestation of the questioning attitude, by means of which the salesperson asks questions in order to help the customer express his objectives. Certainly this creates a certain type of relationship through which the dominant power of the one expressing himself can be seen, emphasizing a certain dependency tendency of the questioned person towards the investigating persons.[5] Without doubt, the salesperson-customer relationship is an interdependence relationship, each party having his/her role in the harmonization of the sales process. A very important aspect is given however by the salesperson, who must achieve his/her ability to ask questions, so that this situation give him/her the status of a privileged person, through which he/she can channel and manipulate the words of the customer.

In this respect the salesperson can use certain psychological strategies of persuasion, such as "*induction by question selection*", "*induction by formulating the questions*" or "*induction by order of the questions*".[6]

Selecting the questions allows the salesperson to direct the customer's speech towards a certain direction, aspect called in specialty terms "*deliberate manipulation.*"[7] For the professional salesperson, this "manipulation" becomes automatic, becoming part of the subconscious selection processes, based on projective mechanisms. Thus, the salesperson will ask the questions corresponding to his/her interest to sell and which are consubstantial with the customer's interest to purchase the product, which fits his/her needs.

Formulating the questions is not an accidental process. It requires both a conscious process of stimulating and triggering, at a psychological and cognitive level, the customer's affective, positive attitudinal reactions, directed towards creating convictions. The mechanism is achieved by using certain words, lexical structures or … (for instance, use of the verb "to invest" instead of "spend" or instead of "price" – "value", "contract" – "agreement" or "convention", "buy" – "own").

A special importance is given also to the *order of the questions*, a fundamental criterion in insuring coherence and consistency of the answers. On the other hand, the customer will be able to express in a balance manner his/her objections, in a logical, coherent order, which will facilitate the activity of the salesperson in prospecting the customer, this diminishing the contractions or subversive tendencies of the customer. Moreover, psychologists themselves state that "*the order in which a questionnaire is carried out run the risk of closing up an individual in a discursive logic, which makes him/her – under the effect of certain successive coherences – say «white» when spontaneously he/she would have said «black». Certain questions are thus contagious, determining what is generally called* ***the halo effect.***"[8]

The functions of the questions

The reasoning behind the elaboration of questions forms by being first aware of some functions, which each question activates in the salesperson-customer relationship. Being closely related to the steps of the sale, following a logical reasoning, these may be: the function of the salesperson acquiring control in the conversation, the function of discovering the interest areas of the customer, the function of isolating the objections, the function of confirming the sale process. We may also add to these, certain functions having a psychological nature, through which the salesperson stimulates the feeling form purchasing and directs the attention of the customer towards acquiring new products.

[3] Jean-Claude Abric, op.cit., pag. 36.
[4] ibidem, pp. 38-48.
[5] ibidem, pp.45.
[6] ibidem, pag. 46-47.
[7] Ibidem.
[8] Ibidem.

1. The function of the salesperson acquiring control in the conversation.

This function corresponds to the ability of the salesperson to capture the attentions of the customer, to lead him/her in a persuasive manner towards the path desired by the salesperson, and not the other way around.

The moment represents the start of the sale, which will be the base of the smooth running of the entire process. In case the salesperson does not show a good initiative and lease the customer feeling ambiguous, the sale process is compromised. The function thus implies the psychological factor, meaning that the salesperson must have control in the conversation, both through verbal communication, as well as non-verbal or paraverbal communication. Essential here is the attitude of the salesperson, in which the customer must see self-confidence, trust and professionalism. And these are manifested both through choosing the proper words, as well as through tone, look, gestures, and mimic. In this regard, after correctly finding out the needs of the customer, the salesperson will state with certainty in speech and mimic or body-language that a certain model/version of the product fits the customer. Self-confidence leads to achieving the trust of the customer and automatically to the possibility of leading the entire sale process.

2. The function of discovering the interest areas of the customer

An important step in communication is made by the salesperson through questions, which help him/her discover the customer's needs, thus shaping the interest areas. The questions follow a logical, gradual order, from general lines towards specific ones, up to finding out the features sought by the customer. The latter will be questioned both from the point of view of the pragmatic needs brought by the new products, as well as of the social satisfaction needs. Often a sale is achieved as a result of the need for social affiliation or of assertion in the society.

Thus a start of questioning the needs of the customer may lead to finding out the benefits that are desired to be achieved by acquiring the respective product. In this respect, the customer will have to be questioned in relation to the current product, which will be changed. In the automotive field, there must be a clear distinction made between different benefits that come with the purchase of a new vehicle. There will be questions about the destination of the vehicle, to be more exact if it will be used as a personal or work vehicle. In the same time, we must find out if there are more persons using the car and what kind of roads will be used. Depending on the received answers, he/she will be recommended to purchase a small class version, a minivan, or even a van. Moreover, in case the customer will also use the vehicle on bumpy roads of the off-road type, he/she will be recommended to purchase a four-wheel drive vehicle. This step is crucial in the sale process, given the salesperson's conscious targeting towards a certain product. If the salesperson does not have enough dexterity in formulating the questions and interpreting the answers, which is sometimes intuitive, the questioning may lead to choosing the wrong product, which in the end will not be purchased since it does not fit the customer's mentioned or non-verbalized desires.

3. The function of regulating and isolating the objections

This function takes into consideration the prequalification of the customer. With the help of the questions, the customer will be directed towards expressing his/her objections. The salesperson must select the important objections, the ones that represent the real interest of the customer, as these must be cleared otherwise the objections will show up permanently. The salesperson must not avoid, but on the contrary, he/she must search them, in order to correct point out the benefits of the product in question. Objections are the ones that confirm our desire to purchase. The customer places himself/herself in the position of the owner of that product; as a result he/she has already an idea or even the desire to purchase it. Objections must be isolated and interpreted as real or imaginary. An example in this respect is offering a vehicle placed on a superior range. Objections like: the car is too large, it has too many features or the difficulty to park it – may mean in reality that we are offering a product that is too expensive. In this case the class of the product must be brought down to a lower level.

4. The function of confirming the sale process

For an optimal process of the sale, the salesperson must make sure that the customer is involved and, as a result, that he asks the questions that will confirm the salesperson the continuity of the initiated sales process. There are questions, which, once answered, will confirm the salesperson that he/she can move on to the next step of the sale. This function is achieved by asking certain summarizing questions: "I understand that you wish to buy a family car and that you will have long drives; thus a diesel sedan would be what we are looking for, is that right?"

5. The function of rationalizing the decisions

This function has a pronounced psychological substrate, in the sense that by means of certain questions, the customer is determined to rationally justify his/her decisions, as it is more a reassurance of the objection-benefit binomial. The customer is responsible for decision taking, and, in case these decisions are taken on an emotional, sentimental basis (as for instance "I want that product because I like it, rather than need it"), and not in a rational manner, the questions of the salesperson acquire an important role in proving the fact that the desires make sense and can be justified rationally within the area of the needs.

Types of questions

The specialty literature in the field of management and sales speaks about several types of questions used by professional salespersons, which are closely related to the moments of the sale process.

The analyst Rackham believes that in order to achieve a higher level of efficiency and in order to have a good order of the questions, these must be elaborated according to four criteria:"***situation, problem, implicationa and need-benefit***".[9] Each criterion involves questions that correspond to different levels of the sale process, starting from prospecting and establishing the needs to finalizing the sale.

In each stage, specialist believe, "the emphasis is on asking the potential customer about his/her particular situation, in order to find a solution coming from the portfolio of the salesperson's products. Here, the three key elements are, first of all, the fact that ***the customer's needs are preeminent***; secondly that ***the salesperson asks questions***, and does not make assertions"; and thirdly that the transmission of the message sent by the marketing department is not relevant for this fundamental process. (…) In the center of the activity lies the solving of problems, rather than communication; if the potential customer is allowed to speak, he will (actually) tell the salesperson how to sell his/her product (n.n.)."[10]

In ***The Book about Sales***, Tom Hopkins analyses the elaboration process of these questions and believes that there are two types of fundamental questions, resulting then in other complementary questions. These two are ***open*** and ***closed questions.***[11] In order to make the presentation of a product more efficient, the salesperson must include in the conversation all the question types:

- **Open questions** call for the customer's reasoning, and the answers offer information that is crucial to the salesperson, as they present the first objections (Who? What? How? When? Where? Which? Why?) and shapes ***the situation,*** which generates the need for a new product. Open questions are the first used in the sale process, since these bring the salesperson a lot of information about the customer, about the customer's profile, his/her financial power and expectations. In the sale time these questions give the salesperson time to think, which is often needed in order to find solutions for the emerged objections. **Closed questions** generally for short, even monosyllabic answers, but these answers determine the continuation or the successful closure of the sale. Questions like "If I deliver you the product in two days, we sign the contract today, don't we? If we find you the darker color, we make the order today, don't we?"
- A particular role have the **complementary questions**, since they operate on a subliminal level and have a very persuasive effect, determining the customer the state and/or confirm the statement of the salesperson. I speak here mainly about the agreement of the salesperson with the customer, expressed by the use of lexical structures such as: "Isn't it right that …?", "Do you also think that …", "am I right?", "this is how it's supposed to be, don't you think so?" Tom Hopkins is right when he says that "*Selling is the art of asking the right questions to get the minor yeses that allow you to lead the potential customer to a major decision. It's a simple operation,* ***and finalizing the sale is nothing more than the sum of all yeses.*** (n.n.)"[12] These complementary questions can be used in each moment of the sale process.
- Another efficient technique of question elaboration is, in the opinion of the same author, **additional stimulation**, mostly used in the phase of establishing a meeting and it consists of formulating an interrogative structure, which offers two options and as a result calls for two answers. The example of the author is eloquent in this regard: "«*Mr. Johnson, this afternoon I will be in your neighborhood. Do you think it would be convenient for you if I drop by at two o'clock or should I wait until three o'clock?*» When he says: «*Three o'clock sounds better*», you got the meeting. And you got it by suggesting two Yeses instead of that No he would have chosen."[13] The technique of **additional stimulation** justifies its efficiency especially because it insures the progress

[9] apud. Jim Blythe, ***Management of sale and of key customers***, Published by Codecs, Bucharest, 2005, page 14.
[10] Ibidem.
[11] Tom Hopkins, ***Art of Selling***, translated by Lia Decei; edited by: Iuliana Enache – Revised and amended edition – Bucharest, Businesstech Internațional, 2014, page 74.
[12] ibidem, page 76.
[13] ibidem, page 84.

of the sale. The salesperson predisposes the customer to accept his/her projects, offering him/her positive alternatives.

- **The implying question** is another stimulating technique with a heavy psychological sublayer. It refers to the benefits of the product, determining the customer to imagine himself/herself as the owner of these benefits, to see himself/herself as an owner, in the future. Naturally, the technique calls for a lot of subtlety and psychological finesse. The implying questions can have, for instance, the following lexical configuration: "Mr. …, do you believe you'll use the cat only for your holidays or will you also rent it?" Tom Hopkins believes that this elaboration technique is also a sort of additional stimulation but on a different level.[14] The customer is given the idea of an additional, productive investment.
- **The hedgehog technique**[15] is answering a question asked by the customer with another question that helps the salesperson keep the control of the conversation and conduct the steps of the sale to the next level. Even though it seems intriguing, this technique shows a high degree of conviction and needs a lot of courage from the part of the salesperson. When the customer asks the question and he/she is answered with another question, the customer may suspect that the salesperson is not capable of giving concrete answers, but the salesperson follows his/her own strategy, thus looking to find information of major importance in the sale process. For instance, the customer asks about the delivery date and the salesperson answers with another question related to the delivery: "Can I have the product on day X of the month?" and the answer would be: "Day X of the month is the best option or you?" The information received by the salesperson as answer to this question may represent a considerable value in the chain of this process, since if the customer gives and affirmative answer, the sale is coming to an end. If the answer is negative, the customer leaves room for delays, doubts etc. The hedgehog technique brings out the customer's unexpressed thoughts and feelings, which must be taken into consideration by the salesperson.
- **Leading questions and discovering questions**[16] are essential in the addressing repertoire of the salesperson. These go hand in hand, meaning that the salesperson leads and discovers, in the same time, much needed information. **Leading questions** are based on an infallible principle in the mentioned area: of the salesperson says something related to the performance of the product, the potential customer may not believe it, however if the salesperson determines the customer to state the respective value, the customer will remain invariably convinced, since he/she stated it. And thus the customer is "lead" towards purchasing. Thus the customer may be asked about the sunroof of a vehicle, if it were useful and in what mountain regions he would like to drive his car first. **Discovering questions** are more efficient if, paradoxically, they don't have the form of a question. Having an ample, enunciating structure, they avoid receiving a negative answer or one lacking interest. For instance, instead of the cliché question "Can I be of assistance?", which is most of the times followed by the trivial answer "I'm just looking", it would be more efficient to ask the leading question: "Please take a look at our models and I am at your service if you have any questions." An "enunciating" question of the type: I have a model of the small class at an affordable price and a model of the middle class – also at a very affordable price. Moreover the large class models also have a substantial discount.

These types of questions constitute the premises for success in sales strategies, since they operate as incentives for the customer and especially as infallible principles in the order and efficiency of the sale process. In this regard the advice of the famous trainer is unbeatable: „a) *Ask discovering questions and they will show you the benefits bought by the customers, so that you know what products and services you can sell them and how to manage that. b) Ask leading questions and these will make them state that they believe what you want them to believe related to your offer. If you don't state anything, they may not believe; but if they state the same thing, then it's the truth.*"[17]

On the other hand, the strategies focused on elaborating questions denote the competence of the salesperson to skillfully manage contradictory conversations, inconsistencies or digressions, thus the objections of the customer can be solved with courtesy and condescension, according to the rules of social ethics and deontology at work.

Conclusion

The elaboration of questions may become, in sales management, the gravity center of sale strategies and techniques. "*The one who asks, will lead*", said Aristotle in Ancient Times, revealing the immutable role of the questions: that of leading the attention and interest of the customer towards purchasing. A skillful salesperson who has systematically mastered the functions of the questions in addressing the customer and in achieving his/her argumentation, will adopt the optimal questioning attitude and will use different

[14] ibidem, page 90.
[15] ibidem, pp. 87-88.
[16] ibidem, pp. 96-100.
[17] ibidem, page100.

types of questions, from the most basic ones, open questions, receiving answers that will help him collect the information needed, to the complementary ones, the involving ones, whose incentive in the customer's psychological cognitive configuration gives them the reason to be used.

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THE IMPORTANCE OF STRATEGIES IN THE SALE PROCESS

Nelu DORLE*

Abstract

The science of marketing, in this case the art of negotiation and selling, is inseparably linked to the salesperson's ability to think, plan and implement strategies. A good negotiator is above all, a good strategist, able to combine effectively the constituents of his/her work, from the intrinsic psychological resources (temperament, intuition, will, motivation, loquaciousness), to those related to external factors, circumstances (economic, financial situation, market competition, customer relationships). The act of selling is not confined to certain prosaic conversations between salesperson and customer, regarding needs and offers, but includes beforehand a complex process streamlined and systematized based on a set goal and on objectives measurable by shrewdly handling tactics of negotiation. The sales strategies used, from the traditional to the innovative, personalized ones, consistent with the trends and pace of life today, is therefore the essence of value in the science of sale.

Keywords: *sale strategies, personal negotiation style, strategic move, value innovation, classic strategies vs. modern strategies.*

Introduction

Regardless of the area of human activity where it occurs, the notion of strategy is the art of combining different methods and means, operations, maneuvers and tactics in order to achieve the targets set. It is a known fact that from ancient times, especially in military art and even in the science of war, victory was conditioned by developing effective strategies. And these were achieved through the cognitive and intuitive visionary ability of the leaders. Strategy means, ultimately, a very good knowledge of the resource intertwined with the planning ability of the courses of action. From the military art to the social organization, from engineering and socio-human sciences to the pragmatic everyday activities, success is generated by the ability "to think" effective strategies.

In business management, strategy holds a paramount importance, since it represents the manner in which a company reaches its degree of effectiveness. The present study aims to examine how sales strategies are designed, with their specific elements optimally directed, depending on the needs imposed by the contextual situation of a negotiation.

Starting paradigms of the theories enshrined in the field, harnessing the scientific references, starting from the specialty literature in our culture (Ştefan Prutianu, for instance) to the current Western one (Tom Hopkins, Rick Page) or of the representatives of the INSEAD Institute from France (W.Chan Kim şi Renée Mauborgne) and in the same time calling on my own experience in this professional field, the research argues the scope achieved by strategic science in the field of sales, emphasizing its prolificacy and efficiency in the modern and current thought patterns.

Actual content

"Strategy is a resource development plan, so as the strengths can rely on the weaknesses of the opponent, creating dynamics and leading to victory."[1] This is the definition given by a specialist in the field, Rick Page, in a study dedicated to sales strategies. On the other hand, other analysts and theoreticians consider that *"Strategy aims at placing the company in a position that can effectively compete and survive in the market."*[2] Strictly in the field of sales, strategy is however closely related to negotiation and *"should be regarded as a way of thinking, a way of dynamic approach to a confrontation or a psycholiogical conflict between two or more wills. (...) The strategy of negotiation is the art of guiding and controling the interaction of wills, which by its nature has a certain dynamics imprinted by one side to the other."*[3] The dominant side is based on the visionary clarity of the negotiation confrontation, since "*the fundamental principle of strategy is to master the interaction of the wills that confront at the negotiation table.*"[4] But to reach this moment of grace, the acquiring of skills to develop strategies is needed, trough optimal combination of the psychological, communicational tools with the pragmatic ones (economic, financial, managerial). R. Henry Miglione rightly asserts in his study ***An MBO Approach to Long-Range***

* PhD Candidate, Technical University from Cluj-Napoca, Faculty of Machine Manufacturing, Engineering and Management, project manager, Prof. Dr. Eng. Liviu Morar.

[1] Rick Page, ***Hope is not a strategy. The 6 keys to winning the complex sale***, Publisher Amaltea, Bucharest, 2006, page 151.

[2] Jim Blythe, ***Sales and key account management***, Publisher Codecs, Bucharest, 2005, page 3.

[3] Ştefan Prutianu, ***Negotiation and transactional analysis***, Publisher Sagitarius, Iaşi, 1996, page 173.

[4] ibidem, page 174.

***Planning**: "A good way to define strategy is to ask yourself the following question: «How and where will I use my resources?» The answer represents your strategy"*[5]

Most experts believe that sales strategies are derived from marketing ones, which, in turn, have their origin in military strategies. The latter are studied, taken as a model of initiative and adapted to the social contexts of the time. Rick Page, for instance, strongly emphasizes the need for preexisting strategic thinking patterns of managers, on which to base strategies for immediate action, in order to anticipate such events and to perceive the visionary strategic plan: "*Intuitive or «natural» salespeople or managers without mental pattern might encounter problems when running a sales team, as they don't know why they are performant and cannot transfer knowledge to others.*"[6] These mental patterns are formed after achieving information acquisition of classic, historical military strategies, which then generate the elaboration of strategic attitudes and skills. In this regard, the formula of military theory strategy is relevant, which was elaborated by the French general André Beaufre, in ***Introduction à la strategie***, according to which strategy is an equation consisting of several components:

$$„S = u \cdot M \cdot P \cdot T$$

where: u – factor of circumstantial situation or influence, M – material and financial forces involved in conflict and in interaction, P – available psychological forces, T – time factor."[7]

Depending on the weight that these elements have in availability of the negotiator, strategy acquires a certain situational contour. The salesperson must take into account the forces he owns to outline her/his appropriate strategy by which to win over the customer. A strategy that builds on the material and financial strengths, will minimize the psychological factor, showing a strong, short but decisive fight, while the strategy that focuses on the psychological forces shows that the financial and material part is inferior and as such will need more time for achievement, tactics and maneuvers to manipulate the will. But the cardinal element in the selection of the strategy depends on the situation, the circumstances in which the salesperson-customer relationship blossoms.

We therefore see that the act of selling, in essence, refers to a relationship of grabbing the other person, a combative relationship, because ultimately it is a fight that a good salesperson wants to win at any cost. The victory of this fight depends on the adopted strategy. Here comes in, of course, the knowledge of human traits, which will generate a specific relationship, whether blatant and rigid, defying the code of ethics, or flexible, cooperative and honest. Therefore, experts say, that "*different people need different strategies and approaches. The choice will be good to the extent that the strategy matches the man. (...) The right man for the right strategy and vice-versa.* "[8] Furthermore, on the field of negotiations, each side enters with his/her luggage of convictions and attitudes, acting accordingly, but the need to choose a strategy in sale is relentless, as it represents – as Ștefan Prutianu states – "a mental map" for the salesperson, a landmark for mental organization of ideas and actions for approaching: "*The negotiator seeks for the way towards the partner, towards the agreement and towards the objectives, using, almost unconsciously, this mental map as a road map or a tourist map. (...)To negotiate without a minimum idea of strategy would be the same as driving without a road map in an unknown land. The mental map in the head of the negotiator is the first intuitive idea of strategy, based on daily behavioral trends.*"[9]

On the other hand, elaborating a complex strategy is not limited only to the intuition of characters and reactions of the customers, the sale strategy takes into consideration a global perspective on social and economic modulations, from the macro-level of the market and industry to the inner level (micro level) of the company represented by the salesperson. This perspective axis requires, in the vision of a theoretician in the field, strategies on four levels: „*(1) industrial market level, (2) enterprise level, (3) opportunity level and (4) individual level. Each level involves different techniques, talents, and technologies, which can communicate the entire strategic plan of enterprise in the entire world.*"[10]

Developing a strategy

Developing a strategy essentially means to make a complex plan of action, in order to achieve major goals. The main elements that are part of it, are primarily related to the context and the information required by the market, to setting goals and objectives, to the salesperson's way of thinking and his/her visionary ability, to the tactics adopted, as a way of action.

The personal manner of designing and implementing a strategy creates the salesperson's ***style***. It's in fact the performance acquired with

[5] apud. Rick Page, ***Hope is not a strategy. The 6 keys to winning the complex sale***, Publisher Amaltea, București, 2006, page 169.
[6] Rick Page, op.cit., page 152.
[7] Ștefan Prutianu, op.cit. page 181.
[8] Ștefan Prutianu, ***Negotiation skills training,*** vol.III, Publisher Polirom, Bucharest, 2007, page 43.
[9] Ibidem.
[10] Rick Page, op.cit., page152.

much perseverance, which individualizes his/her work and thus launches him/her among professionals.

The theoretician Rick Page elaborates in his study some preliminary stages[11] of developing an efficient strategy. In this regard we must mention:

13.**Information** – „ the more we know about competition, about the process of making decisions, about policy and customer needs, the more we are able to formulate a coherent strategy."

14. **The vision of success –** which consists of the "mental image", which the salesperson intends to apply in order to achieve his/her purpose. He/she appeals to graphical and technological means to communicate the benefits and impregnate them in the minds of customers.

15.Setting **the aim and objectives**. The aim has a large level of generality and represents the desirable purpose. It has a macro-structural nature, defined on a long term on the organizational culture scale of the enterprise / company. The objectives aim at micro-structural purposes, put on the map segments necessary for the achievement of the purpose, being immediately measurable at the end of the action.

16.**Tactical actions –** Detailed actions taken to implement the chosen strategy. There is often confusion between strategy and tactics, but semantic terms delineation highlights **the strategy** as a way in which the goals, "the plan of attack", are achieved, how the objectives, resources, partners, customers, etc. are planned on a long term, and **tactics** - the manner in which strategy steps are taken, flexible and adaptable to unexpected situations, taken on short time segments.

17.**Revisions of the strategy –** „the most important part of a strategic plan is its **testing** (author's note)" – says Rick Page, taking over the idea of a renown professor from Stanford, Tom Kosnik, according to whom „testing strategy is what differentiates amateur strategists from efficient ones."[12] Thus we can access information necessary to make revisions to tactics or to create a better adaptability to the situation.

These stages are not immutable, they suffer difference nuances from one strategist to another, but the directions they indicate remain generally valid. Ștefan Prutianu[13], for instance, identifies the following stages in the setting a negotiation strategy:

18. ***Setting the objectives*** (equally the starting point and ending point in developing a strategy) and, in parallel, ***gathering the information*** regarding the referential situation (context, market, customers, competition etc.). The objectives are later formulated in a precise manner, based on the gathered information.

19. ***Decomposition of the negotiation process*** *in stages with intermediate objectives, which gradually brings the final objective closer* (such as, for instance, setting a meeting, the meeting, tendering, finding a solution).

20. ***Identification of tactical actions****, which could materialize the strategy*. In this stage there are different tactics, means, ways, tricks used, which support the achievement of intermediary objectives. Here, a significant percentage is taken over by "bargaining power sources, where, when, the team, the system of alliances, etc."

21. ***Evaluation of the chances of success of tactical actions*** *and choosing the more efficient ones.* This is the stage in which the positive effects of the tactics are estimated.

22. ***Simulating or testing the negotiation strategy.*** The last stage in achieving the strategic plan has the role of registering the details of the design negotiations trajectory, in order to see the omissions or possible errors that must be corrected before the plan is being implemented.

The strategy "*gradually materializes by linking together tactical actions*"[14], says the theoretician Ștefan Prutianu. Tactics are therefore the interior motive of strategies. Subordinated to them and acting in a small circle within their general framework, tactics have greater flexibility, because they change depending on the circumstances, on the discussion partner or on unexpected events that suddenly occur, while the strategy remains constant. Changes from the inside operate at the level of tactics without changing the strategic purposes. The latter changes only when the information generates major changes in the plan of approaching the customer.

On the other hand, the author of the already mentioned volume, ***Hope is not a strategy***, considers that, from operational point of view, the semantics of the two words overlaps to some degree, depending on the interpretation perspective, in the sense that "*the same element, regarded from up or from down, may be strategy or tactics. (…) What is a tactic for a company becomes a strategy for a subordinate division. What is a tactic for a division becomes a strategy for the department.*"[15] In this regard, „*a poin of action could be a strategy, as well as a tactic in the same time, depending on the level it's analyzed*."[16]

As a result, the forming of a strategy is the point from which any salesperson begin, the strategy

[11]apud. ibidem, pp. 159 – 164.
[12] ibidem, page160.
[13] apud. Ștefan Prutianu, ***Negotiation skills training****....*, pp.44 – 47.
[14] Ștefan Prutianu, ***Negotiation skills training,****...* page 46.
[15] Rick Page, op.cit., page 164.
[16] Ibidem.

being basically the center of gravity of a sale, according to which the salesperson must shape his/her way of thinking, identify his/her purpose and objectives, establish his/her tactical actions, depending on the sources available and the referential framework in which the salesperson-customer communication takes place.

Strategy and style

Beyond the compositional elements of a strategy, the salesperson takes into consideration several psycho-temperamental factors that determine the style of negotiation and determines equally the choice of a certain type of strategy.

A salesperson's negotiating style is the synthesis of his/her individual qualities and abilities, his/her own way of working, his/her original way of approaching a negotiation situation. The individual peculiarities refine over time by accumulating experiences, forming certain constants manifested as a stimulus, reaction, perception, and finally way of action. These constants, however, start from certain dispositions, instincts or spontaneous reactions that are closely connected to the salesperson's personality, especially with his/her psychological temperament. The negotiating technique, acquired according to a certain theoretical pattern, will bear, in its practical manifestation, the insignia of the negotiator's personality and the result of this symbiosis will generate the fundamentals of a personal negotiation style. In this regard, Ștefan Prutianu in his study about forming the negotiation abilities believes that „*the personal negotiation style synthesizes the character and personality of the negotiator, his/her deep attitudes and convictions, opinions, habits, and bad habits, which he spontaneously adopts when he/she enters into a situation with potential conflict and searches for a solution together with the opponent.*

The personal negotiation style is rather attitude, predisposition and spontaneous behavior than deliberate strategy. The voice, tone, gaze, facial expression, involuntary movement or body posture are some indications that betray him/her, beyond the will and conscious thinking, which throw masks over the hidden face over of our personality "[17]

Undoubtedly the personal negotiation style takes over the temperamental color of the negotiator, but we cannot say that it is only resumed to these subliminal aspects. Having a style in an industry means much more than this; it means the performance of a process of training and polishing of certain tendencies of action, deeply rooted in both the baggage of knowledge, education and training, as well as in the practical experience achieved over time.

The above mentioned specialist develops several directions of categorization of the personal negotiation style, relying on certain behavioral paradigms perceived as "ways of solving confrontations"[18]: ***competitive*** – presents an aggressive, dominant, adverse behavior, strictly concerned with personal interests and ignoring the needs of the partner, even causing him/her losses and undermining his/her dignity; ***concessive*** – based on understanding, docile attitudes, even obedience and apprehension before the adversary; adopting attitudes of ***compromise*** – consists in choosing a quick solution, without searching for advantages and avoiding losses. This attitude gives the impression of sufficiency, without the possibility of reaching performances or at least the feeling of satisfaction after achieving victory. It presents a amiable, comfortable relationship, without any risks, but also without the spectacular; ***cooperation*** – the most advantageous behavioral style in the field of sales, precisely because the negotiating parties see themselves as partners, whose goal is common and they search together for the optimum solution that benefits both sides. "*Emphasis is given to the effort of overcoming the problem and not of defeating the opponent.*"[19]; there are persons who adopt a behavioral style characterized by the tendency to ***avoid*** confrontation and to lose, as a result, the battle, negotiation and its benefits.

Several times, the confrontation between two parties, two wills result, in essence, in the victory-defeat report. This report is more suitable for situations of force which do not allow negotiation. At the bargaining table, in the relation customer-salesperson, the negotiation must, however, overcome the absolutism of this report, given that beyond confrontation and imposition of ideas, desires or visions, the salesperson must seek solutions that favor both sides, the customer's side as well as the salesperson's. Ultimately, the salesperson's victory shall be recovered through the customer's satisfaction and not necessarily through his/her "defeat". The latter can be understood as a kind of relaxation of the customer's desires, handling them in the sense of adopting the salesperson's concepts and vision. Following a fierce confrontation with the difficult demands of the customer, the salesperson may consider him/herself victorious if he/she managed to convince the customer of the efficacy of the product offered, giving the customer as a solution his/her own interests and thus gaining profit.

[17] Ștefan Prutianu, ***Negotiation skills training***..., page 23.
[18] ibidem, page 21.
[19] ibidem , page 22.

Synopsis of the dynamics of creating different types of sales strategies

The specialty literature approaches various taxonomies of strategies used in sales, according to various criteria.

Thus, in the vision of Ștefan Prutianu, starting from the fundamental formal categories, which generally valid, there are ***direct strategies and indirect (lateral) strategies.***

According to the psychological criterion, he differentiates between ***competitive strategies and cooperative strategies***[20], which he divides according to the negotiation style: ***domination strategy, concession strategy*** (surrender), ***avoiding strategy***, ***compromising strategy.***[21]

Rick Page, in his study about the development of sales strategies, identifies a classification of these styles according to the criterion of basic elements, which compete in achieving the proposed purpose. The general strategy categories (***anticipatory strategy, frontal strategy, flanking strategy, functional strategy, strategy of selling to the state, programming strategy***[22]) are in their turn divided into different types of subordinate strategies, which become however methods or tactics for their achievement.

Tom Hopkins, in his turn, identifies another series of sale strategies, based on the methods and tactics of motivating the salesperson, measurable in attracting and influencing the customer: ***multiplying references, offering additional services, selling in a bunch, entering the clientele professional horizon, entering the unknown clientele horizon, assuming a publicity message, renewal of the contracts and rebuilding connections, Thank You notes.***[23] At a closer look, we speak rather about techniques / methods / tactics to seize the customer, but placed in relation to the purposes, objectives and resources owned, they can form effective strategies for development and multiplication of the clientele.

We must not ignore the strategies proposed by Sayan Chatterjee, called ***strategies of avoiding failure: strategies of growth and diversification***[24], which can be categorizes into ***entering strategies based in differentiation, entering strategies based in low prices, market shaping strategies, development of multiple ways of migration.*** The development of strategies aims mostly on affirmation and consolidation of a company in the market, minimizing competition and winning over a solid clientele. Most strategies target, in these circumstances, the growth of profit, but of considerable importance in the management of a company or companies are these "risk avoidance strategies", by means of which possible ways of profit loss or even bankruptcy may be annihilated. Of course they have a different approach of the elements that are part of a strategy, from a broader perspective, which includes risk and their assumption, since, as the author says in his study in the field of strategies, "*profits comes from the ability of a company to assume risks, avoiding their negative impact.*"[25] On the other hand, these strategies anticipate the competitive risk, opting for tactics with the lowest level of risk and are developed after a exhaustive analysis of the capacities and resources and the position of the company on the market.

Regarding the strategic idea of shaping the market, W. Chan Kim and Renée Mauborgne develop, in a recent marketing study, ***the Blue Ocean Strategy***[26] – an innovation, we could say, in the strategic field of management and marketing. The authors propose a modern, progressive vision of taking over the market, adapted to the global tendencies of the contemporary values, debunking to some extent the traditional competitive strategies. We talk about a reconfiguration of the sense a strategic thinking can have. Focused on creative force, on searching for a new solution, according to the dynamics of present life, of the current geopolitical configurations, which influence the development of decadence of the companies and industries, *the Blue Ocean Strategy* aims to move the emphasis from competition and competitive battle (called by the authors ***red oceans***) to creating new spaces of manifesting an economic and industrial life, particularly a market universe, which is permanently changing and evolving. These new spaces, which "are not mapped" in the atlas of companies and industries, generically called ***blue oceans***, become an imperative in modern society, through the fact that it targets invention and business launch depending on the progress of technology. The authors of the study emphasize the importance of overcoming competition (exiting the "red waters") by reorientation in the perspective of *strategic moves*: "*How can a company come out of the red ocean of bloody competition? How can it create a blue ocean? (…) In the search for an answer, our first step was to define the basic unit of analysis for our research. (…) Thus, it seems that neither the companies, nor the industries are the best unit of*

[20] Ștefan Prutianu, Negotiation and transactional analysis...., page 174.
[21] idem, Negotiation skills training..., pp.48-60.
[22] Rick Page, op.cit., pp. 169- 186.
[23] Tom Hopkins, The book of selling, Bucharest: BusinessTech International, 2014, pp. 468-489.
[24] Sayan Chatterjee, Strategies of avoiding failure, Bucharest: Publisher All, 2009.
[25] ibidem, page 23.
[26] W.Chan Kim, Renee Mauborgne, Blue Ocean Strategy: How to create an uncontested market space and make the competition irrelevant. Bucharest: Publica, 2015.

analysis and study of the causes of profitable growth. Consistent with this observation, our study shows that ***the strategic move****, not the company or industry is the correct unit of analysis for explaining the creation of blue oceans and of the durable high level performance.* ***The strategic move is represented by a set of managerial actions and decisions involved in the development of a major offer of market creation*** (s.n.)."[27] And the latter is based on the principle of ***innovation by value*** (defined as "*a new type of thinking and executing of a strategy, which leads to creating a blue ocean and to detachment from competition.*"[28]), thus overcoming competition strategies, based on "*compromise between value and cost.*"[29] Such innovating strategies develop other stages of development than the traditional ones, following different multilateral approaching ways and perspectives[30], both externally, which targets a reconfiguration of the market borders and as a result of the "chain of buyers", as well as internally, related to the capitalization "of the strategic groups within the industry" and to their complementary and even emotional offers: "appeal exerted on buyers".

Traditional strategies vs. modern strategies

It's well known that modernism occurs and develops as a reaction to the structural and traditional visionary patters. Market economy does not know static forms, but has a effervescent dynamic, which is continuously changing. That is why selling strategies follow the global tendencies of current social and economic life. If society evolves and generates new demands, in the vibrant rhythm of technological developments of the last decades, marketing people must follow the principal of adaptability and create strategies according to the contemporary reality. We believe however that a modern and efficient selling strategy may be thought and elaborated by a salesperson that developed a solid base of knowledge and assimilation of classic theories and formulas, on which basically any modern innovation is grafted. Traditional strategies are an extremely necessary base in forming a strategic vision, since it is the support in which the lines of future fruitful innovation is anchored, either contesting tradition or surpassing it. In a culture, generally speaking, classicism is considered to be an inexhaustible source of values, upon which the ideas of modernism are created. The well known analogy of Bernard of Chartres, from the 2nd century AD, according to whom the moderns (in the sense of new, of new thinking and vision) are midgets climbed up on the shoulders of ancient giants, who see however more and farther that the latter, not because they have a larger vision, but because they stand up and lean on the gigantic stature of the giants[31], is as eloquent as possible in the sense of our assertion about the classic-modern report.

The dictum is however justly and fully exploited by the historians in the idea of progress. Not having a classic base as fundament, modern innovations, regardless of the scientific field or the scope of activity of the person, remain mainly invalid in time; as it is understood that evolution cannot manifest itself strictly within the limits of traditionalist conceptions.

Thus, strategies in sales, precisely because they are directly related to the idea of social progress, must exceed their general grids of classic, military strategies, from which they start, but not by ignoring and annihilating them, but rather by assimilating them in the sense of creativity, because they appeal to the salesperson's ability to guess the optimal direction of approach of the customer and adjust the tools for the adopted purposes.

Conclusions

Sale strategies, metaphorically speaking, represent the path created by the salesperson to achieve his/her goal by concerting the immanent intrinsic elements available with those caused by external circumstances, by the market or by socio-economic evolution, thus standing out in a creative and original manner as a professional style and value. The professional salesperson sets his/her own effective personal strategy, in a timely manner, once he achieved the prospecting of a customer, and the style created by scientific assimilation and gained experience distinguishes him/her as an individual and imposes him/her in the same time as an innovator in the field. The vision of sale opens up and gives him/her a broad perspective, in which the dynamic strategies follows the natural trajectory from the classic patterns towards the modern vision of thinking, designing and implementing them, a vision that leaves much room for spontaneity and insight of the negotiator who is placed into the circumstances of using his/her talents on a personal and creative level.

[27] ibidem, pp. 44, 46.
[28] ibidem, page 49.
[29] Ibidem.
[30] ibidem, pp.91- 130 et passim.
[31] apud Matei Călinescu, ***Five faces of modernism,*** Iași: Polirom, 2005, page 29.

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THE IMPORTANCE OF BENCHMARKING IN MAKING MANAGEMENT DECISIONS

Adriana-Mihaela IONESCU[*]
Cristina Elena BIGIOI[**]

Abstract

Launching a new business or project leads managers to make decisions and choose strategies that will then apply in their company. Most often, they take decisions only on instinct, but there are also companies that use benchmarking studies. Benchmarking is a highly effective management tool and is useful in the new competitive environment that has emerged from the need of organizations to constantly improve their performance in order to be competitive. Using this benchmarking process, organizations try to find the best practices applied in a business, learn from famous leaders and identify ways to increase their performance and competitiveness. Thus, managers gather information about market trends and about competitors, especially about the leaders in the field, and use these information in finding ideas and setting of guidelines for development. Benchmarking studies are often used in businesses of commerce, real estate, and industry and high-tech software.

Keywords: *benchmarking, performance, competitiveness, decisions, management.*

1. Introduction

This paper identifies a performance management tool that can be applied to business practices and performance of any enterprise, which can be compared with those of other companies, to identify opportunities for improvement.

The study develops the concept of benchmarking and shows the importance of comparative analysis in identifying, understanding and adoption of best practices within and outside the organization. By choosing as comparator the performance of companies that have achieved outstanding results in a certain area and by comparing these with its own results, the company that uses benchmarking is able to find the most appropriate ways to acquire practices which are reachable and to improve own performance.

In the first part of the paper are presented the concept of benchmarking and its usefulness. In the second part of the paper, are presented the stages of benchmarking and are highlighted the advantages and disadvantages of using it.

The subject in our paper has been the subject of numerous research reflected in scholarly articles, in journals, in books of accounting and management control. Existing studies support our approach and are summarized in section of scholarly literature.

Benchmarking was originally applied in manufacturing industries, and subsequently in other sectors such as trade, tourism, transport, real estate, high-tech software and even education. Modern Benchmarking was initiated by Rank Xerox in the '80s and promoted by large companies, such as Toyota, General Motors, Motorola, in tough competition with rivals, and is considered a method of achieving competitive goals, promote strategic thinking and to help organizations to develop their strengths and reduce weaknesses.

Benchmarking is a dynamic and evolutionary tool, and its main features are played, still, through a review of the literature:

- Benchmarking is the process of identifying, analyzing and adopting the practices of the best performing companies, in order to improve business in own company. Benchmarking is not limited to identifying best practices, but also consists in analyzing and deepening their own practices, those of the competition and also their application within the organization. *(Bouin, X ., Simon, F., 2001);*
- Benchmarking is a continuous process of performance evaluation [...], perhaps the only way to remain among the best;
- Benchmarking is a tool for learning about how to improve activity, processes and management;
- Benchmarking is an information system that allows an enterprise to display their development strategy;
- Benchmarking means a way of identifying potential improvements in the field of efficiency and effectiveness, of current operations, but also of strategy, by comparing company performance with the performance of others;
- Benchmarking is defined as the process of measuring and continuous comparing of business processes with comparable processes of dominant organizations in order to get information that will

[*] Lecturer, PhD, Faculty of Entrepreneurship, Business Engineering and Management, "Politehnica" University of Bucharest (e-mail: **amihaela.ionescu@gmail.com**).

[**] Lecturer, PhD, Faculty of Entrepreneurship, Business Engineering and Management, "Politehnica" University of Bucharest (e-mail: **cristinaedumitru@gmail.com**).

help the organization to identify and implement improvements. *(Andersen, B., Pettersen .mu.g., 1996);*

- Benchmarking can be defined as a continuous process of measuring of products, services and business practices of a company, compared with its best performing competitors and with companies recognized as being performant. Also, it is a continuous and systematic process of evaluation of companies as market leaders, of determination of business and manufacturing processes that represent best practice and to obtain reasonable performance targets. (Rank Xerox company)

2. Benchmarking - a new path towards organizational performance

2.1. Typologies concerning benchmarking

Managers of a company may choose one of the following types of benchmarking:

Internal benchmarking is done by the comparative analysis of processes between two compartments of the same organization (one of them being considered as reference). Regarding access to information, this is unlimited. The potential gains can only reach 10%, a lower level than the external benchmarking. Experts believe that internal benchmarking should be considered an intermediate step in the process of reporting at the identified leader in the field.

External benchmarking targets organizations outside the company. If you cannot establish a partnership in practice of benchmarking, getting data in this case is done with great difficulty.

External benchmarking can be applied in the following forms:

- *Competitive benchmarking* consists in analyzing strategies, processes and practices of other competing organizations or of those with same activity. Data collection is performed with difficulty, fearing industrial espionage. Earnings can range up to 20%;
- *Functional benchmarking* aims comparison a certain functions of the organization performing benchmarking with a similar function of a particular organization taken as reference in order to identify new options for improving future work. The advantage of this type of benchmarking practice consists in easier way to collecting data, because non-competitive ratio that exists between companies showing interest in creating these partnerships that can generate positive results for all parties. Earnings may reach 35%;
- *Generic Benchmarking* is realized between enterprises from different sectors, related to the processes and working methods. Data exchange is done relatively easily, and the gain obtained by this method can be up to 35%;
- *Benchmarking strategic* (long-term) involves the analysis and evaluation of strategies that have generated high performances; implies the comparison of strategy, allowing the quantification of future development strategies of the company, regarding processes, technology and distribution;
- Horizontal benchmarking - aimed at identifying best practices in operation processes of organizations that are recognized as market leaders, but who are not direct competitors of the organization that conducts benchmarking. The main advantage lies, in this case, in the ease with which data can be obtained, because organizations are not competing.

2.2 Implementation and deployment of benchmarking process

Implementing a benchmarking process helps the management to obtain data to support decision-making, to formulate and implement the strategy, but also requires the full support from management (time, effort, financial resources). The purpose of the benchmarking process should be clearly defined at the outset: what you want to know, why, and what you intend to do with the results?

In the process of benchmarking must be taken decisions regarding the purpose and expected results and must be identified areas or aspects of the organization's activities which will be subject of benchmarking process. These must be consistent with the organization's profile and mission and organizational development. It is essential to have a clear understanding of the issues and, depending on needs, these must be prioritized so as to be launched a realistic benchmarking exercise, having adequate resources.

The reasons for making, in a company, a benchmarking with leading organizations are numerous. Benchmarking can be applied in situations in which the organization:

- is still competitive, but competition is becoming stronger and stronger and key indicators of the company are deteriorated;
- is in difficulty and the management trying to reach a level of total quality (according to ISO 9000);
- needs innovative ideas, other than those proposed by its collaborators;
- is occasionally and sincerely interested how unfolds various processes in the highest rated companies on the market;
- is in a survival situation.

In order for benchmarking to become an effective process to improve the functioning of a company, the following need to be pursued:

- evaluating its own work, identifying strengths and weaknesses, which can be turned into opportunities for improvement;
- knowing the competitors and the leader in its

field of activity;

- incorporating best practices in its work.

Implementation of the benchmarking process supposes four main stages:

PLAN – DO – CHECK – ACT

g) ***Planning*** *is the first step and aims to establish the object of comparison (products, services, working methods) that needs benchmarking, selecting the comparison item (competitor, another firm, departments, processes) and choosing the methods of collection, evaluation and comparison of the data.*

23. Training Team - it is a decisive factor in the success of the analysis because are very important the qualities of team members, knowledge of the process and detailed knowledge of the organization studied;
24. Documentation concerning the process of analysis - includes activities such as identifying the area of analysis, identifying critical success factors, development of factors for their quantification; it is recommended to use quality management tools such as flow charts or others that can serve this purpose.
25. Identification of the subject of Benchmarking analysis - it is important to take a decision in this regard in the first moments of designing benchmarking, because of the possibility carrying out a superficial analysis on a wide range of investigation or a thorough analysis focused on a small area.
26. Elaborating a statement of the purpose of benchmarking - prevents any deviation of the team from the purpose originally set.
27. Determination of criteria for the selection of partners - directly related to the critical success factors that will determine the selection of partners
28. Identifying potential partners - based on the selection criteria specified in the previous step.
29. Establishing the plan for data collection - are chosen tools and techniques of data collection (interview, surveillance, drafting of questionnaires).

h) ***Application*** *- aims actual choice of partner for comparison and data collection.*

30. Research regarding data collection in order to select partners - identifying and selecting information sources for processes of partners.
31. Evaluation of results and identification of potential partners - between partners identified in the planning stage are selected only partners that best fit with the purpose of benchmarking designed, by assessing depending on critical success factors selected in the planning stage.
32. Development of instruments for data collection - after selecting target organizations, the information relating to them must be reevaluated, collected and processed.
33. Internal evaluation of selected instruments for analysis - it's recommended that before the practical application of selected tools for analysis, these be tested within their own organization.
34. Contacting partners to identify and request for participation in Benchmarking - partners selected for reviews have to be contacted and solicited for cooperation in the designed Benchmarking.
35. Selection of partners - is done according to the interest for the proposed analysis.
36. Drafting the questionnaires
37. The management of detailed investigations - involves implementation of all tools and methods selected.

i) ***Checking (analysis)*** *aims to identify and quantify the differences between their own performance and those of the chosen partner and also to establish the causes which explain the performance of the best one. Also future performance targets are identified and approved (improvements resulting as necessary) and action plans are established.*

- Comparing the performance of their own organization with those of the partners - it involves processing and transposing the information gathered in a manner that allows comparison and subsequent identifying of differences.
- Identifying operations such as "the best practice" - will answer questions like: What do partners do and the organization that is subject to this study does not? How do partners do that?
- Formulating the strategy of implementation - it involves assessment of adaptability of solutions, identifying improvement opportunities, cost analysis.
- Preparing the action plan.

j) ***The action*** *aims to release the action plans and monitor the progress. Also are identified standard targets achieved and new practices are fully integrated into the organization.*

− Implementing the action plan - at this level it is important to pursue the implementation of all solutions developed initially without them to be "dissolved" or interpreted.

− Monitoring and reporting progress - it's important that periodically request reports from senior management regarding the implementation of the improvements plan.

− Develop a plan of continuous improvement - identifying new opportunities for benchmarking, identifying new occurred lack, etc.

Each Benchmarking study is specific. There is no universal recipe to be followed in drawing up a Benchmarking study. As a starting point is essential the understanding of the functional and risk profile of the tested company. This profile is obtained after performing a functional analysis. Particularities and terms of the transaction analyzed also have a significant role in establishing the strategy of searching of potential comparable companies.

2.3 The advantages and the disadvantages of the benchmarking

Advantages

A major advantage of practicing internal benchmarking is the possibility of integrating benchmarking between tools and practices of the company, which can support standard tools by following:

- using benchmarking as a reference in the **dashboard**;
- including information obtained through benchmarking in business **forecasting and budgeting**, with a role in determining the performance targets and hence the establishment and analysis of deviations from target and achieve continuous adjustments needed.

The trend of integration of benchmarking with other tools is often cited in the literature, resulting in *a proactive model that integrates the environmental, cost and improvement (Andersen and Moen, 1998*) and favors strategic actions, leading the company to superior performance.

Applying benchmarking can bring many benefits for company such as:

- implementation within the enterprise of the best practices in the field;
- definition of objectives credible, ambitious and accessible;
- maintaining the viability, competitiveness and profitability;
- improving main financial indicators;
- trying to surpass himself, becoming as good as possible;
- better definition of the expectations of customers;
- identifying strengths and weaknesses;
- achieve of the objectives set faster, taking lowest risks;
- increased credibility of improvement processes;
- enrichment and growth of all the good ideas in the field;
- establishing a network of contacts and professional exchanges;
- reduced staff reluctance to change.

Disadvantages

Poorly defined reference values can lead to wasted effort and inconclusive / without meaning. Just copying a factor or politics may not lead to obtaining desired performance.

Incorrect comparison. It finds the limited results obtained in the absence of detection of great practices or due to the failure to define its own process before data collection in order to ensure comparability.

Reluctance to share information. Study of the performance of successful firms, although promoted and supported at European level, is still difficult to deploy, because it collide with secrets of firm, successful practices and intellectual property rights which will not be transferred transparently, without limitations, from the one ,,who is better".

Moreover, the importance of certain data requires the signing of confidentiality agreements concerning the use and communication of data, which cannot be transmitted to third parties without the consent of those who offer it.

Choosing the wrong partner used for comparative analysis. What is good for someone else may not fit our organization.

Among the weaknesses of benchmarking is also found:

- lack of involvement of employees who will use the information and improve process
- inconsistency of process improvement goals and company strategy
- own creativity is impeded
- may be lost sight of customer needs

3. Conclusions

In summary, benchmarking is one of the most useful and effective tools that help managers in making decisions to achieve the objectives included in the company's strategy, knowing that success in business depends on achieving these goals. Its aim is improving performance by identifying competitive advantages and learning about products, services, own operations, by comparison with the best.

The benchmarking forces the company to establish goals and objectives, based on customer demands on quality, costs and delivery terms of products or services. If the objective of improving the quality is to become the best in everything that is done, benchmarking allows to know if the target was reached or when it will be achieved. This is the only tool that teaches us how "good" can turn into "best". Benchmarking shows what is today's "best" and how to achieve this level of excellence. It is therefore important for the success of the benchmarking process to identify best practices and determine how such practices can be adopted by the organization.

Although many people consider Benchmarking a safe method for success, an organization will not improve performance if there is no proper infrastructure for a total quality program. Without a culture of quality and other basic

elements of Total Quality Management, such as information systems, process control, human resource management programs, trying to imitate the leader can register failure.

Research shows that small firms are heavily interested in applying this method, since involve imitation and adaptation, rather than innovation, and offers enhanced competitiveness, shorter time to perform analysis and to apply the results and the ability to acquire good practice. Finally, through continuous monitoring and comparison with similar organizations that are successful will get improved performance.

The approach that the authors of this paper have done is theoretical and it recognizes the need for some case studies to understand the complexity of situations that involve the use of benchmarking analysis.

Other lines of research could be identifying other tools that can help managers in making decisions or submission of operational budgets included in the budgets network of the enterprise.

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THEORETICAL FEATURES REGARDING THE EVOLUTION OVER TIME OF THE MAIN COMMUNICATION MODELS USED FOR THE STUDY OF MASS COMMUNICATION

Irina IOSUB[*]
Otilia-Elena PLATON[**]

Abstract

In the context of increasingly accelerated development of technology and particularly of the Internet, mass communication acquires new meanings. This article proposes a brief theoretical approach to the study of mass communication as it was treated in the specific literature of the 50s and 60s, when there was little talk about new technologies. However, many features identified since then still retain their topicality and for this reason it is interesting to note the evolution over time of the main communication models that were and some of them still are used for the study of mass communication. They are relevant to the context in which a complete study of mass communication is required, not only from the perspective of the present, but also from the period in which it was outlined. Thus, this article is divided into three main sections: the first part represents the meaning of communication in a general sense, so that the second part to represent the mass communication process and its characteristics, and the last part to represent the main models of communication in the order in which they have occurred, and especially aiming at new features that each of them brought.

Keywords: *communication, marketing communication, mass communication, communication models.*

1. Introduction

Communication has rapidly developed even since the old ages. It was initially supported by the Greeks, because „for them, the art of words, meaning the science to build one's speach and to express it in the agora, was a prerequisite for citizenship status"[1], and then by the Romans who „developed the communication study and improved the speech in order to increase the influence of the discourse on the listeners"[2].

From the etymological point of view, the noun *communication* comes from Latin, where the word *comunicatio* means conversation, and the verb *to communicate*, also originating from Latin, i.e. *comunico*, means *to share (with smb.)* or *to be in connection (with)*[3]. Thus, as the word is defined by the Dictionary of the Romanian Language[4] the approach to share with somebody (your thoughts, ideas and feelings) is the result of a communicating action. As the society continued to develop, the word communication has expanded its meaning, and now when it comes to communication, we will not only refer to the transmission of information, but to the entire set of interactions that are based on communication or, in other words – *communication is inevitable!* – the first axiom of the School of Palo Alto[5]. Basically, this means that regardless of the presence or absence of intentionality, „all behavior has a certain communicative value"[6], and non-communication is impossible.

In this context, the objective of the paper is to present the development models used in mass communication, with the improvements brought by each model, depending on the evolution of the communication study.

2. Definitions, components and features of the mass communication process

In a very general sense and very true at the same time, the communication „is a condition of life […] begins at birth and continues until death"[7], so „human relations (and not only they) represent communicational interactions"[8].

Osgood said that „one speaks of communication whenever a system or a source affects another system, in this case a recipient, by manipulation of alternative symbols which can be transmitted over the channel that connects them"[9].

[*] PhD Candidate, The Bucharest University of Economic Studies, Romania.
[**] Teaching Assistant, Ph.D., „Nicolae Titulescu" University, Bucharest, Romania (e-mail: **otiliaplaton@univnt.ro**).
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[2] Ioana Cecilia Popescu, *Comunicarea în marketing* (Bucharest: Uranus, 2003), 28.
[3] Guțu, 1983 apud Ibidem, 12.
[4] Dicționarul explicativ al limbii române, 1996 apud Ibidem, 12.
[5] Watzlawick, 1972 apud Tran and Stănciugelu, Ibidem, 56.
[6] Tran and Stănciugelu, Ibidem, 56.
[7] Jean Lohisse, Comunicarea: de la transmitere mecanică la interacțiune (Iași: Polirom, 2002), 75.
[8] Ioan Drăgan, *Paradigme ale comunicării de masă* (Bucharest: Șansa, 1996), 7.
[9] Osgood, 1957 apud Tran and Stănciugelu, Ibidem, 12.

From another perspective, capturing its procedural character, John J. Burnett defines communication as „a process by which two or more people try using symbols to exert a conscious or unconscious influence on others in order to meet their own interests"[10]. Abric[11] also defines communication in the same tone, when he says that it is a very dynamic social act, voluntarily or involuntarily, subsumed under „a process of mutual influence between several stakeholders".

There can be seen how the above definitions have at least two common elements: *communication is a process by which information, opinions, beliefs, etc are transmitted* – between individuals or groups; regardless of the context in which we find ourselves every day, *we cannot live without communicating*[12].

2.1. Definitions of mass communication

In terms of mass communication, there are several definitions in the literature which also reveals a few common features of mass communication: it is an organized process, where the communicator (an organization) addresses a broad audience by using specific technical means.

Thus, Wright states that, „mass communication is addressed to relatively large, heterogeneous and anonymous audiences: messages are transmitted to the public, often organized over time, in order to reach the majority of members of the public at the same time; they (the messages) are evanescent; the communicator tends to be a comprehensive organization or to operate as such, and it may involve significant costs"[13].

Like Wright, Freidson[14] highlights how „mass communication can be distinguished from other types of communication by being addressed to a large part of the population, rather than to one or a few people, or to a special part of the population. In addition, it essentially involves the presence of certain technical means of handling, so that communication can reach at the same time all individuals concerned."

Lazar[15] defines mass communication as „an organized social process. Those who work for the media, be it a newspaper or a TV channel, are part of a large enterprise in society. The independent journalist image isolated in front of his typewriter is nowadays out of fashion. Every journalist, whether working for a newspaper, a radio or TV station, belongs to an employees' group in the said company and performs a well-defined work in the sense of teamwork".

In another more comprehensive definition, mass communications are viewed as "a form of social communication very distinct from the communication between individuals or groups"[16]. Fodor and Szecsko consider that mass communications are characterized mainly by their massiveness, heterogeneity and by the use of technical means. According to Fodor and Szecsko, the massiveness of communication systems is manifested in three ways. Firstly, they circulate the information, culture, entertainment in massive quantities; furthermore, their messages are addressed to the public masses. Finally, "the manufacturing techniques for producing the communication content can be assimilated to a certain degree, by the techniques of industrial mass production"[17]. The second characteristic of mass communications is its heterogeneous nature, which manifests both by content and by their audiences: their messages differ in quality, form, their coding system, their function; they are addressed to members of all social classes, whatever their cultura level, the nature of their interests and their lifestyle. The third characteristic assumes that "the one communicating the message is not directly related to the one who receives it, them being separated by technical means"[18].

In order to distinguish the important role played by mass communication and the difference between this and the other communication forms, we shall still remember, in short, some classifications of communication forms that are based on criteria such as: *messaging technique* and *how individuals participate in the communication process*[19].

Depending on the *messaging technique*[20], there are two forms of communication: *direct communication* (based on personal direct relationships between individuals) and *indirect communication* (which is achieved by means of technical devices that mediate communication).

In the second classification that takes into account *how the individual/individuals are participating in the communication process*, there are three types of communication[21]: *intrapersonal communication* (is the communication performed with hiself/herself or the inner dialogue of the

[10] Burnett, 1988 *apud* Popescu, Ibidem, 14.
[11] Jean-Claude Abric, *Psihologia comunicării: teorii şi metode* (Iaşi: Polirom, 2002), 15.
[12] Tran and Stănciugelu, Ibidem, 11.
[13] Wright, 1959 *apud* Drăgan, Ibidem, 42.
[14] Freidson, 1954 *apud* Drăgan, Ibidem, 42.
[15] Lazar, 1991 *apud* Drăgan, Ibidem, p. 42.
[16] Fodor and Szecsko, 1974 *apud* Drăgan, Ibidem, 49
[17] Fodor and Szecsko, 1974 *apud* Drăgan, Ibidem, 49.
[18] Fodor and Szecsko, 1974 *apud* Drăgan, Ibidem, 49.
[19] Tran and Stănciugelu, Ibidem, 18.
[20] Drăgan, Ibidem, 18.
[21] Tran and Stănciugelu, Ibidem, 18.

individual), *interpersonal communication* (is the immediate, direct communication, conducted by individuals who are "face to face") and *mass communication* (is the communication performed for a large audience by specialized institutions in this regard).

One can easily guess just by the classifications and definitions as mentioned above that mass communication needs both specialized equipment and people. Next, we shall specify in detail the characteristics of mass communication and how it differs from other types of communication.

2.2. Features and components of the mass communication process

Based on the *key elements without which communication* would not take place (a transmitter, a channel, a message, a receiver, the relationship between transmitter and receiver, the effect, the context in which communication occurs and the things that messages refer to)[22] we can distinguish the role and characteristics of each of them when we particularly refer to mass communication.

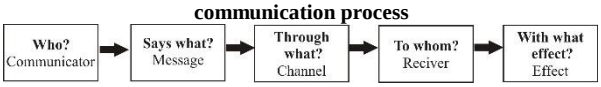
Therefore, unlike the interpersonal communication, in the case of mass communication, for example the transmitter of the message is an "institutionalized person"[23], meaning that a person who is part of a larger group of people, who share a common point of view, is the communication organization: media group, radio station, TV station etc. and has the endorsement of that institution. Furthermore, we do not talk about the flow of information that reaches from a transmitter to a receiver, but from one or more transmitters always to more receivers. Thus, „communication is socialized, becomes collective"[24], because as broadcasters are institutions made up of groups of several individuals, the receptors of messages are great communities of people and this leads to audience socialization[25]. Communication is "directed at a wide audience, heterogeneous and anonymous [...] messages are sent to the public, most often planned in order to simultaneously reach the audience members"[26]. A third characteristic of mass communication is its mediated feature. If in the interpersonal communication, there is a direct communication, mass communication would not be possible without technological assitance. Therefore, the channel plays a very important role as transmitters and receivers are separated by space limitations. The presence of a relay that technically facilitates the transmission of information gives to mass communication an indirect nature[27]. As regarding the receptors' feed-back and the effect of messages upon them, receptors' response is overdue, meaning it occurs with some delay.

3. The evolution over time of the main communication models used in the study of mass communication

Starting from the **Harold D. Lasswell's classic formula** (1948), one of the first and perhaps the most famous model of mass communication, due to its simplicity, any communication act must provide answers to the following questions: *Who says? what? In what channel? To whom? With what effect?*[28]

These questions translated into a graphic form, create the model shown below (Fig. 1).

Fig. 1 Lasswell's Formula. Elements corresponding to the communication process



Source: McQuail & Windahl, 2004, p. 19

For each question, Lasswell identified one field of research. Thus, „according to him, the first chapter is *the control analysis*, i.e. the study of factors that initiate and control the communication process (editors, communicators' groups, the organization and role of media institutions); the second consists of *analysing* the *content* of communication, i.e. the study of messages and their direction; the third refere to communication *channels* (print newspapers, cinema, radio, television, video etc.) The fourth chapter concerns the *audience* and and how to receive messages, and the fifth includes the *analysis of effects* and of media *effectiveness*"[29].

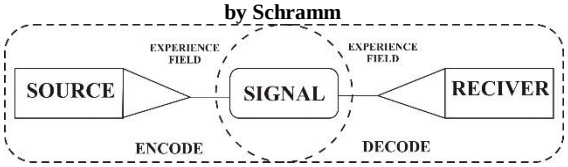
With all the criticism and improvements later brought upon this model – concerning the absence of feed-back and the fact that it leads the specialist towards distinct fields of research although they interrelate[30], it should be stressed that, at that time, Lasswell drew the directions that mass communication research should focus on[31], especially considering that the author was interested in political communication and therefore in

[22] Denis McQuail and Sven Windahl, *Modele ale comunicării pentru studiul comunicării de masă* (Bucharest: Comunicare.ro, 2004), 12.
[23] Tran and Stănciugelu, Ibidem, 119.
[24] Tran and Stănciugelu, Ibidem, 119.
[25] Voyenne, 1962 *apud* Tran and Stănciugelu, Ibidem, 119.
[26] Wright, 1959 *apud* Werner J. Severin and James W. Tankard, Jr. *Perspective asupra teoriilor comunicării de masă* (Iași: Polirom, 2004.), 16.
[27] Drăgan, Ibidem, 44.
[28] McQuail and Windahl, Ibidem, 19.
[29] Drăgan, Ibidem, 50-51.
[30] Braddock, 1958 *apud* McQuail & Windahl, Ibidem, 20.
[31] Paul Dobrescu and Alina Bârgăoanu, *Mass media și societatea* (second edition) (Bucharest: Comunicare.ro, 2003), 121.

persuasion. Consequently, Lasswell's formula remains the reference in this field, as the first model of mass communication.

The communication model achieved by **Schramm** together with **Osgood** (Fig. 2) participated in the formation of the idea that „everyone in the communication process is both source and recipient of the message"[32]. Thus, the model captures two key processes that take place almost simultaneously durig the communication process: encoding and decoting the the message. The message encoding involves the transposition of signs and symbols in messages, while decoting refers to the accurate interpretation of messages[33].

Fig. 2 Components of the communication model developed by Schramm



Source: Nadolu, 2007, p. 68

In order for that process to take place under optimal conditions, it must meet several conditions. It is necessary that the „source has accurate and unambiguous information; it should be accurately coded into communicable signs and thus be transformed into a clear message; the message should reach the receiver in its authentic form, and here it must be decoded according to the coding model. Otherwise, the receiver does not respond in accordance with communicator's project, which means that the system does not work"[34]. Then, coding and deconding the messages occurs depending on the *experience field* of each of the participants. The experience field is defined through „the knowledge, symbols, information, attitudes of the two <<links>>"[35]. Therefore, both the source (transmitter) and the recipient (receiver), who later turns into a transmitter, should take into account during the coding process of the elements present in the experience of the other one, because the accuracy in decoding the message is directly proportional to the area of intersection of previous experience of the two. „When the *area of intersection* of the two *experience fields* is *large*, communication is facilitated; if the intersection is *very small*, the communication becomes very difficult (applicable to people from different cultures), and when there is no intersection, the communication becomes practically impossible"[36]. An important and new element also introduced by this model, translates into the capacity of a person to be the interpreter of messages. It encodes and decodes messages at the same time; it is both transmitter and receiver, and when he changes from the receiver position into the transmitter, he may provide *feed-backs*. The feed-back is a new concept introduced by this model and it represents the response reaction, whereby the positions are reversed. In mass communication, the feed-back is given by the audience through phone calls, e-mails, letters etc. in response to the treatment of a subject, for instance.

Another novelty introduced by this model is to *multiply the communication channels*. When we refer to direct interpersonal communication, we are able to say how a message can be transmitted in several ways, or through multiple channels such as: facial expression, the tonality in which the message is transmitted, emphasizing certain words etc. In mass communication, multiplying channels is customized according to the transmission media. For instance, in newspapers, „such multiplicity is displayed by: the wording of the news; headlines and size of headlines; information, reports, aticles layout on pages; inserted images; used fonts etc."[37]. This could be, in Schramm's opinion, a mass manipulation technique[38].

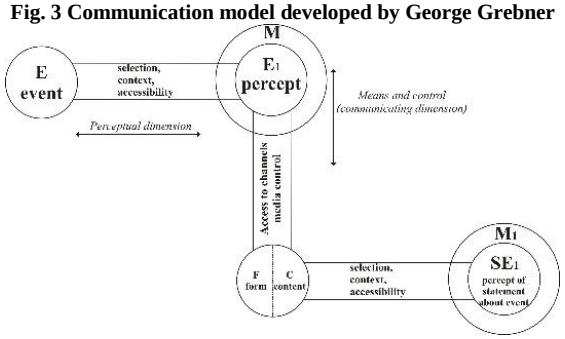
The communication model created by **George Gerbner** (Fig. 3) and introduced in 1956 is qualitatively distinguished from the previous thanks to the innovation it brings: „first of all, it links the message to the "reality" it represents, which facilitates the discussion of the issues of perception and understanding; secondly, it sees communication as a process consisting of two alternating dimensions: the *perceptive* (or receiving) one and the *communication* one (the size of transmission and control method)"[39].

On the other hand, the model is flexible enough to be used for a variety of communication circumstances, from interpersonal communication to mass communication.

Thus, starting from Lasswell's formula and analyzing the graphic representation of the model (Fig. 3) we may say that the model shows how: *1. someone, 2. perceives an event and 3. reacts, 4. in a given situation, 5. by using certain means 6. in order to make available 7. in a certain form and 8. in a certain context, 9. a specific content 10. that has certain consequences*[40].

[32] Lohisse, Ibidem, 90.
33 Ioan Drăgan, 1996 apud Bogdan Nadolu, Sociologia comunicării de masă (Timișoara: Excelsior Art, 2007), 68.
34 Drăgan, Ibidem, 31.
35 Drăgan, Ibidem, 31.
36 Drăgan, Ibidem, 31.
37 Drăgan, Ibidem, 31.
38 Drăgan, Ibidem, 33.
39 Dumitru Borțun and Teodor Borșa, Semiotica vizualului - academic course (2004), 36.
40 McQuail and Windahl, Ibidem, 27; Drăgan, Ibidem, 35.

Fig. 3 Communication model developed by George Grebner



Source: Tran & Stănciugelu, 2003, p. 43

Thus, the concepts that Gerbner introduces in his model are „the perception, production, messages' meaning; the message as a unit of form and content; the notion of intersubjectivity as an expression of the ratio between the messages output, perception of events and messages"[41].

As it is graphically represented, on the two axes, the model shows how the perception of the event determines the communication process. Thus, following the above staging, here's how Gerbner's model can be described.

On the horizontal axis (perceptual size), there is M's perception - man or machine, on the event (E) - natural event or publicized event. Event's perception (E_1) is M's *reaction* that occurs *in a certain situation* and that involves *"*a link between the event and *its sensorial, cognitive and creative reorganization by M"*[42]. In turn, the situation may influence how the reaction and reception occurs. It has "psychological, physical and social dimensions. Between E (the event) and E_1 (the perception, message) come:

- the selection action;
- the event accesibility (possibility of being perceived);
- the context in which it occurs"[43].

On the vertical axis (*the size of the communication*) it is describes the process by which, at this stage, the perception turns into the message. The message (or signal) is graphically represented in the circle divided into two (SE). The content (half circle denoted by E) can be communicated in several ways (S). It is important to find the most appropriate form (S) for the content to be communicated (E). This is the axis "of the means used for creation, transmission and distribution of messages"[44]. The access to communication channels is based on certain criteria, such as the importance of the subject, but "the actual selection will be made by a communication *medium* and by the one controlling it"[45].

In the third stage of the model there is described how the perception (SE_1) of another recipient (M_1) about SE (i.e. the message sent by M) is born. So M_1 is not directly related to the event (E), but to its description (SE) and thus the perception (SE_1) was born. The manner in which the second recipient interacts with the message determines its perception.

In terms of mass media communication, this model enables us to understand the variety of factors and processes that intervene between the actual events and their communication as well as the extent to which the media content is understood by the audience[46].

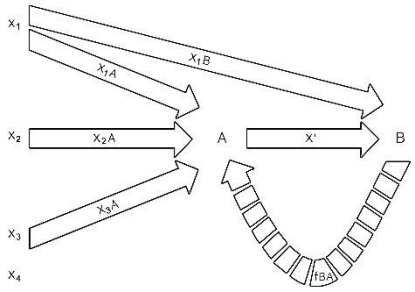
Considering the differences between mass communication and the interpersonal communication, and based on both the communication model developed by Newcomb and on the theories of balance and dynamic correlation of Heider[47], **Westley** and **MacLean** developed a new model of communication that draws attention to some important features of mass communication.

Thus, the mass communication differs from interpersonal communication in that for the mass communication "feed-back is minimal or delayed; there is a greater number of A (alternative media source) and X (objects in the external environment) which a given person B (the audience member) must relate to and of which he/she must choose"[48].

Graphically represented in two stages (Fig. 4 and Fig. 5), the model shows us how in the first stage (Fig. 4), A and B, the interpersonal communication actors interact. It is a classic model of communication in which A selects between multiple objects (X_1, X_2, X_3) forming the environment of the two, the ones that he/she must communicate to B. X' is the message sent by A to B. At the same time B has also access to the same objects (X_1B), therefore, he/she can search by himself/herself for information and provide feedback (fBA) to A.

[41] Tran and Stănciugelu, Ibidem, 43.
[42] Drăgan, Ibidem, 36.
[43] Tran and Stănciugelu, Ibidem, 44.
[44] Drăgan, Ibidem, 36.
[45] Borțun and Borșa, Ibidem, 37.
[46] Gerbner, 1964 *apud* McQuail and Windahl, Ibidem, 30.
[47] McQuail and Windhal, Ibidem, 38.
[48] McQuail and Windhal, Ibidem, 39.

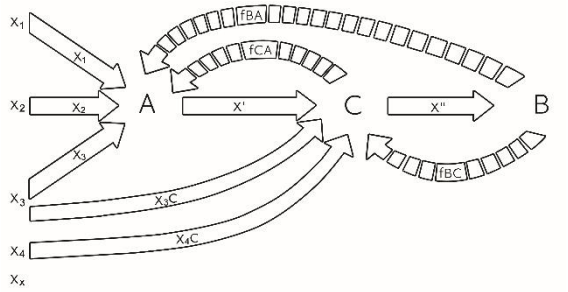
Fig. 4 The first stage of the model, in which A selects between the potential X objects those which shall be provided/communicated to B



Source: McQuail & Windahl, 2004, p. 40

In the second stage, there comes a new element: the communication channel (Fig. 5).

Fig. 5 The conceptual model of mass communication developed by Westley and MacLean



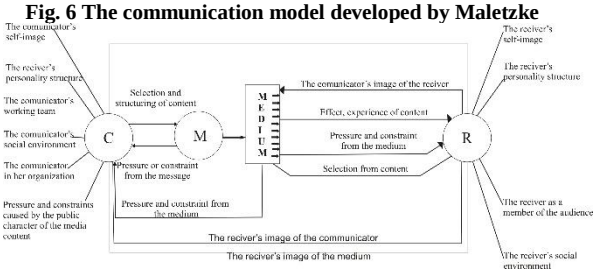
Source: McQuail & Windahl, 2004, p. 40

From the perspective of mass communication the model can be explained as follows[49]:

- X1, X2, X3, X4, X5 are the environmental objects (events) which translate into topics of communication (e.g. political crises, presidential elections, election results, etc.);
- A is the communicator – he/she/it can be an individual or an institution/organization;
- B is the audience (individual or group of individuals) who need the information;
- C is the media organization that filters the messages which A transmits to B, depending on B's interests and concerns;
- X' represents the event that the channel (C) selects for transmission to the receiver (B), but not before it is transformed by the media institution (C) into the message to be communicated (X") to the audience.
- X3C and X4C are the comments which the media institution (C) makes directly on the events (X), by the reporter (e.g. reporting from the scene);
- fBA is the feed-back provided by the audience (B) directly to A (it can be a political vote or purchasing a product, if it is a reaction to advertising);
- fBC is the feed-back provided by the audience to the channel (the feed-back of the viewers of a TV show, of the listeners of a radio station, etc.);
- fCA is the feed-back which the transmitter A receives from the media institution (C). It can be for stimulating, changing, or blocking A.
- The importance of the model lies in several important aspects that distinguish it from previous models, in that:
- it emphasises the importance of feed-back which the auditors provides either to the channel (C), either directly to the source (A);
- it captures one of the most important functions of the media (C), that of the selection of topics based on the relevance they have for the audience;
- it emphasizes the flexibility of the relations between audience (B) and event (X) or source (A), in that that the media (C) does not monopolize such direct relationships which the receiver may have. Thus, the receiver can become, in turn, a source of information.

The model created by **Maletzke** (Fig. 6) in 1963 it was described in his book, Psychologie der Massenkommunikation[50].

Fig. 6 The communication model developed by Maletzke



Source: McQuail & Windahl, 2004, p. 49

In essence, the model includes the same specific key elements of all types of communication: a transmitter, a receiver, the message and the means of communication. Differences occur as follows:

- the author identifies between the means of communication and the receiver two factors that influence how the receiver receives the message - the pressures and constraints of the means of communication, on the one hand, and the image the receiver has about the means of communication, on the other. While the limitations of the communication media relate to media features, the image which the receiver has about the media of communication is influencing the expectations related to the media content. The content selection and how the receiver perceives contents are consequences of the communication media's prestige. Besides the variables related to the communication channel, there are other variables described in the model, also called independent

[49] Drăgan, Ibidem, 46-47; McQuail and Windahl, Ibidem, 39-42.
[50] Maletzke, 1963 *apud* McQuail and Windahl, Ibidem, 49.

variables, and that influence the perception of the messages: self-image of the receiver, the personality structure of the receiver and the social context in which the reception occurs.

- Another important element of the model is "the communicational behavior of the transmitter"51, i.e. how the transmitter will select and structure the messages to be transmitted. In this process the transmitter must take into account, on the one hand, the pressures and constraints of the message (as the message form must be adapted to content) and on the other hand, the pressures and constraints of the means of communication. Likewise, as for the receiver, there are several factors involved (independent variables), such as: the self-image of the transmitter, his/her/its personality structure, transmitter's position as part of a team and, at the same time, as part of an organization, as well as the pressures and constraints relating to the public nature of the media message.

The model also highlights the importance of forming an image of the transmitter on the receiver and vice-versa, and in the context of the mass communication it is even more difficult to sketch this image in transmitter's mind, given how receivers are regarded as a heterogeneous and anonymous mass[52]. The absence of spontaneous feed-back characteristic to interpersonal communication also makes it difficult for the transmitter to form an image on the audience.

3. Conclusions

The need for communication, the emergence of new technology that streamlines the communication process and the speed with which the changes take place in all areas affecting the process of mass communication, leads us to affirm about mass communication that it "coexists and interacts with other communication forms and processes"[53]. Thus, with the advent of the Internet we talk about a communication "addressed to an active audience, where the consumer is considered a partner and not just a final target"[54]. On the other hand, feedback methods have diversified and audience rapidity of reaction is no longer a problem. Therefore, it should be stressed that the mass communication process is not linear, but it is based on gaining and maintaining the public attention[55]. As it was seen in the description of the model developed by Westley and MacLean, the communicator must relate to the audience and construe its needs.

All these changes highlight the dynamics of the communication process. Therefore, by presenting the models used in the study of mass communication, this article brings many significant theoretical contributions in the field of communication: Lasswell's communication model or formula, Schramm's communication model, the communication model developed by George Gerbner, the communication model developed by Westley and MacLean and, not at least, the model developed by Maletzke.

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[51] McQuail and Windahl, Ibidem, 46.
[52] McQuail and Windahl, Ibidem, 47.
[53] McQuail and Windahl, Ibidem, 9.
[54] Otilia-Elena Platon, Rolul comunicării de marketing online prin social media în susținerea capitalului mărcii, (Ph.D. thesis), 2015, 17.
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URANIUM MARKET TRENDS

Serghei MĂRGULESCU[*]
Elena MĂRGULESCU[**]

Abstract

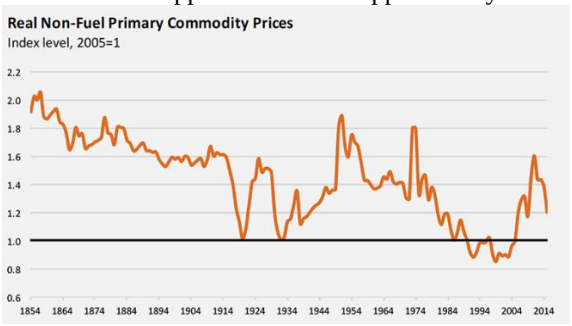
The recent UN Climate Talks in Paris have put forward the goal of limiting the global temperature rise to two degrees Celsius by the end of the century. This is providing a strong political base for expanding the nuclear power capacity because of the critical role that nuclear power plants play in the production of electricity without emissions of greenhouse gases. In all, more than a dozen countries get over 25% of their energy from nuclear power, with 437 nuclear reactors operating around the world. On top of that, there are another 71 reactors under construction, 165 planned, and 315 proposed. Global uranium demand is expected to rise 40% by 2025 and 81% by 2035. Mined supply of uranium will struggle to keep pace amid rising demand and falling secondary supplies. A cumulative supply deficit is expected to emerge by 2021 while 2016 marks a huge inflection point for the industry, beeing the first year that demand will actually exceed supplies, creating a 60,000-tonne shortfall by 2018. Over the next 10 years, we're going to see uranium prices more than double while the bull run will begin in earnest in 2016.

Keywords: *nuclear power, uranium supply, uranium demand, uranium prices.*

Introduction

In 2015 the dynamics of supply and demand for industrial and precious metals were out of favor. The worst performer, with a decline in prices of about 40% is rhodium. The next two are nickel and iron ore, each down more than 30%. Tin, zinc, palladium, platinum and copper aren't far behind, each down more than 20%. Gold and silver were down about 5%. Uranium is one of the few commodities that hasn't gotten trounced. It's traded roughly flat over the past year. That's because, here, the supply-demand fundamentals have already begun to turn.

But here's the secret about commodities: They're elastic. As they get cheaper, demand increases and supplies shrink. It happens every time.



This chart shows how commodities have performed over the last 160 years.

As you can see, every sharp decline is followed by an equally dynamic rebound.

Each boom and bust cycle lasts about seven or eight years. The down-cycle we're witnessing right now began back in 2010. So if the pattern holds we'll see another boom begin around 2017.

That's not a given, of course. These cycles can be extended by overarching circumstances.

For instance, the boom cycle that began in 1933 was exacerbated by World War II. As a result, it lasted almost two decades. Similarly, the commodity price collapse that occurred from 1974 to the late 90s was exacerbated first by Fed Chairman Paul Volcker's war on inflation, and then the collapse of the Soviet Union.

These kinds of watershed events are atypical but they do happen. Still, it doesn't change the fact that the trend always reverses.

For instance, platinum and palladium are set for an annual deficit this year — 20.3 million tonnes for platinum and 13.3 million tonnes for palladium. Yet, these metals are at their lowest level in seven years. Copper and nickel will eventually come back into fashion, but not for a while. Silver is expected to double its present value of around 15$ per ounce in the next two years, but after a possible fall to 10$ per ounce.

The Third Energy Era

There have only been two true eras of energy so far — the chemical and mechanical. Only recently have we started the transition to the third — the elemental.

The first two eras are marked by two tracts of knowledge. The first is chemistry, and the development and exploitation of fuel sources. The second is engineering, and harnessing potential through efficiency and transmission. In many

[*] "Nicolae Titulescu" University of Bucharest (e-mail: **margulescu@univnt.ro**).
[**] "Nicolae Titulescu" University of Bucharest, (e-mail: **elena.margulescu@univnt.ro**).

regards, we haven't changed our ways since we started using wood fires for heat and light.

What we do to coal, natural gas, gasoline, and jet fuel is the same. We exploit the chemical structure of a fuel to break down molecules in an exothermic reaction.Then we use the heat however we can. The problem, to date, has been how much heat we end up losing in the process, or building something robust enough to contain the reaction.

If you have a fireplace, you aren't too far off from where we started when our ancestors learned how to burn wood. Only 10% of the heat released actually heats your house. The rest goes right up the chimney. With so much energy being lost, increasing the fuel supply is a terrible idea. The scaling at 10% efficiency is horrendous. A constant stream of incremental improvements resulted.

Using the same principles of mechanical force used for wind and water mills, engineers drove up efficiency by using turbines, coupled with closed steam pipe systems. The discovery of ideal fuel-to-air ratios led to efficient pistons that, when paired with camshafts, opened up even smaller engine designs that could be mounted on vehicles. Coolants and lubrication reduced friction and excess heat, allowing more efficient, higher RPM designs. Weight reductions from material changes drove down weight.

The dynamo transformed mechanical energy into a stream of electrons. Wires were thrown up worldwide to blanket the world in an electrical grid carrying power from chemical reactions. Even state-of-the-art batteries simply exploit unbalanced chemical reactions to generate a constant flow of electrons. So much has changed in recent history, but it has all been through incremental improvements upon tried and true chemical and mechanical laws of nature, often rapidly adopted whenever a new scientist's discovery or engineer's design is revealed.

It wasn't until the middle of the last century that the third era started to emerge, marking fundamental breaks from both the chemical and mechanical eras.

The Elemental Era

The new era of energy dives into our relatively new understanding of our universe. We are going beyond molecular reactions to exploit the fundamental properties of atomic forces and physics. Power generation from basic nuclear physics is becoming the norm. In regard to the nature of the fuel, nuclear and solar power, so different in public perception, must be lumped together.

Nuclear power, as we know it, approaches elemental power via ultra-heavy atoms that can be forged by nothing less than the crucible of the catastrophic explosion of ancient stars. No burning, no chemical reactions, no carbon pollutants. The fundamental, unstable nature of the radioactive isotopes we refine are enough to create constant heat to turn steam turbines.

The energy potential is unfathomably greater as well. By weight, uranium packs about 17,000 times the energy potential of modern fossil fuels.

Solar energy exploits the other end of the nuclear spectrum. Hydrogen and helium fuel the 10 billion year-long thermonuclear explosion, barely contained by gravity, commonly known as the Sun. We capture the tiniest hint of a fraction of the energy that rains down on us as solar radiation, with maybe 15-20% efficiency. Yet it is still enough to be economically feasible and capture over half of the total world energy market by 2050.

This third era is going to change so much that we cannot possibly imagine the full implications today. The latest designs for both power sources have shed their early limitations, and the world is rapidly moving to exploit element-based power sources as quickly as possible to reap unprecedented benefits. New generation designs for nuclear power, such as molten salt reactors, cannot melt down and can reprocess old fuel.

...there are several things that are making it more likely that we are going to see some real progress on the nuclear front. Certainly at the top of the list is the emergence of global concern over climate change issues. It's hard — even for the people who've long opposed nuclear power — to fight nuclear energy and global warming at the same time. People now recognize the critical role that nuclear power plants play in the production of electricity without emissions of greenhouse gases.

How long will our supplies of uranium and thorium last?

Ask a geologist how much uranium we have and he won’t give you an easy answer. Or maybe he will, but then the answer is not of much use. The simple answer is: the earth’s crust contains 2,8 parts per million (ppm). That’s enough uranium to serve us until the time the sun turns into a red giant, more than a billion years from now. But it would mean ploughing over the planet and most people would want to avoid that – so let’s get practical.

Uranium is literally everywhere, in rocks and in oceans. How much of it we can use, depends on how hard we look for it and on what we are willing to pay for it. Let’s start with a moderate estimate of available resources of uranium. On world-nuclear, we see the known supplies of the world: 5.327.000 tonnes. In our extreme scenario, using 70.000 tonnes per year, this would last us 76 years. Not really a an impressive number. Even if we add the known supplies of thorium (3.385.000 tonnes worldwide), we would only roughly double this number to, say, 150 years. (To make things appear even worse, the number of tonnes per year in our extreme scenario is

almost the same as the amount our present nuclear power plants use: 68.000 tonnes annually. That's mainly because conventional nuclear reactors use only about 0,5% of the energy content of the uranium)

But the quantity of thorium quoted above (5.327.000 tonnes) is the thorium that can be sold for the market price of 80$ per kg (and hence, must be produced cheaper). What if we are willing to pay more? How much more uranium and/or thorium does that make available? For instance for Thorium, the Atomic Energy Commission has studied the available resources in 1969. Of this thorium, we've hardly used anything since those days. The report raises the question how much thorium is recoverable at a price of 500$/kg in 1969 dollars, perhaps 3000$/kg today. The answer is 3 billion short tonnes or 2.700.0000.000 metric tonnes, enough to last us 40.000 years in our extreme scenario. For uranium, the figures will be not much different. (And no, 3000$/kg is not a ridiculous price. At this price, we'd need to pay $3.000.000 for the fuel to produce 1GWe-yr. And 1 GWe-yr equals 8.760.000.000 kWh, which means a fuel cost of $0,0004 per kWh.) This means that even in our extreme scenario, the combined uranium and thorium of the United States would be enough to power the world for about 100.000 years.

If that is not enough to be called 'sustainable', consider yet another option: seawater. Uranium forms soluble salts and the seas contain 0.003 ppm Uranium. Again, that doesn't sound like much, but according to Masao Tamada of the Japanese Atomic Energy Agency it adds up to about 4.5 billion tons, adding another 64.000 years of sustaining our extreme scenario. The technique of winning this sea-uranium is still in its infancy, but Japanese researchers have succeeded in winning it at a cost of $240/kg. And here's an article that describes the technique of extractring the uranium. The production speed is still very low and not nearly enough for the yearly refill of a single molten salt reactor, but we have all the time in the world to improve our technique… Still not satisfied on the sustainability? The concentration of the uranium in the sea is an equilibrium. Meaning: if we take some out, nature will refill the store through rivers and rock-weathering – it already does: rivers carry uranium to the sea all the time.

Charles Barton – a respected blogger on the subject of molten salt reactors estimates that dissolved natural uranium from terrestrial sources, that rivers continually carry to the seas, amounts to about 32,000 tons per year*. Finally, uranium in seawater is in equilibrium solution. 'Added dissolved uranium causes other dissolved uranium to precipitate out of sea water. The uranium precipitation is deposited on the sea bottom, but may re-dissolve at some future time.' In short: even in our extreme use scenario, we won't run out of uranium.

And remember, our extreme scenario was pretty extreme: energy produced by solar and wind, and saved by energy conservation, were all discarded. While in reality, these will fill in a substantial part of our energy demands. These sources combined will provide us with all the energy we need.

Uranium production

Uranium production figures, 2004-2014(July 2015)

Country or area	Production (tU)											% change
	2004	2005	2006	2007	2008	2009	2010	2011	2012	2013	2014	2013-14
Australia	8982	9516	7593	8611	8430	7982	5900	5983	6991	6350	5001	-21
Brazil	300	110	190	299	330	345	148	265	231	198	231	+16
Canada	11,597	11,628	9862	9476	9000	10,173	9873	9145	8998	9332	9134	-2
China ^	750	750	750	712	769	750	827	885	1500	1450	1500	+3
Czech Rep	412	408	359	306	263	258	254	229	228	225	193	-14
France	7	7	0	4	5	8	7	6	3	0	3	-
Germany	77*	94*	65*	41*	0	0	0	52	50	27	33	+22
India^	230	230	230	270	271	290	400	400	385	400	385	-4
Kazakhstan	3719	4357	5279	6637	8521	14,020	17,803	19,451	21,317	22,567	23,127	+2
Malawi	0	0	0	0	0	104	670	846	1101	1132	369	-67
Namibia	3038	3147	3077	2879	4366	4626	4496	3258	4495	4315	3255	-25
Niger	3282	3093	3434	3135	3032	3243	4198	4351	4667	4528	4057	-10
Pakistan^	45	45	45	45	45	50	45	45	45	41	45	+10
Romania^	90	90	90	77	77	75	77	77	90	80	77	-4
Russia^	3200	3431	3430	3413	3521	3564	3562	2993	2872	3135	2990	-5
South Africa	755	674	534	539	655	563	583	582	465	540	573	+6
Ukraine^	800	800	800	846	800	840	850	890	960	1075	962	-11

Country or area	Production (tU)											% change
	2004	2005	2006	2007	2008	2009	2010	2011	2012	2013	2014	2013-14
USA	878	1039	1692	1654	1430	1453	1660	1537	1596	1835	1919	+5
Uzbekistan	2016	2300	2270	2320	2338	2429	2400	3000	2400	2400	2400	0
Total	40,178	41,179	39,670	41,282	43,853	50,772	53,663	53,494	58,344	59,673	56,252	-6

World Nuclear Power Reactors & Uranium Requirements (*1 January 2016)*

This table includes only those future reactors envisaged in specific plans and proposals and expected to be operating by 2030.

The WNA country profiles linked to this table cover both areas: near-term developments and the prospective long-term role for nuclear power in national energy policies. They also provide more detail of what is tabulated here.

COUNTRY (Click name for Country Profile)	NUCLEAR ELECTRICITY GENERATION 2014		REACTORS OPERABLE 1 Jan 2016		REACTORS UNDER CONSTRUCTION 1 Jan 2016		REACTORS PLANNED Jan 2016		REACTORS PROPOSED Jan 2016		URANIUM REQUIRED 2015
	billion kWh	% e	No.	MWe net	No.	MWe gross	No.	MWe gross	No.	MWe gross	tonnes U
Argentina	5.3	4.0	3	1627	1	27	2	1950	2	1300	215
Armenia	2.3	30.7	1	376	0	0	1	1060			88
Bangladesh	0	0	0	0	0	0	2	2400	0	0	0
Belarus	0	0	0	0	2	2388	0	0	2	2400	0
Belgium	32.1	47.5	7	5943	0	0	0	0	0	0	1017
Brazil	14.5	2.9	2	1901	1	1405	0	0	4	4000	326
Bulgaria	15.0	31.8	2	1926	0	0	1	950	0	0	324
Canada	98.6	16.8	19	13553	0	0	2	1500	3	3800	1784
Chile	0	0	0	0	0	0	0	0	4	4400	0
China	123.8	2.4	30	26849	24	26885	40	46590	136	153000	8161
Czech Republic	28.6	35.8	6	3904	0	0	2	2400	1	1200	566
Egypt	0	0	0	0	0	0	2	2400	2	2400	0
Finland	22.6	34.6	4	2741	1	1700	1	1200	1	1500	751
France	418.0	76.9	58	63130	1	1750	0	0	1	1750	9230
Germany	91.8	15.8	8	10728	0	0	0	0	0	0	1889
Hungary	14.8	53.6	4	1889	0	0	2	2400	0	0	357
India	33.2	3.5	21	5302	6	4300	24	23900	36	41600	1579
Indonesia	0	0	0	0	0	0	1	30	4	4000	0
Iran	3.7	1.5	1	915	0	0	2	2000	7	6300	176
Israel	0	0	0	0	0	0	0	0	1	1200	0
Italy	0	0	0	0	0	0	0	0	0	0	0
Japan	0	0	43	40480	3	3036	9	12947	3	4145	2549
Jordan	0	0	0	0	0	0	2	2000			0
Kazakhstan	0	0	0	0	0	0	2	600	2	600	0
Korea DPR (North)	0	0	0	0	0	0	0	0	1	950	0
Korea RO (South)	149.2	30.4	24	21677	4	5600	8	11600	0	0	5022
Lithuania	0	0	0	0	0	0	1	1350	0	0	0
Malaysia	0	0	0	0	0	0	0	0	2	2000	0
Mexico	9.3	5.6	2	1600	0	0	0	0	2	2000	270
Netherlands	3.9	4.0	1	485	0	0	0	0	1	1000	103
Pakistan	4.6	4.3	3	725	2	680	2	2300	0	0	101
Poland	0	0	0	0	0	0	6	6000	0	0	0
Romania	10.8	18.5	2	1310	0	0	2	1440	1	655	179
Russia	169.1	18.6	35	26053	8	7104	25	27755	23	22800	4206

COUNTRY (Click name for Country Profile)	NUCLEAR ELECTRICITY GENERATION 2014		REACTORS OPERABLE 1 Jan 2016		REACTORS UNDER CONSTRUCTION 1 Jan 2016		REACTORS PLANNED Jan 2016		REACTORS PROPOSED Jan 2016		URANIUM REQUIRED 2015
	billion kWh	% e	No.	MWe net	No.	MWe gross	No.	MWe gross	No.	MWe gross	tonnes U
Saudi Arabia	0	0	0	0	0	0	0	0	16	17000	0
Slovakia	14.4	56.8	4	1816	2	942	0	0	1	1200	466
Slovenia	6.1	37.2	1	696	0	0	0	0	1	1000	137
South Africa	14.8	6.2	2	1830	0	0	0	0	8	9600	305
Spain	54.9	20.4	7	7002	0	0	0	0	0	0	1274
Sweden	62.3	41.5	9	8849	0	0	0	0	0	0	1516
Switzerland	26.5	37.9	5	3333	0	0	0	0	3	4000	521
Thailand	0	0	0	0	0	0	0	0	5	5000	0
Turkey	0	0	0	0	0	0	4	4800	4	4500	0
Ukraine	83.1	49.4	15	13107	0	0	2	1900	11	12000	2366
UAE	0	0	0	0	4	5600	0	0	10	14400	0
United Kingdom	57.9	17.2	15	8883	0	0	4	6680	9	11220	1738
USA	798.6	19.5	99	98990	5	6218	5	6263	17	26000	18692
Vietnam	0	0	0	0	0	0	4	4800	6	6700	0
WORLD**	**2,411**	**c 11.5**	**439**	**382,547**	**66**	**70,335**	**158**	**179,215**	**330**	**375,620**	**66,883**
	billion kWh	**% e**	**No.**	**MWe**	**No.**	**MWe**	**No.**	**MWe**	**No.**	**MWe**	**tonnes U**
	NUCLEAR ELECTRICITY GENERATION		REACTORS OPERABLE		REACTORS UNDER CONSTRUCTION		ON ORDER or PLANNED		PROPOSED		URANIUM REQUIRED

Sources: Reactor data: WNA to 1/1/16 (excluding nine shut-down German units)
IAEA for nuclear electricity production & percentage of electricity (% e) April 2015.

WNA: Global Nuclear Fuel report Sept 2013 (reference scenario 2015) – for U. 66,883 tU = 78,875 t U_3O_8

Operable = Connected to the grid.

Under Construction = first concrete for reactor poured, or major refurbishment under way.

Planned = Approvals, funding or major commitment in place, mostly expected in operation within 8-10 years.

Proposed = Specific programme or site proposals, expected operation mostly within 15 years.

New plants coming on line are largely balanced by old plants being retired. Over 1996-2013, 66 reactors were retired as 71 started operation. There are no firm projections for retirements over the period covered by this Table, but WNA estimates that at least 60 of those now operating will close by 2030, most being small plants. The 2015 WNA Nuclear Fuel Report reference scenario (Table 2.4) has 132 reactors closing by 2035, and 287 new ones coming on line (figures include 28 Japanese reactors on line by 2035).

TWh = Terawatt-hours (billion kilowatt-hours), MWe = Megawatt (electrical as distinct from thermal), kWh = kilowatt-hour.

** The world total includes six reactors operating on Taiwan with a combined capacity of 4927 MWe, which generated a total of 40.8 billion kWh in 2014 (accounting for 18.9% of Taiwan's total electricity generation). Taiwan has two reactors under construction with a combined capacity of 2700 MWe. It was expected to require 972 tU in 2015.

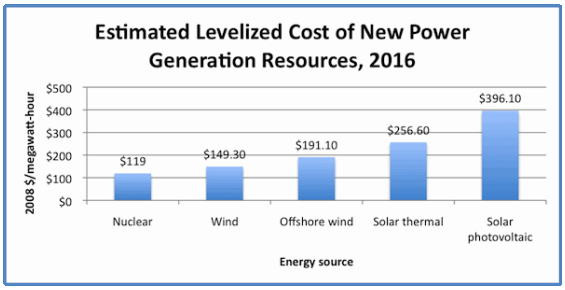
The Economics of Nuclear Power

- Nuclear power is cost competitive with other forms of electricity generation, except where there is direct access to low-cost fossil fuels.
- Fuel costs for nuclear plants are a minor proportion of total generating costs, though capital costs are greater than those for coal-fired plants and much greater than those for gas-fired plants.
- Providing incentives for long-term, high-capital investment in deregulated markets driven by short-term price signals presents a challenge in securing a diversified and reliable electricity supply system.
- In assessing the economics of nuclear power, decommissioning and waste disposal costs are fully taken into account.
- Nuclear power plant construction is typical of large infrastructure projects around the world, whose costs and delivery challenges tend to be under-estimated.

Assessing the relative costs of new generating plants utilising different technologies is a complex matter and the results depend crucially on location. Coal is, and will probably remain, economically

attractive in countries such as China, the USA and Australia with abundant and accessible domestic coal resources as long as carbon emissions are cost-free. Gas is also competitive for base-load power in many places, particularly using combined-cycle plants, though rising gas prices have removed much of the advantage.

Nuclear power plants are expensive to build but relatively cheap to run. In many places, nuclear energy is competitive with fossil fuels as a means of electricity generation. Waste disposal and decommissioning costs are included in the operating costs. If the social, health and environmental costs of fossil fuels are also taken into account, the economics of nuclear power are outstanding.



It's far more efficient than solar, wind, and even coal in terms of levelized cost.

OECD electricity generating cost projections for year 2010 on – 5% discount rate, c/kWh

country	nuclear	coal	coal with CCS	Gas CCGT	Onshore wind
Belgium	6.1	8.2	-	9.0	9.6
Czech R	7.0	8.5-9.4	8.8-9.3	9.2	14.6
France	5.6	-	-	-	9.0
Germany	5.0	7.0-7.9	6.8-8.5	8.5	10.6
Hungary	8.2	-	-	-	-
Japan	5.0	8.8	-	10.5	-
Korea	2.9-3.3	6.6-6.8	-	9.1	-
Netherlands	6.3	8.2	-	7.8	8.6
Slovakia	6.3	12.0	-	-	-
Switzerland	5.5-7.8	-	-	9.4	16.3
USA	4.9	7.2-7.5	6.8	7.7	4.8
China*	3.0-3.6	5.5	-	4.9	5.1-8.9
Russia*	4.3	7.5	8.7	7.1	6.3
EPRI (USA)	4.8	7.2	-	7.9	6.2
Eurelectric	6.0	6.3-7.4	7.5	8.6	11.3

* For China and Russia: 2.5c is added to coal and 1.3c to gas as carbon emission cost to enable sensible comparison with other data in those fuel/technology categories, though within those countries coal and gas will in fact be cheaper than the Table above suggests.

Source: OECD/IEA NEA 2010, table 4.1.

At 5% discount rate comparative costs are as shown above. Nuclear is comfortably cheaper than coal and gas in all countries.

Uranium Will Be 2016's Best-Performing Commodity

In a bad year for metals and commodities in general, uranium has been the lone bright spot. The glowing green stuff surged almost 40% since bottoming out at $28.25 per pound in 2014. It's currently trading around $37.

Uranium was drastically oversold in the wake of the 2011 Fukushima disaster. World energy demand is set to rise 37% by 2040, according to the IEA.

Not every country is blessed with massive reserves of natural gas and coal. And the ones that are are rethinking that model in light of climate change. Carbon emissions are no longer en vogue. They pose a serious risk to our health and our environment.

Of course, green energy sources — such as solar, wind, and hydropower — aren't capable of carrying the load on their own. They're too expensive, and they simply don't have enough juice to power the planet.

Nuclear power is necessary. It's cheaper than alternative fuel sources, and it emits no carbon. In that capacity, nuclear energy is actually good for the environment. Nuclear power has avoided the release of an estimated 56 gigatonnes of CO2 since 1971. That's almost two years of total global emissions at current rates.

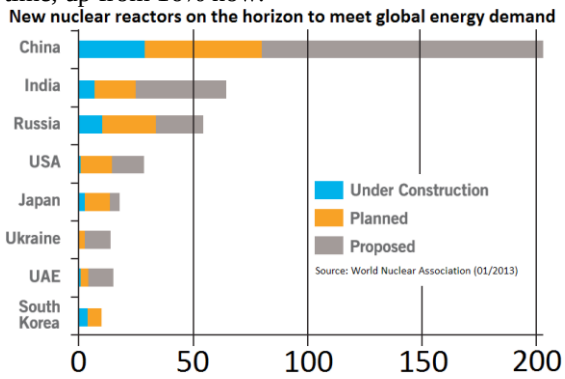
In all, more than a dozen countries get over 25% of their energy from nuclear power, with 437 nuclear reactors operating around the world. On top

of that, there are another 71 reactors under construction, 165 planned, and 315 proposed.

China is the biggest driver by far. The country currently has 17 reactors in operation, another 28 under construction, and more than 100 planned. Beijing is spending a whopping $2.4 trillion to expand its nuclear power generation by 6,600%.

India is in a similar situation. It's pledged to grow its nuclear power capacity from 5,000 megawatts to 63,000 megawatts by 2030.

And Russia aims to boost the share of electricity it gets from nuclear power to 25% in that time, up from 16% now.



Even Japan is restarting reactors. In all, 15 Japanese nuclear plants housing 25 reactors have applied for permission to resume operations. Five reactors have already been cleared. This, predictably, has led to a sharp rise in uranium demand.

Industry consulting group UXC Consulting believes uranium demand will grow 61% by 2035 to 238 million pounds, up from 173 million pounds in 2014. And that may even be lowballing it.

An early 2015 *Morningstar* report declared: We expect global uranium demand to rise 40% by 2025. Annual growth of 2.8% might not sound like a lot, but is massive for a commodity that has seen precious little demand growth since the 1980s. Consider that average annual copper demand growth of less than 3% from 2002 to 2012 was enough to drive a 336% price increase.

Mined supply of uranium will struggle to keep pace amid rising demand and falling secondary supplies. Low uranium prices since Fukushima have left the project cupboard bare. We expect a cumulative supply deficit to emerge by 2021.

These shortfalls should begin to have an impact on price negotiations in 2017 because utilities tend to secure supplies three to four years prior to actual use. We estimate prices must rise from $50 a pound to $75 a pound to encourage enough new supply.

No doubt, the five-year bear market in uranium prices was devastating for producers. Prices slid from $52 per pound to just $28.25 in June 2014. Mining the metal quickly became unprofitable, leading to mine closures and even bankruptcies. Several years ago, there were 500 companies mining uranium. Today, there are just 20. The uranium crash removed 96% of suppliers from the market. Now, 80% of the world's primary uranium supply comes from just 10 mines. And future global supply is dependent on just five newly proposed projects.

That hasn't been a problem up until this point, because the world had adequate reserves to cover for declining production. But 2016 marks a huge inflection point for the industry. This is the first year that demand will actually exceed supplies, creating a 60,000-tonne shortfall by 2018.

Over the next 10 years, we're going to see uranium prices more than double, surging from less than $40 per pound today to more than $80 per pound in just a few short years. That bull run will begin in earnest in 2016. You can expect the metal to rise to at least $50 per pound next year. That alone would be a 35% jump from current levels. After that, it's likely to hit $60 in 2017 and $70 or even $80 in 2018.

Conclusions

The recent UN Climate Talks in Paris have put forward the goal of limiting the global temperature rise to two degrees Celsius by the end of the century. This is providing a strong political base for expanding the nuclear power capacity because of the critical role that nuclear power plants play in the production of electricity without emissions of greenhouse gases. Nuclear power is also cost competitive with other forms of electricity generation, except where there is direct access to low-cost fossil fuels.

Green energy sources — such as solar, wind, and hydropower — aren't capable of carrying the load on their own. In all, more than a dozen countries get over 25% of their energy from nuclear power, with 437 nuclear reactors operating around the world. On top of that, there are another 71 reactors under construction, 165 planned, and 315 proposed.

In this context, a cumulative supply deficit is expected to emerge by 2021 while 2016 marks a huge inflection point for the industry, beeing the first year that demand will actually exceed supplies, creating a 60,000-tonne shortfall by 2018. Over the next 10 years, we're going to see uranium prices more than double, while the bull run will begin in earnest in 2016.

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PERSPECTIVES UPON CONSUMPTION AND HAPPINESS

Andreea Mihaela STROE*

Abstract

Consumers are described by economists as rational people when making a decision and when interacting with different types of framing problems. Theories explaining rational "consumer's rational behaviour" , assume that emotions can be controlled and even ignored so people be able to behave in a rational manner. An important issue was to establish the rational economic report between resources and needs and finding ways to optimize it. Rational consumer behaviour is considered to be one that ensures maximum consumer satisfaction with maximum efficiency at minimum cost. Each user asks himself at one point, if happiness is found in material goods and services. Economists would like that the consumers believe that in their attempt to explain buying behaviour. However, it is a matter of debate if psychological records tend to state otherwise. It is suggested that people buy goods and services hoping that they will substitute the factors that make them truly happy . It is debatable whether consumption is detrimental to human happiness and if the link between consumption and happiness extends to all buying experiences.

Keywords: *consumption, consumer behaviour, regret, decision, utility.*

Introduction

There are countless empirical evidence, especially research in Western developed countries, where basic needs are over-satisfied, the fact that a strong materialistic orientation is associated with well-being, or low happiness.

So were developed two concepts in psychology and other studies of happiness: the eudaimonia well-being and the hedonic well-being. Basically this distinction was still present in Greek philosophy, when Aristotle created the notion of living a virtue that leads to happiness, or otherwise said, a life consistent with the values and personal requirements that lead to happiness (hedonism, for example). Epicurus saw the happiness in maximizing pleasure and minimizing pain. Research and modern theories within both directions easily reached the conclusion that they are related and that to be happy is needed both.

Extreme materialism is basically linked to the satisfaction of needs, some artificial, resulting in maximization pleasure and self-removal. At some point appears the addiction of shopping and purchasing items and services over the natural needs of the body and soul, with the main aim of maximizing pleasure and reducing suffering. This dependence leads to repeated use and a strong orientation towards the financial side of life. This is consumerism with its satisfactions and its negative sides.

The subject of happiness has been a playground for philosophers. Since the 1970s, it has become the object of empirical research in the social sciences. In the wake of the social indicators movement, happiness became a common topic in a large scale welfare surveys, and a key topic in psychological research on mental health and in medical research on 'health related quality of life'. The starting point of the literature on economics and happiness is an empirical finding, generally referred to as the Easterlin paradox: which states that individuals and countries that have higher income results in a higher happiness, but over time income growth is not associated to higher happiness levels (Easterlin 1974). Motivated by this puzzling result, a large number of studies in the economics and happiness literature have investigated the relationship between income and happiness.[1]

The concept of happiness has been most extensively analyzed by philosophers and historians. Most philosophers and historians agree that the concept of happiness in antiquity centered around good luck and fortune, whereas contemporary Americans view happiness as something over which they have control and something that they can actively pursue. The economics of happiness or happiness economics is the quantitative and theoretical study of happiness, with its positive and negative affect, well-being, quality of life, life satisfaction and related concepts, typically combining economics with other fields such as psychology, health and sociology. It typically treats such happiness-related measures, rather than wealth, income or profit, as something to be maximized.

After all, happiness is what Jeremy Bentham was out to maximize. In the 1950s and 1960s psychologists and sociologists reopened the question of whether if happiness could be quantified.

The economist Richard Easterlin imported the happiness discussion to his discipline with a 1974 paper pointing out that the results of national

* Phd Assistant, "Nicolae Titulescu" University of Bucharest (e-mail: **stroeandreea@univnt.ro**).

[1] "Consumption and happiness-Introduction to this special issue", Lucca Stanca and Ruut Veenhoven.

happiness polls did not correlate all that well with per capital income. Rich people were generally happier than poor people in the same country, but richer countries weren't necessarily happier than poorer ones; and beyond a certain level, rises in income over time failed to increase happiness. It took quite a while for the so-called Easterlin paradox to gain much attention from other economists. But the recent emergence of behavioral economics, which takes psychological research seriously, has caused an explosion of surveys about happiness and well-being.[2]

The psychologist and behavioural economics pioneer Daniel Kahneman has been working with the economist Alan Krueger on creating "national time accounts" in the U.S. These would combine time-use surveys conducted by the Bureau of Labor Statistics since 2003 with measures of economic value and maybe even happiness.

Content

Research in happiness economics has focused mainly on the effects of income and employment, that is, on how much and in what way money is earned. As yet, there has been relatively little interest in the effects on happiness of how earnings are spent.

In modern multiple-choice society we face several major consumer choices, such as when we buy a house, a car, or a life-insurance. Expectations about happiness play a key role in such decisions. People who spend a large part of their income on a spacious house typically expect that life will be more satisfying in a big house.

On the other hand, predictions of future happiness appear to be subject to many debates. Kahneman and Thaler (2006) distinguished between *expected utility* and *experienced utility*, the latter being the ultimate effect on happiness. The concept of mis-predicting utility, describes the loss of happiness.

The need to consume more and more can be also induced emotionally as a manipulative marketing strategy. Consumers are described by economists as rational people in the decisions they make and how they interact with different types of consumer. Theories explaining "consumer's rational behaviour " , assuming that emotions can be controlled and even ignored in order that people be able to behave in a rational manner. Some researchers believe that emotions do not perform a real function therefore their impact on consumer decision should not be taken into account. However, many other researchers are trying to prove the serious role of emotions in shaping buying decisions (Damasio , 1994). Thus , emotions cannot always be controlled , and consumers do not always act in a rational manner . For example , giving people a negative feedback can decrease self-esteem and changing moods and , consequently , can be difficult to determine which of the factors has generated more choice or less correct. Related to the emotional consumer , is introduced the concept of *emotional intelligence* which refers to the ability of individuals to recognize their emotions and feelings , to understand their message and their consequences on people around . Emotional intelligence involves an interdependent relationship with other market participants.

American psychologist Daniel Goleman defines emotional intelligence through five elements[3]:

- self-awareness, which highlights the fact that individuals who are aware of their inner life are more self-confident because of their intuition and confidence and have the power to examine objectively their purchses. Thus, during the decision making, emotional consumers are able to realize the weaknesses and strengths, acting more decisively.
- motivation, reflecting a characteristic of people with high emotional intelligence , they are inclined to give up the immediate results in favor of long-term success , demonstrating greater efficiency .
- empathy, which is the ability to identify and understand the wishes and opinions of other individuals . Such people know how to capitalize on social relationships and avoids stereotypical behaviors and decisions runaway, which reduce the chance of cognitive dissonance following the acquisition of a product.
- social skills that characterize those people very accessible and with strong teamwork skills . They prefer others to support them to evolve and are inclined to communication and social interaction.

It can be seen that individual rationality must nest somewhere and its emotional and social capacities in order to tackle the modern consumer in a comprehensive perspective. The role of emotions that can induce the creation of a purchasing mood is an essential counterpoint to describe the contemporary consumer behavior that can be precisely targeting marketing manipulation by having into consideration affective aspects.

To make people experience certain feelings is something quite difficult, so researchers choose to induce moods of purchasing. Even when successfully induced emotions are to be tested, it is important that the dependent variable to be measured shortly after the experiment because emotions are conducted in a smaller timeframe.
(Isen, Clark and Schwarty, 1976).

[2] Harvard business review -The economics of well-being, febr. 2012.
[3] „Emotional intelligence", Daniel Goleman, ed. Curtea Veche, 2008.

Two particular areas demonstrates the important role of emotions in how the consumer processes the information and how they have selective attention and recall. Both show that emotions are an integral part when it comes to understanding how individuals act when their attention is influenced by certain factors. Most economists want to know what drives some consumers to focus more on products than others and whether specific product attributes their attention more than others. Perhaps the feeling it appears at some point in the acquisition process can be explained by observing consumer behavior.

In a study conducted by Bower, Gillian, Montiero (1981), it was revealed that learning selective state can be caused. In a study, participants were given a good or a bad state of hypnosis and then were asked to read the answers in some psychiatric interviews. Those with a sense of well focused mood have recalled a number of positive facts, those with a bad one remembered only negative facts. Therefore, the study shows that emotions triggered by subconscious experiences can divert focus or information which are imprinted in the memory. An explanation should be provided that the material is more congruent with the mood that people are more likely to remember. (Bower, Cohen 1982).

Other research supports the idea that the state of mind may influence people in the leading of their attention. Participants were given one task of generating a certain state of joy or sorrow. After generating state, they were asked to evaluate a piece of clothing with certain attributes. The results demonstrated that participants pay more attention to information that matched the feelings experienced then, although these had no connection with the garment. So emotions may play a role in how much attention is given to certain information about a product unless the information is similar with the state of mind of the evaluator. These emotional states can have a significant effect on the purchasing decision. Emotional reactions precede and are independent of cognitive reasoning. When confronted with services and products to choose from, consumers analyze how they perceive stimuli which are exposed to (Schwarz, 1990).

Heuristic "how this makes me feel" can be used as a basis for making a judgment. Variables are affecting consumer decision, even if the way these are felt do not have a direct link with the decision. It is important that the mood of consumers to be a good one when deciding on what they consume, otherwise they will end up associating a product with their negative status and, consequently, will evaluate the product in a disadvantageous way. Individuals with a positive mood tend to assess stimuli in a more favorable manner. However, positive emotions can influence the very least a very familiar stimulus because consumers are guided by previous assessments that are already part of their mental schema. For example, if a consumer is experiencing anxiety, it is less likely to participate in a risky buying action therefore will buy something that will guarantee him benefits and safety.

Regarding the attitude to risk, you should catalog the status of consumers into two types: those who are willing to take risks when they have a good mood, excepting when the chances of loss are small and those who are not willing to accept if the chance of risk is high. This is due to the desire to preserve a good feeling that would have altered the eventual loss. Unfortunately, researchers studied the people's willingness to accept a risk in adverse conditions, has not reached the same documentation as those regarding the impact of positive states. Some suggest that negative moods may increase the chance for individuals to accept the risk (Leith, Baumeister, 1996), while others have found that negative emotions are making people more risk averse. It cannot be assumed that all negative emotions now generates the same results, however, one can distinguish between different types of negative emotions

For this purpose has been achieved Zellmann theory of emotions that is based on the idea that emotions can be transferred from one stimulus to another, fact which is known as emotional transfer. There are four aspects of emotions:

38. The stimulus can augment positive or negative emotion ;
39. People tend not to observe small changes in stimulus ;
40. Normally , people assume that what it is known has a single cause ;
41. Perceived external stimuli tend to disappear more quickly than psychological ones.

The third and fourth parts of emotions indicates that there is a very small window of opportunity, where emotions are transferred from one stimulus to another. Individuals assume that there is something particular in emotions that stimulates the buyer therefore it is outlined that this will produce a very small transfer emotionally, and once the stimulus decreases, it will not be long until there will be nothing left to transfer.

So the best time to create an emotional transfer that could result in a bill of sale is between two states of concentration on a single stimulus. This theory can be used in particular for media planning implications or programming when the commercials are put in the air.

Observing the decision, taking into account all factors that influence the market, the consumer feels a greater or lesser satisfaction after the product purchase, the utility minimizes the opportunity cost of choosing and regret may appear in the Post Review stage of the decisional process. It has been analyzed how psychological factors affect the

revealed preferences and how individually utility is felt the as the ultimate goal of the acquisition (is the resentment of pleasure from meeting the need? so what was the utility of the buying decision). It should also be examined how behavioural economics improvements in terms of the classic explanation of the utility consumer , thus complement economic vision with psychological issues related to consumer decision .

On the other hand, another issue regarding the consumption and the happiness is the regret problem that can occur after the purchasing is made.

This is to say that the happiness and the experienced utility can be diminished by the feeling of regret that appears after the consumer buys the product.

There are two types of regret*: a priori regret* and *post-decision regret*. The first type of regret appears before the decision is made, having into consideration the alternatives that lay in front of the consumer. The feeling that one can make a bad decision can paralyse the buying decision having the prospective of a negative post-acquisition experience.

The post-decision regret appears after the purchase is made, so the buyer feels unmet with the chosen alternative. If the purchases make consumers happier or not is demonstrated by the kind of activities that are studied regarding consumer behaviour. There are different levels of happiness, which make your life happier as a whole or only momentarily, which are related to instant gratification or satisfaction. Overall happiness cannot be achieved by consumption.

In the above imagine (Fig.1 The fulfillment curve; Source: www.gentrichslowly.org) that illustrates the fulfillment curve, inverted U shape is made up of three parts, an ascending curve that leads to a higher level of satisfaction, a middle part and a downward curve relatively flat . Great satisfaction is obtained after a number of options. The feeling of happiness continues to grow as consumers add more options to the consumer experience because in such way they believe will find out what they ideally want.

Conclusions

Utility function is often chosen in shaping certain preferences to economic agents. The fundamental assumption of the concept is that the "actor" is seen as a rational maximizer who aspires to make a decisions that will bring the greatest usefulness possible. This is the concept of happiness in the economic perspective of the consumer behaviour, but as we observed the utility can be influenced by emotional factors and the rationality of the economic agent can be altered.

Consumption is a complex process that depends on many factors. The complexity of the buying decision is linked largely to the complexity of consumer needs. Thus today's consumer is no longer satisfied, generally are covered some basic needs, but the quality and social status. Such as rationality purchasing decisions must be analyzed in terms of these factors. Also rationality of unplanned purchase of products based on impulse, depends very much on the reasons that led the consumer to act in this way.

Consumer behavior remains a tense area in the human development research and it is a matter of debate primarily in economic terms, in terms of rational agents seeking the best alternatives and taking the best decision, but also psychologically, revealing motivations that violates this principle of rationality and that reflects and explains, in an appropriate manner, the contemporary economic life meaning.

In other words, research suggests that the decision maker behaves as a rational individual in most cases, but for a proper analysis of attitudes and mechanisms of decision consumption, there must be considered limited situations that can be influenced by subjective issues.

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SOCIAL MEDIA – VITAL INSTRUMENT IN GAINING CONSUMERS CONFIDENCE

Mirela-Cristina VOICU[*]

Abstract

Given that, currently, the consumer has become more demanding and organizations face some of the greatest challenges due to the economic climate of recent years, the need to build and cultivate strong relationships has become vital not only for the company's success but also for its survival. And solid relationships are built over time through confidence. Trust is one of the most important elements in the process of purchasing and consumer loyalty; it is difficult to obtain but easy to lose. Companies that are enjoying a high degree of confidence benefit from best quotations for their shares, higher profits and a better retention of the best employees. The effects of the lack of confidence are obvious (unsatisfied consumers, lost sales) and very expensive for the company. In this context, through the following paper we seek to bring more understanding on how a company can gain the confidence of consumers given that the forms of communication that consumers prefer and that are gaining momentum currently, are taking place online, especially in the social media.

Keywords: *social marketing, consumers trust, social media, conversational marketing, consumer behavior.*

1. Introduction

If in the past the consumers were more easily satisfied, now they have become increasingly more demanding. It's not so surprising given that the current consumers have multiple choices, most often plan their purchases without feeling the pressure of time, and thanks to the Internet, the desired products are just a click away. On the other hand, organizations face some of the biggest challenges arising from the economic climate of recent years. In this context it is appropriate to build and nurture solid relationships, primarily with consumers, vital not only to the success of the company but also for its survival. But solid relationships are built over time, earning consumers trust.

Trust is a critical issue in any type of relationship because a relationship that is not based on trust is not really a relationship. The same applies to the case of the company's relationship with the consumer. Trust is one of the most important elements in the process of acquisition and customer loyalty; it is difficult to attain but easy to lose.

While many parts of a business can be measured, it is difficult to measure gained confidence. We can see however that companies who are enjoying a high degree of confidence benefit from best quotations for their shares, higher profits and a better retention of the best employees. The effects of the lack of confidence are obvious (unsatisfied consumers, lost sales) and very expensive for the company.

Considering the above, through the following paper we seek to bring more understanding on how a company can gain the confidence of consumers given that the forms of communication that consumers prefer and that are gaining momentum currently, are taking place online, especially in the social media.

2. What is consumers trust and what are consumers trusting?

According to the Dictionary of the Romanian Language, trust means "to put basis on the honor, on someone's sincerity; sense of security towards someone's honesty, good faith or sincerity; to count on someone or something"[1].

How can this concept be translated in the enterprise-customer relationship? Which are the characteristics of a company that benefit from consumer confidence? The answer to these questions is more complex in relation to the concept of trust that is defined above.

We can affirm that a company that won consumers trust is regarded as:

- a moral enterprise, meaning that it complies with the law and is correct;
- a company that cares about its customers;
- the company's products are as advertised;
- the information conveyed by the company is accurate, complete and impartial. It should be considered that consumers will not feel the acute need to look for alternatives when they are trusting the information and products provided by the company;
- the company's products and/or services are of good quality;
- the company takes into account the consumers

[*] Lecturer PhD, Faculty of Economic Sciences, „Nicolae Titulescu" University of Bucharest (e-mail: **voicu.cristina.m@gmail.com**).

[1] *Dictionary of the Romanian Language*, 2009, 2nd edition revised and enlarged, Romanian Academy, „Iorgu Iordan - Alexandru Rosetti" Institute of Linguistics, Univers Enciclopedic Publishing House.

interests.

On the other hand, consumers that don't have confidence in a company, are suspicious over its statements and intentions, are verifying from several sources the information provided by it, are giving up more easily on purchasing the company's products and/or services, are deciding to hide or refuse to provide personal information and are telling others about their negative experience with the company.

Conventional wisdom argues that confidence in a brand is rooted in the quality and innovation of company's products. These two attributes are extremely important, but they represent only a small part of a multitude of attributes that determine the confidence in a brand, covering an area exceeding the company's commitment, the integrity of its products and services, its purpose and conducted operations. Although, successful companies have placed in the center of their activity the quality and innovation of products, growing brands have recognized the advantages of listening to customers needs and feedback, adopting responsible measures in solving a problem or crisis and creating programs with a positive impact on the local community.

Also, it is already known that commercial messages are regarded with increasingly more skepticism by consumers; currently they are turning their attention toward collective wisdom and experience of their friends and colleagues regarding products, brands or companies on the market. When people are talking with pleasure and willingly about a product or service, it significantly contributes to increasing confidence in that product/service. This is also reflected by studies in the field. According to data from Forrester Research, 70% of consumers have confindence in brands recommended by friends, and only 10% trust those that are the subject of company's promotion[2].

And where are people currently sharing information if not, most often, online! Word-of-mouth, or „buzz marketing" gained a very high credibility among consumers and thus contributes to increasing the credibility of an enterprise. The internet, through e-mail and its vast and accessible information repository, websites, search engines, thanks to millions of forums, blogs, lifestyle websites, product rating, price comparisons or special offers websites, 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 products, brands or companies. It is much cheaper to get good references online, than offline. A positive online presence can add extra value to company's products and services and also extra confidence in its brand.

3. How to build trust using the online environment?

First of all, there are several premises from which the company should begin in order to get a good start in the online environment. Thus, in online environment the company must meet the following requirements underlying an activity whose purpose is gaining the consumers' trust:

- *Online presence.* The online environment has acquired an unprecedented spread that cannot be ignored by any company. Ignoring the power of this tool is of course an alternative, but not a smart one. On the other hand, the company's choice to not actively participate in the online environment does not mean a total lack of its presence in this environment given the fact that you can not prevent people from discussing and sharing. In these circumstances, the viable alternative for a company is to make its presence felt in online and to create from it one of the pillars on which to build consumer confidence in the company. Creating a professional website, a good use of Google Adwords, SEO (Search Engine Optimization), the company's presence on information aggregators sites and in online media are all tools that provide an active presence of the company in the online environment. Initiallly, trust is built from facts and concrete examples, verifiable; then, trust is developed in time. Thus, a site with a professional design or appropriate to company's promoted message, a clear communication of company's values and objectives, the presence of contact data, a detailed presentation of products etc., represents the first step in a company's online activity[3] . In this context, its also very useful and meaningful the use of visual content (photos and videos) that keep the consumers' attention focused on the company's blogs or other online content for a longer time.
- *Accessibility*. Along with a good online presence, the company must ensure the consumer about its availability, placing and popularizing its contact data everywhere online. Also, the company's presence on social networks should be regularly harmonized and updated. Accessibility should also be understood in terms of accessibility of the consumer. In this case, the company must have the possibility to contact customers via email, phone, and even through social networks.
- *Encourage customer reviews*. Increasingly more consumers turn to various specialized forums and websites, to guide themselves in making their

[2] Wasserman, T., 2013, *Report: 70% of Consumers Trust Brand Recommendations From Friends*, Mashable, 21 March 2013, http://mashable.com/2013/03/21/70-percent-brand-recommendations-friends/

[3] Năstase, T., *How to grow the confidence in a brand using the Internet: main directions*, Traian Năstase Blog, accessed January 25, 2016, http://www.traiannastase.ro/cum-sa-cresti-increderea-intr-un-brand-prin-internet-directii-principale/

purchasing decisions. In these circumstances it is important for the company to encourage customers to post reviews on such forums in order to build a strong and credible presence for the enterprise.

− *Transparency* is another asset of a company that aims to gain consumer confidence. The company must ensure that the public can get an idea about its work and the areas in which it excels. Also, the transparency must be maintained in the event of errors. Any perception related to a secret, concealment or dishonesty will undermine public confidence. In case of a mistake, it is recommended that the company constantly share the actions that it undertakes to correct it and to track the results of those actions.

− *Exposure on the website of the company's professional affiliations*. Professional affiliations speak for themselves and its necessary for people to know about them. If the company is a member of an important organization or association in the field, it is good that this information be published on the website.

− *Developing a privacy policy*. Many consumers are worried about providing personal data. A strong privacy policy for the company's website can bring peace and comfort to customers and can win their trust.

4. Gaining trust through social media

We can easily observe that social networks, blogs and other online communities seem to thrive everywhere around us. People use social networks as a primary source for an extremely broad range of information, a phenomenon that keeps gaining momentum. Apart from social networks, people are used to communicate on forums, too; the people they meet there are strangers, but they share the same passions and interests. Online, people communicate sincerely, they share their thoughts openly, and the barrier between an introvert and an extrovert keeps getting slimmer. At the same time, "blogging", as an activity has become widespread and keeps growing. It hasn't been long since social media has overtaken email at the top of the online activities, placing itself first at this moment, an assertion that will surely remain valid in the foreseeable future, considering this field's development.

We can realize the scale of the social media phenomenon if we consider the statements of Mark Zuckerberg, founder of Facebook, made in early 2009, in which he equivalented Facebook to a nation claiming that it was the eighth largest country in the world. Though, since 2015 Facebook, with its 1.55 billion users has exceeded the previous estimation and it is now the largest country in the world, surpassing China and India.

It is certainly appropriate to ask ourselves whether Romanians may represent a population of interest in this area. According to "Intel UltraYou" study, commissioned by Intel and conducted by Mercury Research, Romanians spend on average 31 minutes a day to update their social networks accounts, surpassing the European average in this field. Among the existing social networks, Romanians prefer Facebook, which is the most popular network in our country, followed by Hi5, Google+, Netlog and Twitter. 39% of them post at least once a day on these channels and postings consists mainly of photos (69% of the respondents), while 66% of the respondents post opinions, and 62% various information[4]. On the other hand, according to Facebrands, in Romania there are approximately 8.3 million Facebook users[5].

All these lead us to conclude that in the online environment, social media may be the most important instrument through which a company can earn consumer confidence. Before making any decision regarding this field, it is good to understand what social media is and which are the types of applications that can be used in the direction that we want.

In the selection process of the environment in which the company wants to make its presence felt it is important to consider that social media refers to several categories of applications. These applications can be categorized by taking into account the abundance of media/social presence and the level of user self-presentation as is shown in the following table:

Table 1. Classification of social media applications by media abundance/social presence and level of user self-presentation/self-disclosure

		Media abundance/Social presence		
		Low	*Medium*	*High*
Level of user self-presentation/ self-discosure	*igh*	Blogs	Social networking sites (e.g. Facebook)	Virtual social worlds (e.g. Second Life)
	ow	Collaborative projects (e.g. Wikipedia)	Content communities (e.g. YouTube, Flickr, Slideshare)	Virtual game worlds (e.g. World of Warcraft)

Sourse: Kaplan, A.M., Haenlein, M., 2010, *Users of the world, unite! The challenges and opportunities of Social Media*, Business Horizons, No 53, pp. 59-68, http://www.sciencedirect.com/science/article/pii/S0007681309001232

[4] Fantaziu, I., 2012, *How much time do Romanians spend on Facebook*, evz.ro, 10 October 2012, http://www.evz.ro/detalii/stiri/Ct-stau-romnii-pe-Facebook-1004927.html

[5] FaceBrands.ro – Romanian brands on Facebook, accessed February 1, 2016, http://facebrands.ro/

From the table above it can be observed that blogs and collaborative projects have the lowest levels of media abundance and social presence, because these types of applications are most often based on text, allowing a relatively limited exchange between users. At the next level of media abundance and social presence of users are content communities and social networking sites; in addition to text-based communication, these applications are allowing users to share images, videos and other forms of media. At the highest level of media abundance and social presence of users, are virtual social and game worlds that are trying to replicate in a virtual environment all dimensions of a face-to-face interaction.

On the other hand, from the point of view of the second criterion used in classifying social media applications - the level of user self-presentation/self-disclosure - blogs are having a much higher level of self-presentation than collaborative projects, the latter being focused on specific areas of content. Also, the social networking sites enable users to self-disclose on a much higher level compared to communities of content and virtual social worlds involve a high level of self-disclosure in relation to the virtual game worlds, these latter being driven by strict rules that oblige users to behave in a certain way (for example, as warriors in a fantastic imaginary realm).

Unfortunately no company can use all social media applications, given that a short census in this area will reveal that there are dozens if not hundreds of such applications, and the number is growing steadily, taking also into account that one of the key requirements of a company's activity in social media is to be active. Choosing the most appropriate social media applications depends primarily on the target group of the company's actions. On one hand, each application attracts a certain group of people, so enterprises need to be active wherever their customers are present. On the other hand, in order to ensure an effective communication, the company should focus on those applications that have specific characteristics.

Once it has decided upon the social media applications through which the company will relate with consumers, it will decide on the orientation of its efforts to create or purchase those apps. In some cases, the use of an existing social media application is indicated, offering various advantages such as the application popularity and the existence of an already created user base. Also, a social media application is more appealing to potential users the higher the number of registered users. In other cases, the required application may not be available, in which case it must be created. For example, Fujifilm Japan has launched its own social network aimed at creating a community of photo enthusiasts and Sears in collaboration with MTV created a social network on the subject of purchases at the beginning of the school year.

Regardless of the company's decision to purchase and/or create social media applications, it is particularly important for it to assimilate the basic idea regarding social media activity - this activity should aim rather participation, sharing and collaboration than direct publicity and sale.

Also, whether the company chooses to use different social media applications or set of applications within the same category for the widest action range possible, it is very important to ensure that all its social media activities follow the same guideline. We must not forget that one of the objectives of an effective communication aims at reducing ambiguity and uncertainty and when using a variety of communication channels, nothing can be more confusing to the consumer than contradictory messages sent through various channels. At the same time, integration should be considered both in the case of using different types of social media applications and the relationship between social media and traditional media. In the eyes of the consumer all this is the emanation of a single entity - the company.

In addition to those mentioned, social media can contribute at increasing the company's credibility by pursuing the following directions:

- ***Using social media in marketing research.*** In a similar way to that in which people pursue its entire activity, the company must pursue in turn the interests of individuals and identify consumers wishes, preferences and perception of company's brand. On the other hand, defining the profile of the consumer with whom the company wants to converse is one of the most important steps in the process of building trust. How will the company manage to have a relationship with an unknown consumer? Moreover, nobody wants to connect with boring people. As such, the company's preoccupations must overcome the self-presentation attitude of the company and of its products and in order to achieve this it is necessary to use marketing research. To have a true picture of consumer profile means to go much deeper than to select few demographic variables such as age or income. Thus, the enterprise must find what the consumers would like to hear, what they would like to talk about, what would they consider as interesting, enjoyable and valuable, what are their likes and dislikes, hobbies and passions. This will enable the company to understand the consumer at another level, and therefore to build a long lasting relationship with him.

In addition, the company must constantly supervise its online reputation and take prompt action when faced with problems such as negative comments regarding the company and its products.

In this regard, there are several instruments to be used and through which the company is notified when it is mentioned in the online environment: Google Alert, Mention, TalkWalker, Social Mention.

- ***Socializing with fans and providing quality services.*** In order to provide quality services the company must exploit every opportunity it has to learn customers opinion about its products/services and adapt its offer accordingly. Customer presence in social media is such an opportunity. On the other hand, being always available to customers, constantly answering their questions and concerns and solving their problems through social media is the right attitude that contributes to creating both among fans and all online users the image of a company which not only cares for its current and potential customers but also for people in general.

Also, by using data collected from social media a quite specific consumer profile can be created, which will enable the company not only to turn to the appropriate type of social media platform but also to properly convey its messages. Conversations will be based in this case on collected information regarding consumers likes and dislikes, hobbies and passions. This will lead the consumer to feel connected at another level with the company and will make it the first option that the consumer will choose whenever he will need the kind of product that the company is offering.

On the other hand, the company's credibility is increasing when it proves that it values consumer feed-back and that their desires have a high impact on the development of the company's products. In this way, the company is showing that it is open to changes, which will lead to the involvement of as many consumers as possible in making better products.

At the same time, the company must have an active attitude in its desire to develop a good relationship with consumers. Social media requires a permanent exchange of information and continuous interaction. In this respect, it is necessary to ensure fresh content and initiate constant discussions with consumers. Also, in order to facilitate the „buzz marketing", 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. The company must be aware that the efforts to win consumers trust through social media should be oriented beyond the boundary drawn by the answers to negative comments and promotion of company's products. Social media involves less of an activity that underscores the company's products superiority and more an activity that is engaging consumers in a open and active conversation. The company must consider the fact that social media users are keen to actively engage and become both consumers and producers of information.

- ***Constant supervision of competition.*** It is well known that in a company the information about the competition must have a constant flow. With only a glimpse over competitors' social media platforms, the company can find important information on the marketing strategies they implement.
- ***Positioning the company as an expert in the field.*** The company will position itself as a valuable resource that the consumer will want to use by disseminating in social media interesting and useful information, advice and answers to questions about their area of activity.

Any company should be aware of word-of-mouth power. Based on studies' results, experts have concluded that a friendly recommendation wins four customers for a product or service, and a "negative review" can remove up to 14 potential customers for a product/service that are present in the reviewer's circle of friends and acquaintances. Word-of-mouth propagation has taken on an unprecedented scale in the social media era.

5. Measuring the company's level of trust gained through online environment

After all the efforts to gain additional confidence among consumers through the online environment, the company will want to determine the effectiveness of its activity in this area. Thus, the most complex indicator of the level of confidence gained by a company is the level of ***members involvement***, be it an online community, a social network, a social community or a political party. There are a multitude of online tools that count likes, tweets, number of visitors, but fail to provide any information about the involvement of individuals, although often these indicators are regarded as such.

Consumer involvement is important because it means action, consistency, conviction, accountability, and ultimately confidence given to the company. Online, the intensity of user involvement in a community may vary from moderate interest to active attention and even fascination.

The level of an individual's involvement in an online community can be quantified according to the following criteria[6]:

- creating an account;
- number of visits in a given period;
- number of posts in the community;
- number of polls attended in a given period;
- interaction with other community members;
- response to community newsletters;

[6] *How to measure the involvement of online communities members?*, accessed February 1, 2016, eResearch Corp, http://www.eresearch.ro/

- its posts popularity among other users;
- intense activity during online meetings.

Also, the number of comments about the company or its products, number of sharings, conversion rate (the rate of visitors who make a particular desired action when visiting the website, such as purchasing a product), the number of visitors per conversion (measures the number of visitors who make a desired action when visiting the website, such as downloading a file, making a purchase, donation of money or signing a cause), the average length of a visit, visitor loyalty on site (measures the number of visitors who are constantly and frequently accessing the company's page; the frequency and consistency of visits can be estimated based on the number of visits per visitor from a certain period of time), consumer sentiment etc. are indicators which contribute at determining the confidence level the company managed to gain through online environment.

Only by using a set of criteria and indicators to express consumers interaction, engagement and commitment regarding the company's activity, we can get closer at obtaining a complete image about the level of confidence that the company gained through its social media activity.

3. Conclusions

Given that, currently, the consumer has become more demanding and organizations face some of the greatest challenges due to the economic climate of recent years, the need to build and cultivate strong relationships has become vital not only for the company's success but also for its survival. And solid relationships are built over time by earning consumers trust.

Trust is one of the most important elements in the process of acquisition and customer loyalty; it is difficult to achieve but easy to lose. The benefits of the companies' that are enjoying a high degree of confidence are well known: higher profits, loyal consumers, better quotations for company's shares, better retention of the best employees etc. The effects of the lack of confidence are obvious (unsatisfied consumers, lost sales) and very expensive for the company.

Word-of-mouth or „buzz marketing" came to gain a very high credibility among consumers and thus to contribute at increasing the credibility of an enterprise. The internet, through e-mail and its vast and accessible information repository, websites, search engines, thanks to millions of forums, blogs, lifestyle websites, product rating, price comparisons or special offers websites, podcasts and other digital platforms, have opened significant opportunities to spreading a credible „word-of-mouse" (buzz facilitated by Internet) regarding products, brands or companies. It is much cheaper to get good references online, than offline. A positive online presence can add extra value to company's products and services and also extra confidence in its brand.

The starting point of an online activity leading to consumer confidence, is to ensure the company's presence in the online environment through a professional website, a good use of Google Adwords, SEO (Search Engine Optimization), ensuring the company's presence on information aggregators sites and in online media, and using visual content (photos and videos) that keep the consumers' attention on company's blogs or other online content for a longer time. At the same time, the company must ensure its availability by popularizing contact data online, harmonize and update its presence on social networks and create the possibility of contacting customers either through email, phone or through social networks. On the other hand, given that increasingly more consumers are turning to various forums and specialized websites for guidance in making their purchasing decisions, the company must encourage customers to post reviews on these forums in order to build a strong and credible presence for the enterprise. Also, transparency is another "brick" to be placed in the foundation on which the company is building consumer confidence. Transparency should be ensured especially if the company commits any mistake. In addition, mentioning the company's professional affiliations on its website and the development of a privacy policy to bring peace and comfort to customers come to complete all the other measures meant to gain their confidence.

Online, social media is a major tool through which the company can earn consumers' trust. Regarding the company's activity in this area, the basic principle that must be assimilated considers participation, sharing and collaboration, rather than advertising and sale. In addition, the company should focus its efforts towards the use of social media applications in identifying consumers desires, preferences and perception about the company and the profile of those with which the company wants to have a conversation in social media. The company must find out what the consumers would like to hear, what they would like to talk about, what would they consider as interesting, enjoyable and valuable, what are their likes and dislikes, hobbies and passions. This will enable the company to understand the consumer at another level, and therefore to build a long lasting relationship with him. Conversations based on what the consumers like, their hobbies and passions, will determine them to feel more connected with the company. The latter will become the first option that the consumers will choose whenever they will need the kind of product that the company is offering.

Also, an enterprise that is always available to customers, that constantly answers their questions

and concerns and solve their problems, will build a positive image, of a company that cares not only for its current and potential customers but also for people in general. In addition, the company's credibility is increasing when it proves that it values consumer feed-back and that their desires have a high impact on the development of the company's products. Also, the company must facilitate the „buzz marketing" by creating credible messages, stories and websites for their products, that should be convincing, interesting and/or entertaining, so that consumers should be driven to seek information and pass it on to friends and family.

In its efforts to win consumers trust, the company must be aware that social media involves less of an activity that underscores the superiority of the company's products over the competition and more an activity that is engaging consumers in a open and active conversation, given the fact that social media users are keen to actively engage and become both consumers and producers of information. In addition, the company will position itself as a valuable resource that the consumer will want to use by disseminating in social media interesting and useful information, advice and answers to questions about their area of activity.

After all the efforts to gain additional confidence among consumers through the online environment, the company will want to determine the effectiveness of its activity in this area. The most complex indicator of the level of confidence gained by a company is the level of members' involvement. Consumer involvement is important because it means action, consistency, conviction, accountability, and ultimately confidence given to the company. Online, the intensity of user involvement in a community may vary from moderate interest to active attention and even fascination.

A complete picture on the level of confidence that the company has gained can only be achieved by using a set of criteria and indicators to express consumers interaction, engagement and commitment regarding the company's activity.

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TIME MANAGEMENT FOR ACCOUNTANTS

Cristina Elena BIGIOI[*]
Adriana-Mihaela IONESCU[**]

Abstract

Time is money. Every accountant knows that. In our country, the taxes are changing frequently. The accountants have to update their fiscal knowledge. The purpose of the article is to find how the accountants manage their time, taking into consideration the number of fiscal declarations and the fiscal changes. In this article we present some ways to improve time management for accountants.

Keywords: *management, time, accountant, schedule, prioritization.*

1. Introduction

In a period in which people want to make as many as possible, time is important. It is not about how to do to have more time to accomplish everything you want to do, but how well you use the time available to perform tasks. It's about efficiency.

By the present study we aim to identify how accountants manage their time, which factors are an impediment to meeting deadlines, who are "thieves of time" for them.

An accountant needs "tools" and "raw material" to do the work for which he is paid. The tools are accounting and tax knowledge, knowledge that the accountant needs to update continuously, given the regulatory changes more frequent in our country.

The raw material is provided by the client, sometimes in a timely manner, often late. A third important element is the deadline. So accountant must process documents submitted in compliance with the deadline for fiscal declarations. In these conditions accountant ability to manage their time becomes important.

To meet the goals of the study, the authors will get information from people working in the accounting field.

The need to increase productivity and reduce costs resulted in increasing the workload of a person. At the same time it increased stress levels.

In these conditions it has developed the idea to use time more efficiently to obtain a favourable ratio between work and personal life.

To improve the ability to manage free time, employees have attended Time Management trainings.

Green and Skinner[1] obtained evidence to suggest that training in time management was effective from the viewpoint of the participants and from the perspective of their managers, it does have a positive impact for the majority of participants.

The study undertaken by Hall and Hursch[2] has demonstrated that by following a course in time management, participants were able to increase time allocated to high priority tasks, leading to increased satisfaction and productivity.

Adebisi[3] concluded that there is a direct relationship between time management and business performance, encouraging business managers to use time management practices as a strategy to survive the competition.

Time management has proved a panacea and not a placebo effect for organizational effectiveness. Time management allows increased productivity, easier scheduling of tasks in order to achieve goals.[4]

2. Content

1.1 What is time management?

How important is the time? What speed has it? The answer varies from person to person. For an examinee, time passes too quickly during

[*] Lecturer, PhD, Faculty of Entrepreneurship, Business Engineering and Management, "Politehnica" University of Bucharest (e-mail: **cristinaedumitru@gmail.com**).

[**] Lecturer, PhD, Faculty of Entrepreneurship, Business Engineering and Management, "Politehnica" University of Bucharest (e-mail: **amihaela.ionescu@gmail.com**).

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[3] JF Adebisi, „Time management practices and its effect on business performance", Canadian Social Science, vol 9, 2013, http://www.cscanada.net/index.php/css/article/view/j.css.1923669720130901.2419

[4] L.B. Ojo, D.A. Olaniyan, "Effective time management in organization panacea or placebo", The social Scinces 3(6), 2008.

examination. In the waiting room of a hospital, time flows too slowly.

What is time? Ojo[5] enumerates the characteristics of time:

- it is an unique resource
- it is the most scarce resource from universe
- it cannot be replaced
- it cannot be accumulated like money
- it has no button on / off like a machine
- time is running no matter what happens

More important than time is how we use it. Whatever is the length of the time, the science of its use makes it long[6].

The time management is defined as the analysis of how working hours are spent and the prioritization of tasks in order to maximize personal efficiency in the workplace[7].

The time management is a vehicle that can carry you from wherever you are to wherever you want to go[8].

The time management is not about getting more things done in a day. It's about getting the things that matter most done[9].

1.2. Time management for accountants

In an accounting department, time must be managed very well. Accountants stress level is high in the period 20-25 of the month, given reporting period for fiscal declarations.

For those working in the accounting department of a company things are simpler. They have daily access to documents.

They work daily, so every day is a chance to reduce the workload assigned for last period, which determines the reduction of the degree of stress.

An accountant in an accounting cabinet can have as clients several entities. Efficient use of time depends on the interval of the month in which the accountant receives financial documents in order to process the information.

So often it happens that workload is very high in the last period of time, increasing stress levels considerably. It is recommended to negotiate the delivery of documents in the first 3 days of the month.

Often it happens to be necessary additional information in order to record a document (sick leave for an employee to determine the allowance for sick leave, decision to close a contract for the correct calculation of wages, a labor contract for inclusion in the payroll of the new employee, contract for an invoice etc). In these cases information may be requested by email or instant messenger programs, but the faster the information can be obtained by phone. The condition is that the discussion does not stretch more than necessary.

Every day, before finalizing the work program it is recommended to draw up a list of tasks to be performed the next day. Thus we have a clear picture of the tasks to be performed. Realizing the tasks that must be accomplished in the next period creates the opportunity to prepare and be sure you have not forgotten important items.

In the morning we have more enthusiasm, we are rested, concentration is greater, and the possibility of interruption is less.

It is the best time to complete tasks with high degree of difficulty or requiring more attention. This process eliminates the stress of a task to be done today.

Each has its own rhythm to be considered to get the highest efficiency. Some people have efficiency the evening, others in the early morning hours.

For completing tasks, prioritizing plays important role. Also the difference between urgent tasks and important tasks must be known. If possible, delegate tasks.

It states that a large share of our results come from a small share the effort. It is important to identify and having regard to solving tasks that produce the greatest results.

Thus, urgent and important tasks take priority. The urgent, but with small importance must be delegated to someone else. For important, but with small urgency tasks, it is established a moment for to be resolved. A task with small importance and small urgency can be removed from the list.

Tasks that require a low consumption of effort can accomplish when the fatigue is high or when the concentration is low. Major projects will be solved when we have the best efficiency.

Taking over a new task must be accompanied by an analysis of the time needed to resolve them and the effect obtained by solving task.

The work of an accountant requires attention. But most of the time, the concentration is interrupted by external factors even several times a day.

A period of uninterrupted work away from email and telephone is very effective and can improve your productivity for the whole day. It is better to fix a timeframe in which work is permitted interruption (for example it sets a time frame in which customers can call to resolve problems).

During a day should be set moments of rest that allow battery charging and maintaining attention. These moments are planned. Conversation or coffee breaks should be monitored to avoid becoming too frequent or too long.

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[5] L.B. Ojo, D.A. Olaniyan, "Effective time management in organization panacea or placebo", The social Scinces 3(6), 2008.
[6] Scott Adams, cited in "Citate despre timp", available at http://asara.ro/citate-despre-timp/
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[9] L.B. Ojo, D.A. Olaniyan, "Effective time management in organization panacea or placebo", The social Scinces 3(6), 2008.

Much time is lost in finding a solution to a fiscal problem. The existence of an advisory department or person in charge of updating the tax knowledge is helpful. Thus, by having a regular intern training about fiscal updates the time required for information is reduced.

It is helpful to write down for a week which tasks have been fulfilled, how long was spent on breaks. We can identify where the most time is lost.

If the customer is charged per hour, it is necessary to quantify the time spent in favor of that client. Tracking the time show where weak areas are and help create a plan to eliminate or reduce those inefficiencies.

To be efficient, you can group similar things. For example, in certain periods of time can make phone calls, you can reply to emails.

If you find that you can not do all the tasks, it may consider the option of working with a partner in busy periods.

An organized desk reduces stress. Especially in busy days, the time spent for searching documents buried under piles of papers or in various file folders is stressful and wasted. A few minutes spent at the end of each day to put in order all the documents save you half an hour in frustration tomorrow.

Time for work and time for personal business should be separated. If work is done at home, it is better to separate workspace for personal space.

Accountants know that the last three days, the crowd at financial administration counters is very large compared to other days.

As well, the website used for online submissions is widely used during that period, resulting often it stops.

Stress is high these days, to have the certainty that submission is in legal period of time. We believe that using the last day of the accounting period is characteristic for accounting firms that have more customers, the deadline for declarations being the same.

In their case, the workload is much higher in the same period of time.

This situation can be improved. Depending on the volume of business firms, the accounting office may require delivery of documents before every weekend or during the first 3 days after completion of the month.

Often there is psychological comfort that "there is still time ... why now submit"? It is recommended that in the first days of the month to resolve situations for all companies that require allow consumption of time. Thus, in the last days of interval there will be a reduced number of statements to be submitted.

1.3. Study results

We created a questionnaire with 13 questions for people working in the accounting field, in order to identify how they manage their time.

Respondents were randomly selected and the questionnaire was sent by email. We chose to send the questionnaire so as to be received in a Friday morning, at the beginning of the month. We did this because we felt that Friday is the last day of the week, when the schedule is lighter, compared to the first day of the week. In the first days of the month, the stress level is lower, compared to the period 20-25 of the month. However, very few questionnaires were completed in next 3 days.

53 completed questionnaires were obtained. 47 of the respondents are women, 6 respondents are men. 21 people work in an accounting office and 32 work in an accounting department. Of all, only 5 people do not enter data into an accounting program. As experience in accounting, 27 people have experience of 1 year, 8 people have experience between 2 and 5 years, 5 people – between 5 and 10 year and 13 people have over 10 year experience. As the number of companies managed, 16 persons manage a single company, 16 persons manage 2-5 companies, 10 persons manage between 6 and 10 companies, and 11 persons manage over 10 companies.

Tasks that take time, in descending order are:

- processing of documents in an accounting program
- updating knowledge in accounting
- discussions with clients
- preparing fiscal statements
- printing fiscal statements
- other tasks (explaining the financial situation with managers, preparation of payrolls, arranging documents in folders).

7 people said they receive documents from clients in the past 5 days. The vast majority receive documents in the first 10 days of the month.

19 of the respondents who submitted statements are declaring taxes in the last 5 days. 25 do not have the task of declaring taxes.

The busiest time of the month is the period 20-25 of the month for 38 persons, followed by the period 1-15 of the month for 12 persons.

All of respondents check the email every day, but most respondents check their emails several times per hour (37 persons).

No person could say that his work is not interrupted. Most believe that their work is often interrupted (30 persons). 11 persons said that their work is interrupted all the time.

People working in an *accounting office* receive the documents mainly in the first 10 days (this is true also for those with over 10 years experience). 11 of the people working in an accounting office use the last 5 days to declare taxes. Those who manage more than 10 companies apply for the documents in the first 10 days, which is a good thing for the proper management. However, the busiest time for 90% of respondents from this category is the last interval

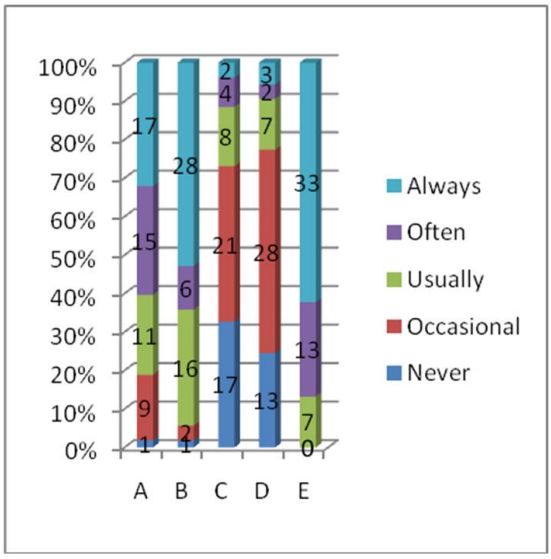
(20-25 of the month) and this period is used, too, for declare taxes. Most consider that their work is "often" interrupted or is interrupted "all the time", and they check email at least once per hour. This is due to the higher number of clients they work with, and the extended period for the receipt of documents.

The respondents working in *an accounting department* declare taxes in the last interval of the fiscal period, but most of them do not have this task (probably the declaration of taxes is outsourced). For more than half of them, the busiest time is 20-25 of the month, too. Those working within the company have the advantage of receiving documents daily. 81% of those employed in the accounting department check email several times per hour, probably because they collaborates with other departments of the company (for billing, for example). Their work is often interrupted or rarely.

Related to how the respondents manage their time (chart 1), 81% of people are accustomed to plan the daily task (to make a "to do" list), 17 person always do it. 94% of respondents prioritize daily tasks in order of importance (27 persons do it every day), knowing the difference between urgent and important tasks.

28 persons (52%) occasionally reserve time for contingency, 13 persons (24%) never take into account the possibility of an unexpected event which may affect the time available. To plan the daily rest period is not a priority for the respondents but the rest periods have their purpose, improving the performance.

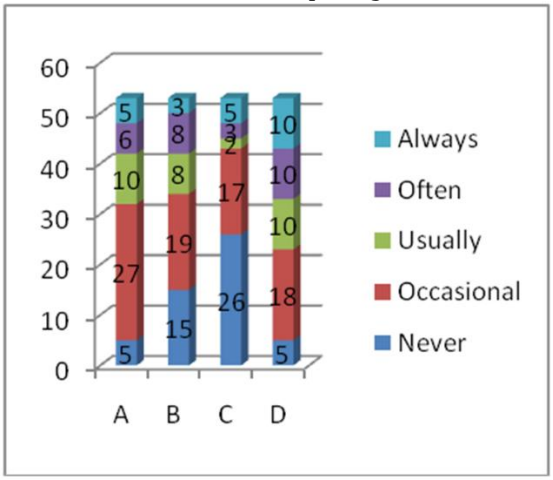
Chart 1. Planning time



A. I plan my daily tasks/ I prepare a to do list
B. I prioritize daily tasks in order of importance
C. I plan my daily rest periods
D. I reserve time for contingency.
E. I know the difference between urgent and important tasks

Related to completing tasks, the results for the next assumptions are presented in chart 2:

Chart 2. Completing tasks



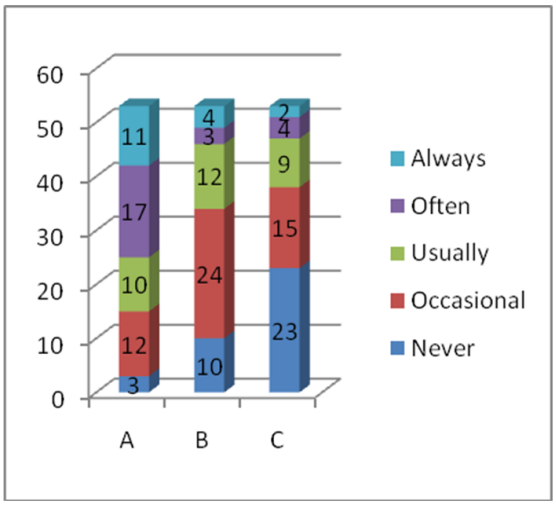
A	I postpone unpleasant things
B	I perform tasks last minute
C	I work home to finish tasks
D	I'm stressed by deadlines.

Occasionally, 27 persons postpone unpleasant things. Just 28% of respondents never perform tasks last minute.

Most respondents try to do their work during working hours.

5 persons declared that they are not stressed by deadlines; one of these persons declares taxes and have over 10 years experience. The rest of people have a different degree o stress related to deadlines. Just one respondent with over 10 years experience is always stressed by deadlines (chart 2).

Chart 3. Saving time



A	I group similar tasks (eg reply to emails, phone calls)
B	When I take a task, I verify the report result/ time invested
C	I try to delegate tasks to save time

For saving time, few respondents group similar tasks, 10 of them never verify the report between result obtained and the time invested when they take a new task.

43% of respondents never delegate tasks to save time (in accounting sometimes is impossible to delegate, especially if you are the only person capable of fulfilling that task).

3. Conclusions

Time management is important in all areas.

It was shown that people who can organize their time were able to increase time allocated to high priority tasks, leading to increased satisfaction and productivity.

For accountants, time management may reduce stress, which is generally quite high because of legislative changes and deadlines. People who completed the questionnaire try to planning time for complete the tasks. They have a planning for daily tasks; they prioritize the tasks in order of importance and try to do the work during working hours. Some of them need to appreciate the time by accepting the task whose results obtained justify the time invested.

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APPLICATION OF CASH FLOW RETURN ON INVESTMENT IN TERMS OF FINANCIAL PERFORMANCE MEASUREMENT

Kristína Jančovičová BOGNÁROVÁ*

Abstract

Value based financial performance measures are generally presented as a major improvement over the traditional performance measures. By including a company´s cost of capital in their calculation they could be applied in order to evaluate the value creating potential of a company. On the other hand, proponents of modern financial measures highlight their correlation with company´s share return. Economic value added (EVA), market value added (MVA), cash flow return on investment (CFROI) among others represent the group of modern measures of company´s financial performance. The aim of this paper is to investigate the use of CFROI as a measure of company´s financial performance. The paper outlines the calculation of this measure and also evaluates its incremental information content above selected traditional measures.

Keywords: *value based performance measurement, cash flow, cash flow return on investment, earnings, share return, economic value added, shareholder wealth.*

1. Introduction

Traditional financial performance measures are often criticised for excluding a company's cost of capital, and are therefore considered inappropriate for the evaluation of value creation. Furthermore, traditional measures calculate an accounting profit according to the accounting guidelines. As a result of these limitations of traditional measures, value based financial performance measures were developed. The major difference between the traditional and value based measures is that the value based measures include a company's cost of capital in their calculation and they attempt to calculate the economic profit, rather than the accounting profit of a company. Economic profit considers the difference between the operating profit and the cost of the capital employed in generating those profits.

Proponents present the value based measures as a major improvement over the traditional measures, and report high levels of correlation between them and share returns. A number of empirical studies investigating EVA (as the most popular value based measure) report conflicting results, and it is consequently not clear whether this value based measure is able to outperform the traditional financial performance measures in explaining the variation in share returns. There is little empirical evidence of the role of CFROI. Based on the results of one study it appears as if the value based measure $CFROI_{Margin}$ (difference between CFROI and the real cost of capital) is not able to outperform earnings in explaining the variation in market adjusted share returns. It is necessary to continue in research and bring empirical evidence of the role of CFROI in this context.

In this paper a value based financial performance measure Cash Flow Return on Investment (CFROI) is investigated. The paper also presents the results from the relative and incremental information content tests conducted for the measure CFROI. Incremental information content indicates whether one financial measure provides additional information over and above that provided by another measure. Relative information content refers to the information content of one financial measure compared to another.

2. Characteristics of the measure CFROI

The measure CFROI is associated with HOLT Value Associates which applies it in a money management context, and Boston Consulting Group (BCG) which focuses on its application in a corporate finance environment.

CFROI compares the inflation-adjusted cash flow generated by a company with the inflation-adjusted cash investment required to achieve it (Young, O´Byrne, 2011). By including the estimated lifetime of the company's depreciable assets and the expected residual value of its non-depreciable assets, an internal rate of return is calculated. This CFROI figure is then compared to the company's real cost of capital. If CFROI is less than the company's real cost of capital, additional investment would yield a negative NPV and the investment would not contribute to the creation of shareholder value. Alternatively, if the CFROI is greater than the real cost of capital an increase in investment would provide a positive NPV and shareholder value would be created.

The main characteristics of this measure are listed below:

* Ing. Mgr. Kristína Jančovičová Bognárová, PhD, Faculty of National Economy, University of Economics in Bratislava (e-mail: **kristina.jancovicova.bognarova@gmail.com**).

- The calculation of the measure is similar to that of an internal rate of return (IRR), but it should not be interpreted in the same way as an IRR.
- CFROI values are calculated for each financial year.
- Since its calculation is based on cash flows, it removes the influences of accrual accounting even more than EVA.
- The measure is inflation-adjusted.
- It focuses on the return offered to all the capital providers of the company and not only the shareholders.
- CFROI may be viewed as a return on investment (ROI). However, it is not calculated for individual projects, but rather for the company as a whole.

Calculation of CFROI

The four inputs required to calculate the measure are as follows (Madden, 1999):

42.The average life of the depreciating assets.

43.The total amount of assets (depreciating and nondepreciating assets) adjusted for inflation.

44.The inflation-adjusted cash flows generated by the assets over their lifetime.

45.The final inflation-adjusted residual value of the non-depreciating assets at the end of the asset lifetime.

The asset lifetime is the estimated average economic life of the tangible depreciating non-current assets of the company. This figure provides an indication of the remaining period over which the cash flow will be generated. It is calculated as follows[1]:

$$Asset\ life = \frac{Adjusted\ \text{tan}\ gible\ non-current\ assets}{Depreciation\ on\ \text{tan}\ gible\ non-current\ ass}$$

The inflation-adjusted total assets amount is calculated as the total of the depreciating and the non-depreciating assets. The inflation-adjusted depreciating assets amount is calculated as follows:

Current cost depreciating assets = Inflation-adjusted Tangible Non-current Assets + Construction in Progress + Inflation-adjusted Gross Leased Property + Adjusted Intangibles.

The inflation-adjusted non-depreciating assets are included in the total asset figure invested in the beginning of the period considered. At the end of the asset lifetime this value represents a cash inflow. The assets consist of:

Current cost non-depreciating assets = Monetary assets – Adjusted current liabilities + Investments and loans granted + Current cost inventories + Current cost land and improvements

The amount of inflation-adjusted gross cash flow should be a reflection of the total cash flow generated by the company's operations, and ignores the method of financing[2]. The amount is calculated as follows:

Net profit after tax
+ Depreciation and amortisation
+ Adjusted finance cost
+ Rental expense
+ / - Monetary holding gain / (loss)
- Cost of sales adjustment for replacement value of inventories
+ Net pension expense
+ Minority interest
+ Special item after tax
= Inflation-adjusted gross cash flow

Based on these inputs the company's CFROI value is calculated as the discount rate that would ensure that the present value of all the future cash flows (the equal annual inflation-adjusted gross cash flows, as well as the terminal non-depreciating assets amount) is equal to the initial investment (total non-depreciating and depreciating assets). The CFROI is then calculated as follows[3]:

$$CFROI = \frac{Sustainable\ cash\ flows}{Current\ \text{cos}t\ gross\ investment}$$

The absolute level of a company's CFROI does not indicate whether the company is creating or destroying shareholder value. In order to determine this, the measure needs to be compared to a benchmark value (Martin, Petty, 2000). HOLT Value Associates (consulting firm that promotes CFROI) use a company-specific discount rate when evaluating CFROI. This discount rate is based on the CFROI level, the sustainable asset growth rate, as well as a market derived discount rate[4]. It has two major benefits over the CAPM. Firstly, it considers the expected future cash flows of the market, while the CAPM is based on historical information. Furthermore, the market derived discount rate is a product of the CFROI valuation model itself.

Company-specific discount rates are obtained in a similar way. By comparing with the market rate a risk differential can be calculated. The approach

[1] Land and improvements, as well as construction in progress are excluded from this figure since no depreciation is provided on these items. The amortisation of goodwill should not be included in this figure.

[2] The figure is calculated for a specific financial year, and it is assumed that the same amount will be generated for each of the years included in the asset lifetime.

[3] The sustainable cash flow is calculated after subtracting a sinking fund depreciation amount from the inflation-adjusted gross cash flow. The amount of non-depreciating assets is also excluded from the calculation.

[4] The market derived discount rate is obtained by considering a large representative sample of companies. Firstly, the total market value of their equity and debt at a certain point in time is calculated. The next step is to estimate the expected future cash flow generated by these companies for the next financial period. These cash flow estimates are obtained by considering earnings expectations published by market analysts.

applied by HOLT Value Associates assumes that a company's risk is a function of its size and financial leverage, and that this risk cannot be eliminated by means of diversification. The risk differential can consequently be applied to evaluate the risk associated with a specific company.

In those cases where the CFROI value exceeds the company-specific discount rate, the company's NPV is positive (Fabozzi, Grant, 2000). Consequently,
shareholder value is created, while it is destroyed by CFROI levels below the discount rate (Young, O´Byrne, 2001).

It is also possible to compare CFROI to a real rate calculated for an industry (Martin, Petty, 2000). This enables to identify the greatest shareholder value creators in an industry. Furthermore, it is also important to consider whether a company is able to maintain or improve its level of CFROI.

B. J. Madden considers the application of inflation-adjusted cash flows for the CFROI calculation as one of the major benefits of this measure since it enables comparisons over time, and also between companies in different countries. He also suggests that CFROI solves the problem associated with accounting reserves. These reserves are usually easy to manipulate and could distort the financial performance of a company (Madden, 1999). According to the CFROI approach these reserves are excluded from the calculations.

Since it removes some of the accounting distortions, P. P. Peterson and D. R. Peterson also regard the use of cash flows instead of accounting figures as a benefit associated with CFROI (Peterson, Peterson, 1996).

A. Dzamba also indicates that CFROI represents the future risk exposure of the company, since it is a risk-adjusted discount rate. Because the CFROI calculation focuses on cash it may also be a more applicable measure for shareholders, who tend to focus on cash dividends (Dzamba, 2003).

When calculating CFROI, gross investments are included. Accumulated depreciation amounts are added back to the book values of the assets employed to generate cash flows. As a result of this, the measure removes the problem of heavily depreciated assets as well as different depreciation policies (Martin, Petty, 200).

The primary advantages and disadvantages of CFROI could be summarized as follows:

Table 1: Advantages and disadvantages of CFROI

Advantages
The conversion of accounting profits into cash flow figures.
The use of inflation-adjusted total cash flows rather than the depreciated book values.
The recognition of the life time of the assets utilised to generate the cash flows.
The expression as a return percentage, rather than a monetary amount[5].

Disadvantages
Complexity of its calculation (a large number of accounting adjustments need to be completed).
In the case of start-up operations large capital outlays are usually combined with low or negative cash flows, so CFROI may not be the ideal performance measure to apply.
A company consists of a large portfolio of different projects with varying levels of CFROI. The company value for CFROI is an average for the portfolio and it is difficult to identify projects with low or high levels of CFROI.
Difficulties to communicate it to all levels of a company.
Since the inflation adjustments are only estimates, the quality of the estimates could greatly influence the measure.

The CFROI approach mixes operating and financing decisions. As a result it is not always possible to determine whether changes in CFROI are the result of operating changes, or financing changes. It is, therefore, important to include the level of financial leverage when comparing different companies (Clinton, Chen, 1998).

3. Relationship between CFROI and share returns

The objective of this part of the paper is to evaluate the relative and incremental information content of CFROI in order to determine whether it is able to outperform other traditional financial performance measures in explaining the variation in a company's market adjusted share returns. The study was carried out on a sample of Slovak companies, using these traditional financial performance measures: earnings before extraordinary items (EBEI) and operating cash flow (CFO). When CFROI is applied to evaluate a company's shareholder value creation, it is usually compared to the inflation-adjusted cost of capital. The difference between a company's CFROI and its real cost of capital is the CFROI margin.

In order to investigate the relative and incremental information content of this CFROImargin and the measures CFO and EBEI, the CFROImargin is partitioned into its contributing components using the approach applied by Biddle (Biddle, Bowen, Wallace, 1997):

[5] This ensures even greater comparability between different companies, since the measure is not influenced by the size of the investment.

CFROI margin = CFO + Accrual + ATInt – Capital Charge + AcctAdj + InflAdj + CVAAdjreal + CFROIAdj

where:

Accrual = The total operating accruals of the company

ATInt = Interest expense after provision for tax

Capital Charge = The capital charge based on the cost of capital and the invested capital at the beginning of the financial year

AcctAdj = The accounting adjustments to NOPAT and IC*t*-1 to calculate EVAnom

InflAdj = Inflation adjustments included to calculate EVAreal

CVAAdjreal = The adjustments made to EVAreal to calculate CVAreal

CFROIAdj = The difference between CVAreal and the company's CFROIMargin

The measures CFO, EBEI, and $CFROI_{margin}$, as well as their contributing components, are calculated for 60 Slovak companies during a 10-year period from 2005 to 2014.

Table 2: Descriptive statistics on the dependent and independent variables in the relative information content tests of $CFROI_{margin}$

Descriptive Statistics				
	Market Adj. Return	EBEI	CFO	$CFROI_{margin}$
Mean	0,14	0,32	0,25	-0,009
Median	0,02	0,18	0,16	-0,006
St. Deviation	0,70	0,57	0,52	0,149
Correlations				
	Market Adj. Return	EBEI	CFO	$CFROI_{margin}$
Market Adj. Return	1			
EBEI	0,28	1		
CFO	0,18	0,28	1	
$CFROI_{margin}$	0,31	0,37	0,07	1

The measures EBEI and CFO have the highest mean and median values. The lowest mean and median values are observed for the measure CFROImargin, all close to zero. If the correlations are considered, all are found to be statistically significant at the 1% level. The highest correlation between the dependent variable and an independent variable is observed between the market adjusted return and CFROImargin. It is also interesting to note that the correlation between the market adjusted return and EBEI is higher than in the case of CFO.

Table 3: Descriptive statistics on the dependent and independent variables in the incremental information content tests of $CFROI_{margin}$ (see Table section at the end of the paper).

The correlations between the majority of the CFROImargin components are statistically significant at the 1% level, while the correlation between capital charge and accruals is significant at the 10% level. Only the correlations between the market adjusted return and inflation adjustments, accounting adjustments and accruals, accounting adjustments and inflation adjustments and CFROI adjustments and interest expenses are not significant.

The relative information content of the measures is evaluated by comparing the adjusted R^2 values for regressions based on the following equation:

$Dt = b0 + b1\ Xt / MVEt\text{-}1 + b2\ Xt\text{-}1 / MVEt\text{-}1 + et$

where:

Dt = The market-adjusted return for period t,

X = One of the three measures CFO, EBEI, and CFROImargin

MVEt-1 = The market value of the equity

The results from the relative information content tests are provided in Table 4.

Table 4: Tests of the relative information content of selected measures

	EBEI	**CFO**	**CFROImargin**
Adj. R^2	0,05	0,03	0,07

$CFROI_{margin}$ has a higher adjusted R^2 value (0,07) than the other measures. The EBEI values yields the second largest adjusted R^2 value (0,05). It is followed by the CFO (0,03). In terms of relative information content, $CFROI_{margin}$, therefore, once again appears to outperform the other measures, but the difference between the results for EBEI and $CFROI_{margin}$ are not so significant.

4. Conclusions

In this paper an introduction to a value based financial performance measure CFROI was provided. This measure compares the inflation-adjusted cash flows generated by a company with the inflation-adjusted cash investment required to achieve it. By including the estimated lifetime of the depreciable assets and the expected residual value of the company's non-depreciable assets an internal rate of return is calculated and compared to the company's inflation-adjusted cost of capital. If a company is able to generate CFROI values in excess of its real cost of capital, it is argued that shareholder value should be created. Amongst the benefits ascribed to CFROI the focus on cash flow and the inclusion of the inflation adjustments are considered to be particularly valuable. The complexity of its calculation, and the fact that it exhibits some of the same problems associated with IRR measures, however, are mentioned as limiting factors.

Furthermore, in this paper the information content of the measure CFROI was compared to that of the measures EBEI and CFO to determine whether

CFROI is able to outperform the traditional measures in explaining market adjusted share returns.

In order to evaluate the shareholder value creating potential of a company, the difference between its CFROI value and its real cost of capital (CFROImargin) was calculated. The analysis was carried out on a sample of Slovak companies to evaluate the relative information content of the individual measures, as well as the incremental information content of the CFROI components.

The results of the analysis indicate that CFROImargin is able to outperform earnings as a traditional measure of financial performance in explaining the variation in market adjusted share returns. I tis important to note, that there is not a huge difference between the result for EBEI and CFROImargin, on the other hand, EBEI is better in explaining the market adjusted share returns than CFO. The results from the incremental information content tests indicate that the adjustments required in order to calculate CFROImargin do have statistically significant incremental information content.

These further research areas could be identified:

- Apply the test for other companies in the Slovak republic – make a comparison among sectors.
- Apply the test for a longer period.
- Apply the test for companies in other countries and compare the results.
- Apply the test including other value based measures, too and compare the results.

Table 3: Descriptive statistics on the dependent and independent variables in the incremental information content tests of $CFROI_{margin}$

	Descriptive Statistics								
	Market Adj. Return	CFO	Accruals	Interest expenses	Capital charge	Accounting Adj	Inflation Adj	CVA Adj real	CFROI Adj
Mean	0,14	0,31	-0,07	0,08	0,41	-0,06	0,01	0,11	0,04
Median	0,02	0,15	-0,03	0,03	0,18	-0,02	0,01	0,05	-0,03
Std.dev.	0,78	0,68	0,61	0,18	0,59	0,22	0,35	0,20	0,71
	Correlations								
	Market Adj. Return	CFO	Accruals	Interest expenses	Capital charge	Accounting Adj	Inflation Adj	CVA Adj real	CFROI Adj
Market Adj. Return	1								
CFO	0,18	1							
Accruals	0,06	-0,50	1						
Interest expenses	0,11	0,25	-0,11	1					
Capital charge	0,15	0,54	-0,02	0,72	1				
Accounting Adj	-0,08	-0,17	-0,007	-0,33	-0,38	1			
Inflation Adj	0,005	-0,12	0,075	0,28	0,06	0,003	1		
CVA Adj real	0,12	0,54	-0,12	0,61	0,58	-0,21	0,36	1	
CFROI Adj	-0,08	-0,08	-0,17	0,008	0,31	-0,37	-0,59	-0,33	1

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THE INFLUENCE OF ACCOUNTANCY ERRORS ON FINANCIAL AND TAX REPORTS

Mariana GURĂU[*]
Maria Zenovia GRIGORE[**]

Abstract

To make mistakes is human. An accountant may do mistakes, too. Accountancy errors are defined and classsified by accounting regulations. These set what is the accountant treatment for correcting accountancy errors. However, even though one of the objectives in accounting normalization is made by the disconnection between accountancy and taxation, the accountancy errors influence especially tax reports.

We will further point the impact of accountancy errors on financial and tax reports. We will also approach the accountancy principles that impose the rules described for correcting the errors.

Keywords: *Accountancy errors, accountancy principles, financial reports, tax reports, reported result.*

1. Introduction

In every field of activity errors may occur. In carrying out the accounting activity, there may occur errors possibly referring mathematical mistakes, mistakes in applying accounting policies, ignoring or misapplication of the accounting judgment to the recognition of elements of financial statements, booking omissions.

In this study, we shall present the way the accounting errors affect the accounting and fiscal reports and the accounting principles applied to the specialist's reasoning to correct them.

In carrying out activity by the economic entities, there may occur situations in which some elements of the annual financial statements cannot be measured with precision, but only estimated.

Estimates can be easily confused with accounting errors because they sometimes require revision. The revision is not the correction of an error.

Unlike the correction of accounting errors, the estimates revision does not affect the tax reporting. They affect the financial statements.

Particularly important for the correction of the accounting errors is the date on which they are corrected and the financial year which they belong to. This information helps with determining the way to correct accounting errors.

An important issue addressed in the field is the error analysis so as to distinguish between errors and fraud. Our objective is to study accounting errors and, maybe in another work, we shall address the delicate issue of the border between error and fraud.

„The distinguishing feature between error and fraud would be the intentional nature of fraud. Error would result from a fortuitous action, not intentionally malicious and not with the purpose to distort the true financial performance of firms that disclose accounting information. An irregularity can be seen as an intentional act that does not, however, have the purpose of generating an illegal advantage[1].

This study can help managers and auditors to understand the common circumstances and types of errors, and thus what activities to monitor more closely. The study also contributes to the academic literature by comparing the errors to estimations, by examining the influence on financial and tax reporting.

Besides the theoretical approach of the way to correct accounting errors, a case study on the correction of accounting errors will complete the work. This may be helpful for the accounting practitioners, managers, auditors, but it may also be used as material in future research.

The topic is little discussed in the specific literature.

Since accounting is a standardized science, the main source of information for the present study were the provisions of the Accounting Regulations on the individual annual financial statements and the consolidated financial statements, approved through the Order 1802/2014 issued by the Minister of Public Finance.

The author of the article "Accounting Errors and Errors of Accounting"[2] highlights the importance of assuming the accounting errors: "Accounting should pay more attention to errors, as errors are essential for the updating of beliefs. Accounting is an information system, and errors are

[*] Lecturer, PhD, Faculty of Economics, "Nicolae Titulescu" University of Bucharest (e-mail: **marianagurau@univnt.ro**).
[**]Assistent professor, PhD, Faculty of Economics, "Nicolae Titulescu" University of Bucharest (e-mail: **mgrigore@univnt.ro**).

[1] Antonio Martins, Cristina Sa - Accounting errors, financial information and presumption based taxation: the Portuguese case – OBEGEF, Edicoes Humus, febr 2015, http://www.gestaodefraude.eu/wordpress/wp-content/uploads/2015/02/wp034.pdf

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the carriers of information according to Bayes' Theorem. Accountants are primarily concerned with the mean (value), but the variance of accounting numbers is equally important."

Christensen argues that „error is intrinsic to accounting systems, as it is to all information systems that seek to represent synthetically and objectively a corporate environment that is truly complex and subjective". According to this author, accounting serves several purposes in the context of economic systems, with diverse and contradictory interests.

Conflict between users is common. Thus, errors arise out of this conflict.

2. Accounting errors

2.1. What are accounting errors

Lourenço and Sarmento (2008: 34-35) state that "error", in the context of accounting, will emerge from a random, unintentional or eliberate act caused by negligenceor ignorance.

Errors possibly arising in respect of the recognition, assessment, presentation or disclosure of the financial statements elements. They do not comply with the accounting rules if they contain material or immaterial errors, errors intentionally made to achieve a particular presentation of the financial position, of the performance or cash flows of an entity.

Errors found in accounting may refer either to the current financial year, or to previous financial years.

Errors in prior periods are omissions and misstatements in the financial statements of the entity for one or several prior periods, arising from the mistake of using or not using reliable information that [3]:

k) was available when the financial statements for those periods were authorized for issue;

l) could reasonably be obtained and taken into account in the preparation and presentation of those annual financial statements.

Errors that may appear in the activity of an accountant may be:

- Mathematical mistakes;
- Mistakes in applying accounting policies;
- Ignoring or misapplication of the accounting judgment to the recognition of financial statements elements;
- Booking omissions.

Of the mathematical mistakes, we mention the calculation errors, but the most frequent ones are the inversions of the place of two figures. The latter obes are the most difficult to detect.

Errors in the application of the accounting policies occur, most often, in the situation where accounting is outsourced. Companies whose object of activity is the "Accounting" have a large portfolio of business entities, and the possibility of confusion regarding the accounting policies is higher.

However, as a result of frequent changes of legislation and of the burdensome implementation of the legislative requirements, companies are willing to outsource their services of fiscal assistance and accounting (67%), payroll and human resources management (40%) and legal administration (17%), in order to focus on their basic activities – this is the demonstration of a study by TMF Group Romania, a present since 17 years on outsourcing services market in Romania. In terms of the third category of accounting errors, here we may think if it comes about errors or fraud. The accounting reasoning may be intentionally ignorant, which creates doubts on the honesty of the accountant concerned.

Errors of prior periods also include the misrepresentation of information in the annual financial statements.

Sometimes, errors may be insignificant. Insignificant errors are not likely to influence the financial and accounting information. It is considered that an error is significant if it could influence the users' economic decisions taken on the basis of annual financial statements.

To determine whether an error is significant or not, an analysis is performed within the contextual point, given the nature or the individual or aggregate value of the items.

2.2. Corection of accounting errors

According to accounting regulation on individual financial statements and consolidated financial statements[4] correction of accounting errors is performed at the date of finding.

The accounting treatment which corrects an accounting error is differentiated according to the financial year which an error belongs to. Thus:

- Accounting errors belonging to the current financial year are corrected in the profit and loss account.
- Significant errors related to previous financial years are corrected on account of the retained earnings (account 1174 "Retained earnings resulted from the correction of accounting errors").
- Insignificant errors related to previous financial years are also corrected on account of the retained earnings. However, according to the approved accounting policies, the insignificant errors may be corrected in the profit and loss account.

[3] OMFP 1802 / 2014 - accounting reglulation individual financial statements and consolidated financial statements.
[4] Aproved by OMFP 1802/2014.

In case the correction of an error requires booking cancellation, by the accounting policies, the entity will choose the method of cancellation:

- Red cancellation;
- Black cancellation.

The choice of the cancellation method also depends on the cancellation method used by the software in use.

To correct accounting errors related to prior financial years, there will not be changed the financial statements of those financial years, in order to observe the principle of intangibility of the opening balance sheet.

According to this principle, the opening balance sheet of a financial year shall fully comply with the closing balance sheet of the preceding financial year.

The booking, on account of the retained earnings, of the correction of the significant errors related to previous years, as well as the change of the accounting policies are not considered breach of the principle of intangibility.

***Example**: An entity approved the financial statements of the year N on 04/04/N + 1. On 05/15/N + 1 they found that, during the previous year, a building depreciation had not been booked. The error shall be corrected on the date on which it is found, on account of retained earnings (1174 = 281), the opening balance strictly observing the closing balance sheet of the previous financial year.*

2.3. Errors versus estimates

In carrying out economic entities' activity, there are situations in which some elements of the annual financial statements cannot be assessed with precision, but only estimated.

Examples of situations that require estimates:

- bad debts;
- obsolescence of inventory;
- economic life;
- amount of provisions constituted;
- expected pattern of consumption of future economic benefits embodied in depreciable assets etc.

Estimation involves judgments based on the latest credible information available at a time. In a situation where there are changes in the initial information or new information occurs, the estimate may require revision.

The revision is not the correction of an error but a result of inherent uncertainties characterizing the economic environment.

Therefore, an estimate may need revision if changes occur in the circumstances on which the estimate was based or as a result of new information or of a better experience.

The use of reasonable estimates is an important part of the preparation and presentation of the financial statements. The credibility and relevance of the information in the financial statements are affected by the accounting estimates adopted.

For accounting practices, it is important the distinction between the changes in accounting estimates and the changes in the accounting policies.

A change in the valuation bases, even if based on estimates, represents a change in the accounting policies and not in the estimates. When it is difficult to distinguish between a change in the accounting policy and a change in an accounting estimate, the change in the accounting estimate prevails.

The effect of change in an accounting estimate is prospectively recognized by including it in the result of:

- the period of the change, if it affects only that period (for example, adjustments for bad debts); or
- the period of the change occurs and of future periods, if the change affects them, too (for example, the useful life of the tangible assets).

Unlike the correction of accounting errors, the change of an estimate is never booked in the retained earnings, it is not recognized retroactively.

Example:

An economic entity acquires a machine worth Lei 500,000. The useful life is 10 years, and the company books its depreciation it by the linear method. Due to the change of the conditions of use, at the end of the 2-nd operating year, the company decides that depreciation will be booked along a period of 8 years, the remaining useful life being of 6 years.

Year 1:

- *machine purchase*:

213 = 404 Lei 500,000

- *annual depreciation booking, during the first operating year*:

681 = 281 Lei 50,000

Annual depreciation = Lei 500,000 / 10 years = Lei 50,000 / year.

Year 2:

- *the economic life will be changed, by accounting estimate*:

remained depreciation value = 500,000 – 50,000 = Lei 450,000

annual depreciation =Lei 450,000 / 7 years = Lei 64,285

The 7 years consist of: 6 years + the 2-nd year during which the estimate is done.

681 = 281 Lei 64,285

- *during the following years (year 3,4,5,6,7,8), the booking will be repeated* :

681 = 281 Lei 64,285

3. Detecting of accounting errors

As shown in the second part of this work, accounting errors correction is not a difficult activity. But how do we detect the accounting errors?

Sometimes, accounting errors are detected incidentally. But we cannot rely on chance.

The moment for detecting most accounting errors is that of the preparatory works for the financial statements drawing up.

In this respect, based on a provisional trial balance, they check:

- the consistency between the accounting and the operational records, between the synthetic and analytic accounting;
- whether all justifying documents have been properly booked;
- the legality and honesty of the booked data, which must give a clear and comprehensive description of the economic and financial operations carried out;
- the accounts balances, so as the assets accounts book a final debit balance, and the liabilities accounts book a final credit balance;
- the balances total in the management report should match the balance of the account 371 "Merchandise";
- whether the cash balance is equal to the balance of the account 531 "Cash";
- whether expenditures and income were delimited in time, etc.

As a result of these checks, the probability of detecting possible accounting errors is quite high.

Error non-detection risk is influenced by the size of the economic entity for an important role in identifying errors belongs to the audit action which is not mandatory for micro-entities.

However, even if the financial audit is performed, the control risk cannot be zero for the internal controls cannot provide complete safety on preventing or detecting errors.

The auditor will establish a level of control so as errors arising from inherent risk may be determined.

Accounting errors are part of the qualitative factors affecting the audit materiality. Of these factors, we mention:

1. During the stage of the determining of the preliminary value of materiality:
   - significant errors from previous years
   - possible fraud
   - minor presentation errors possibly affecting certain contractual obligations
   - minor presentation errors possibly affecting the trend of the profits trend.

2. During the stage of estimating the distortions and of comparing them with the preliminary value of materiality:
   - errors hiding a change in the evolution of profits
   - errors causing the change of the loss by profit and vice versa
   - errors possibly causing a major positive or negative reaction of the market.

Following the audit, the auditor states whether, on the basis of the knowledge and understanding gained during the audit in relation to the entity and its environment, he/she has identified significant erroneous information given in the directors' report, by indicating the nature of such erroneous information.

4. Reflecting accounting errors in accounting and fiscal statements

The discovery of an error may result in several consequences. Everything depends on the type of error, on the financial year it belongs to.

In the lines below, we establish the way to proceed in case, following an error, the following situation occurs.

At the end of June, during the year N, an economic entity issued a bond loan worth Lei 500,000, with an interest rate of 5% per year. The interest is to be paid at the end of each bond year. According to the accrual principle, although the company owes the interest on late June of the year N + 1, during the month of December of the year N it should book the interest for the period 07/01/N – 12/31/ N.

The interest to be booked for six months = Lei 500,000 x 5% x ½ years = Lei 12,500

Some of the accounting errors occur as a result of erroneous data typing. Thus, the accountant typed by mistake Lei 15,200 instead of Lei 12,500

666 Interest-related expenditure	=	1681 Interest related to bond loans	15,200

At the end of June N + 1, the due date on the debt related to the bond loans interest, the accountant discovered the error, respectively the booking of an interest related to the bond loans accrued by Lei 2,700 (Lei 15,200 – Lei 12,500 = Lei 2,700). The error also led to the overstatement of the expenditure on the interest by Lei 2,700.

According to the accounting regulations on the individual annual financial statements and the annual consolidated financial statements, the accounting errors are corrected at the time of their detection. The error correction will be booked as follows:

1681 Interest related to bond loans	=	1174 Remained earnings resulted from the accounting errors correction	2,700

From a fiscal standpoint, the principle according to which the fiscal result is calculated based on the incomes and expenses booked in accordance with the accounting provisions in force, the operation of correcting the booking errors, eliminating the idea that they could have been made

with intent, should influence the taxable profit for the fiscal year during which the operation is performed.

Thus, the tax on profit calculated for the year N was declared and paid to the State Budget less Lei 432 (Lei 2,700 x 16% = Lei 432).

Although in accountancy the errors correction does not involve the correction of the accounting statements, the same is not true for taxation. For the statement on the tax on profit (Statement 101), the accountant should:

- - prepare and submit the statement of amendment,
- - pay the difference in the tax on profit, undeclared following the accounting error, and
- - calculate and pay delay penalties for the tax unpaid on due time.

As it may be seen, the tax implications arising from the correction of the accounting errors are more complex for they may involve additional costs.

If the error affects an income, the company pays extra tax on profit. If the profit obtained is distributed as dividends to the shareholders or associates, for the overpaid amounts it should ask for refunding. And, in such a situation, there arises tax on dividends paid extra. It should also be restored the statement 100 by which the company declared the tax on dividends.

4. Conclusions

In this paper, we have tried to combine the accounting and fiscal treatment of the accounting errors correction with the theoretical and applicative presentation of the theme we have chosen.

The accounting error correction is grounded by the principle of the opening balance sheet intangibility and the principle of the methods consistency. The latter is the foundation of the accounting policies handbook by which an economic entity must define the materiality threshold for accounting errors correction, on the one hand, and choose the method for errors cancellation in accountancy: the "red" or "black" cancellation method, on the other hand.

Many of the operations we need to correct require higher attention in terms of the regulations at the time, given the instability of the accounting and fiscal systems in Romania.

Given the current regulations, the main conclusion we have reached is the fact that the influence of the errors on the fiscal reporting is significant in terms of the accountant's activity, but especially in terms of additional costs incurred by the company. It is about penalties arising from the failure to pay some taxes on due time, or from the payment of extra taxes, depending on the structure affected, namely on the expenses or incomes.

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MUTUAL INFLUENCE BETWEEN MONETARY POLICY AND INVESTMENT

Valentin Mihai LEOVEANU[*]

Abstract

The study seeks to highlight monetary policy as a component of macroeconomic policies, the importance of investment on the economy and on economic growth, the correlation between investment and monetary policy in macroeconomic thinking, and the implications of the 2007-2010 financial crisis on the theory and practice of monetary policy. Following submission of theoretical and practical considerations concerning the influence of monetary policy on investment and vice versa, both at micro and macro levels, this paper tries to highlight the effects of monetary policy actions on global and local investment in terms of profitability, risk, liquidity and investment period.

Keywords: *macroeconomic policy of stabilization, macroeconomic models, transmission mechanism of monetary policy, monetary policy interest rate, global and local investments.*

1. Introduction

The primary role of investment in the national economy is to provide support for economic development, so that the volume of investments, their distribution in different economic fields and their efficiency determine the pace of economic growth. The investments represent a category of expenditure regarding the future development of an economy through a variety of effects, such as increasing fixed capital and working capital, increasing technical and economical efficiency of equipment, boosting productivity and increasing employment.

This paper aims to investigate to highlight monetary policy as a component of macroeconomic policies, the importance of investment on the economy and on economic growth, the correlation between investment and monetary policy in macroeconomic thinking, and the implications of the 2007-2010 financial crisis on the theory and practice of monetary policy.

Following the submission of theoretical and practical considerations concerning the influence of monetary policy on investment and vice versa, both at micro and macro levels, this paper tries to highlight the effects of monetary policy actions on global and local investment in terms of profitability, risk, liquidity and investment period.

The importance of this study is reflected by the survey that highlights the strengths and the weaknesses related to the monetary policy decisions in order to achieve financial stability and to put back the economy on a growth path. In accordance to this, the paper presents the evolution of investments in the world and in Romania in correlation with the monetary policy actions taken by the monetary authorities and ends with a summarized conclusions regarding the impact of monetary policy on global investment performance in the 2008-2014 and the monetary policy transmission mechanism and policy impulses to the Romanian economy.

2. Literature review

According to the classical theory of economic growth, it is considered that the factors determining the differences in the production potential of an economy belong to two large groups[1]: 1) labor productivity - how technology is allocate and how the activity is organized to increase the labor productivity, even with the same amount of capital and 2) capital productivity - how much capital goods are necessary to boost the productivity of capital, even with the same technology or organization.

The classical growth theory is based on the following considerations[2]: short-term, the investments affect current GDP by aggregate demand, while long-term the effects of investments conduct to the growth of potential GDP; short-term, savings reduce the consumption and the aggregate demand, which in turn determine the decline of current GDP, but in the long term, savings finance the investments ensuring potential GDP growth; the factors of production are subject to the occurrence of decreasing returns; long-term, technological advance is the main cause of growth, along with capital investments.

[*] PhD, MBA, Faculty of Administration and Business, University of Bucharest (e-mail: **valentine.leoveanu@faa.unibuc.ro**).

[1] Trehan B. (2005) Economic Analysis – Macroeconomics, University of California Berkeley, available at http://eml.berkeley.edu/~webfac/trehan/e100b_sp05/chap4.pdf

[2] Dinu M., Socol C. (2006) From Solow Model to Endogenous Economic Growth – Romania's Reinsertion into Civilization?, Revista Informatica Economică nr. 1 (37)/2006, p.122.

Analysing the interconnections between money and investments, the economic literature highlights three competing models that describe the economy at the macro level[3]. The models try to represent the economic structures that constrain monetary authority in choosing its monetary policy. The three models focus on inflation, unemployment, income distri-bution and growth, whereas monetary policy affects all of them. According to the Neoclassical model, long-term monetary policy can only affect inflation. According to Post-Keynesian model, monetary policy can affect inflation, unemployment, income distribution and growth. In the Neo-Keynesian model, monetary policy affects, too, inflation, unemployment and real wages, but uses a very different economic logic from the rest of the models.

In the paper named "The behavior of aggregate corporate investment"[4] made in 2014, the authors analyze the evolution of the company's total investments during 1952 -2010. Their conclusions express that business investment grow rapidly due to high profits and stocks profitability, but, unlike the standard predictions, are largely uncorrelated with changes in market volatility, interest rates or the risk of default of corporate bonds. At the same time, large investment expenditure predict continued growth of losses for the company concerned and are associated with lower returns on investments, that means too much investment growth coincides with bad news for investors. The analysis shows, too, that the decline in investments due to the financial crisis in 2008 was not unusual, given the drop in GDP and profits in late 2008.

3. The correlation between monetary policy and investment in economic theory and practice

As a function of public authority, the economic stabilization is intended to be achieved by fiscal policy and monetary policy and theoretical concepts are based on the British economist J.M. Keynes studies, showing that a capitalist economy with a decentralized market system can not automatically generate full employment and price stability, but requires deliberate policy of economic stabilization.

Monetary policy is an attribute of national sovereignty, a concept that expresses supremacy within the state and its independence relative to other powers. Within the state power is exercised by public authorities expressly invested by Constitution. Such a public authority is the central bank. In this respect, by the freedom to issue currency, the central bank provides one component of a country's national sovereignty. Waiving such right is both giving up on an attribute of national sovereignty, but also on an instrument of influencing the national economy through specific tools.

Given the economic situation and structure, monetary authorities may intervene on the increase or decrease of the money supply through the use of monetary policy instruments, resulting in two types of monetary policy:

m) expansionary monetary policy - the key issue to be solved is to combat unemployment and recession, so the tools used in the mechanism of intervention are buying treasury bonds, reducing the mandatory reserve rate and interest rate monetary policy. The expected effects are chained by increasing the money supply leading to lower market interest rates and, consequently, to increase private investment in the economy. As a result, aggregate demand increases leading to an increase in real GDP.

n) restrictive monetary policy - the key issue to be solved is inflation, so that the monetary authority sells treasury bonds, increased reserve requirements and interest rate monetary policy. Effects range from a decreasing of supply and continuous by an increase in the interest rate, a decrease of the level of investment which lowers aggregate demand and inflation.

As a general rule, the central bank can target either the price of money, ie interest rate, or the amount of money, but never both, unless the markets are not free and either price or the quantity are fixed by interest rate ceilings or limits on administered lending. Also, when chosen instrument is the interest rate, the central bank may be targeting primarly either only internal stability of currency price or external stability of currency price given by the exchange rate, but never both at once[5].

The effect of monetary policy measures on investment decisions of companies are considered to be the key element in the transmission mechanism of monetary policy. Monetary policy affects investment decisions, on the one hand, the cost of using the capital - a mechanism called interest rate channel, and, on the other hand, changes in companies' financial statements as a result of capital markets imperfections can influence the demand of fixed capital, which highlights balance sheet channel as part of the credit channel.

Interest rates on short-term are considered to be the determining factor of investments. In fact, these interest rates perform three distinct functions: 1. affects the present value of net benefits over time through the discount rate applied; 2. determine the financing cost of bank loans and the rate of return

[3] Palley T.I. (2007) *Macroeconomics and Monetary Policy: Competing Theoretical Frameworks,* New York: Eastern Economic Association, February 23-25, p.4-5.

[4] Kothari S.P., Lewellen J., Warner J.B. (2014) The Behavior of Aggregate Corporate Investment, MIT Sloan School Working Paper 5112-14, disponibil la http://ssrn.com/abstract=2511268

[5] Davies H, Green D. (2010) *Banking on the Future, The Fall and Rise of Central Banking*, Princeton: Princeton University Press, p.24.

demanded by shareholders and 3. has a strong influence on the economic climate, as regards both financial market and the real goods and services market.

Besides the short-term interest rates, there is a range of interest rates on different maturities that are configured according to the monetary policy interest rate and that affect debt management decisions. As aggregate demand is determined by long-term evolution of real interest rates, the term structure of interest rates has an important role in maintaining effective monetary policy starting from the policy interest rate. Indirect influence on the central bank's long-term interest rates stems from the fact that these rates are set by market participants as a weighted sum of the expected short-term interest rates in future rates over which the monetary authority acts directly. According to Fisher's equation, bond yields, as fixed income instruments on long-term, are determined by the component of compensation of inflation demanded by investors for holding long-term securities. This effect can be powered by the term structure of interest rates from the long term to the short term.

The influence of the interest rate channel on investments can be traced in the following manner. A reduction of policy interest rate lowers interest rates on short-term market, so it is expected to increase the investments. Whereas cumulative investments increase the capital stock and open the way to improve production conditions. Production capacity, productivity potential, cost efficiency and quality of production will rise to the extent that the investments were targeted and implemented. As a result, export competitiveness will increase, and consequently employment will increase.

As a component of GDP in aggregate demand, investments have an immediate impact thereof, so that an increase in investment increases GDP, other things being the same. Moreover, since income (GDP) is an important determinant of consumption, its growth will be followed by an increase in consumption, so that there is a positive feedback between consumption and income through investments.

Due to this mechanism, imports will increase and, as a result, the investments based on equipment, machinery and foreign technology will grow also. Thus, they produce an increase in the real interest rates which in turn depends on the deliberate choice of the central bank to increase or not the nominal money supply. Therefore, increasing the real interest rate is an inflection point leading to the compression of investment, which in turn hampers the GDP growth.

Regarding another component of the monetary policy transmission, namely the credit channel, it includes mechanisms by which imperfect financial markets amplify the effects of conventional interest rate. Thus, the cost of external funding is greater than the risk free interest rate, given the existence of information asymmetry which has two forms: adverse selection and moral hazard.

The credit channel implies that an important segment of companies rely on bank loan financing. If monetary policy measures end up restricting banks' ability to give loans, the financial costs of these borrowers will tend to increase, while demand for capital will decrease.

Since bank credit channel implies the existence of a bank as lender, the balance sheet channel means that the debtor's financial situation has an impact on risk premium rate of external finance.

Bank lending to companies, especially smaller ones, are often backed by assets, so a decline in asset prices may lead to difficulties in accessing loans because the low prices of assets reduced net assets of the company. This effect is called the "financial accelerator". Also, the financing of listed companies is easier to achieve when interest rates are low and asset prices are high, so there are favorable financial statements.

The company' capital investment decision may consist of a number of separate decisions, each relating to a project. A capital investment project is a set of assets that are contingent with each other and which are counted together. Assuming that a company consider making a new product, this will lead to a number of actions such as: the purchase of land, the construction achievement, the purchase of equipment necessary for production as well as the increase of working capital (inventories, receivables and cash customers) for operating activities.

Knowing that today's value of a company is the present value of all its future cash flows, it is necessary to understand where from these cash flows come. They come either from the exploitation of assets already in service (assets acquired as a result of any decisions of previous investments) or from future investment opportunities. Considering new investments, they are taking into account only incremental cash flows.

Future cash flows are discounted at a rate which is an assessment of the value of investors' uncertainty on the expected amounts and time of their achievement. Estimating the risk of these cash flows requires a sensitivity analysis about the revenue and expenditure changes in various economic conditions.

The risk of an investment project is reflected in the discount rate, which represents the rate of return required to compensate investors for the risk involved.

From the point of view of investors discount rate is the rate of return required. From the viewpoint of the company discount rate is the cost of capital, ie how much does the company bring additional funding to a monetary unit of new capital.

4. The effects of monetary policy actions on investment

Economic and financial crisis has reduced global potential GDP through two main channels: the restriction of investment and the increase of structural unemployment. First, during the most severe phase of the crisis, investment rates have decreased significantly and financing conditions as well as lending terms and the availability of credit experienced a major deterioration. Intensification of economic and political uncertainties and weak economic prospects have hampered the assessment of investment projects and reduced the expected rate of return on investment. Given the high indebtedness of non-financial corporations in some advanced countries, it becames necessary to reduce it.

IMF specialists presented in the 2015 "World Economic Outlook"[6] a comprehensive study that gives several relevant issues concerning the evolution of private investment in the world, such as:

- the strong contraction in private investment during the crisis and then the subsequent insufficient recovery were firstly a particularity of advanced economies. In this case, private investment fell by an average of 25% since the crisis began comparing the forecast before the crisis, and the return to the previous trend has been reduced. In contrast, private investment in emerging and developing economies slowed gradually, despite the increase during the early to mid-2000s;
- the decrease of investments in the advanced economies included most sectors, so although the contraction was sharper in the case of residential private investment (housing), the non-residential investment-type (business) have a much higher slump represented more than two thirds of the total reduction;
- the decline of overall economic activity following the crisis was the first constraint of business investment in advanced economies, which in turn depend on a number of factors among which the most important is the demand for goods;
- there is some evidence that a number of financial constraints and political uncertainties play an independent role in the investment slowdown in some economies, including the euro area economies with higher lending margins during the sovereign debt crisis in 2010-2011.

In the advanced economies the fixed investments have contracted sharply during the crisis and have not returned to the previous level. Globally, the return of the fixed investment was gradual, but not according to the 2004 and 2007 forecasts.

The private fixed investment also decreased gradually in the emerging markets and developing economies compared to the advanced economies. The slowdown followed a period of rapid growth from the mid-2000s economic boom. Private investment remains broadly in line with the forecasts made at the beginning of the year 2000. In contrast, the forecasts made in 2007 showed a slowdown in the trend. Factors that contributed to this development varied by region, but included falling commodity prices, the effects of contagion on falling demand and tighter financial conditions on internal and external financial markets.

The contraction of credit availability in recent banking crisis has played an important role in reducing fixed investment made by companies. In this regard, the economic branch dependent on banking system for their investments performed at a significantly lower level than the less financially dependent sectors during the banking crises.

By 2009, investments decreased by 50% comparing the previous forecast among the companies with financial dependence on banking sector - almost two times more than those from the less financially dependent. In 2009-2010, the difference between the two groups of companies is statistically significant, but in recent years this gap is reduced until in 2013 it is no longer obvious.

The "World Investment Report 2015"[7] (published in 2014), presented by specialists from the United Nations Conference on Trade and Development (UNCTAD) indicates the decline of global foreign direct investment (FDI) in 2014 with regional variations. While developed countries and economies in transition have experienced a significant decline, FDI inflows in developing economies remain at historically high levels, representing 55% of the total. Developing countries of Asia has experienced an increase of FDI flows while Latin America acquainted a decrease trend and Africa remained linear.

- FDI flows of developing countries fell by 28% to $ 499 billion. FDI inflows to the United States fell to $ 92 billion (40% of the level of 2013). FDI inflows fell in Europe, too, by 11% to $ 289 billion. In some European economies, FDI inflows declined as is the case in Ireland, Belgium, France and Spain, while they increased in the UK, Switzerland and Finland.
- UNCTAD experts believe that the volatility of the business environment in developed countries usually determines transnational companies (TNCs) to remain cautious regarding their investment plans in these countries. However, risk factors such as low level of predictability of global economic governance, a possible crisis of foreign debt expanded fiscal imbalances and financial distress in some developed countries, higher inflation and

[6] International Monetary Fund (2015) *World Economic Outlook, Uneven Growth. Short and Long Term Factors*, World Economic and Financial Surveys, Washington: IMF, April.

[7] United Nations Conference on Trade and Development (2015) *World Investment Report 2015*, Geneva: UNCTAD.

visible signs of overheating in major emerging economies may hinder the recovery of FDI flows in the current period. Typically, acquisitions and mergers are more sensitive to financial conditions than greenfield projects.

Regarding the influence of monetary policy on investments in Romania it is important to highlight some characteristics of Romanian banking sector:

a) the transmission mechanism to the economy is effective when the monetary policy interest rate changes are perceived as strong signals of monetary authority, the central bank;

b) in a highly dollarized financial system the central bank has only a limited control over the market interest rates in local currency, depending on the weight and private loans and deposits in foreign currency. According to the IMF, the factors of dollarization of the economy in Romania have been well documented and include the interest differential, the lack of yield curves in lei, the financing in euros from parent banks and the expectations regarding the adoption of the euro;

c) low development of financial markets, offering a reduced variety of investments, is an important source of dollarisation / euroisation, so a weak interbank market may lead to the persistence of excess liquidity. In turn, this reduces significantly the effectiveness of monetary policy interest rate. The excess of the liquidity in the banking sector is well-known and reappears periodically in Romania;

d) the fact that the stock market and the bond market are underdeveloped and investment opportunities in the long term are scarce conduct to a decreased ability to absorb liquidity in the absence of the existence of a variety of financial securities in order to determine an increased competition between financial products with tight margins of profit, and thus the interest rates in the market to be more responsive to changes in monetary policy;

e) the banks with vulnerable balance sheets may react to an expansive monetary policy by consolidation of their liquidity rather than through credit at lower interest rates. Banks that are more vulnerable financially can use the additional liquidity buffers to increase the liquidity and capital reserves. A change in policy rate may therefore have a very limited impact on market rates. Essentially, new loans are crowded by the presence of potential bad loans in the balance sheet. Romanian banking system has maintained solid capital reserves throughout the financial crisis, but bad loans have increased considerably in recent years.

5. Conclusions

The final conclusions related to this research related to the impact of monetary policy on global investment performance in the 2008-2014 period are presented below:

- the monetary policy measures taken by the central authorities at national level and at the system level (Eurosystem and FED) during and after the global financial crisis were aimed above all to save the financial mechanisms and institutions from an functional outbreak due to blockages that appears on different segments of financial markets - the lack of liquidity in the money markets or the imposibility of trading the so-called toxic assets on capital markets; after ensuring the relative liquidity of the markets, monetary authorities directed their actions to support the transmission mechanism of monetary policy to the real economy;
- following the financial crisis, the authorities in most countries have used monetary policy to stimulate aggregate demand firstly, by cutting quickly the policy rate and secondly, to focus on taking unconventional measures to support the functioning of financial markets, such as supply of liquidity to banks, expansion of the money supply through quantitative easing and by creating excess reserves and direct interventions on large segments of the credit markets;
- the decline of the cost of capital in post-crisis period was primarily driven by a collapse in demand for investment funds in advanced economies;
- as central bank interventions have become less effective, prolonged accommodative monetary policies produce different side effects, such as encouragement of risk-taking tendency, accumulating financial imbalances and distortions in pricing on the financial markets;
- a significant side-effect of the policy measures derived from the contagion effect of monetary policy worldwide. Persistently low interest rates in the major advanced economies have put an increasing pressure on exchange rates and destabilized capital flows in emerging market economies and more advanced small economies.

The conclusions highlighting the author's discussion of central bank monetary policy transmission mechanism and policy impulses to the Romanian economy are:

- there was no correlation between the volume of money in circulation and the level of nominal GDP, so that the needs of the economy are covered with the necessary money (NBR reports);
- a rising level of NPLs was recorded which entailed the granting of new loans;
- the credit channel transmission was slow and information asymmetry involved significant costs and demanded the creditworthiness of the borrowers;
- an essential issue for the Romanian economy - as it is revealed at the European and international level - is how the actions of economic policy switches between, on one hand, the budgetary, fiscal and income policies led by the government, and, on the other hand, the mopnetary policy led by central

bank; here the problem mainly rests on the political environment and Romanian politicians, who has often acted out of step with the monetary authorities and even contradictory at parliamentary and government level;

– adopting the euro as national currency continues to be an important issue for Romania; this objective requires giving up national currency and monetary policy, which implies: structural adjustments are possible to encumber the level of economic activity and employment in an economy characterized by limited flexibility; increase the risk of asymmetric shocks in the absence of synchronization of business cycles in Romania with the euro area;

– the need of Romanian economy to catch up with the developed countries of the EU justifies the question of compatibility with the convergence criteria for euro regarding the budget deficit within the limit 3% of national nominal GDP, and keeping the economy on an inflationary trend of 2% in the euro area; these conditions could be an impediment to the future development of Romanian economy. The need for an accelerated development - involving mobilization of intensive inputs that lead to the creation of new production capacity with new technologies, the emergence of new economy branches with leading role in the Romanian economy and the decline of the exceeded economic sectors, conduct to an objectively emergence of a structural inflation; as such, it is possible a compliance between an accelerated development of the new EU member with a government deficits exceeding 3% of GDP and an inflation around 2%?

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BANK LENDING EVOLUTION IN ROMANIA DURING 2008-2015

Valentin Mihai LEOVEANU*

Abstract

The period of global nuisance of banking and financial sector during the international financial crisis continues to have overwhelming implications in the current period, which requires careful research of monetary and financial phenomena locally and globally. In this sense, this article aims to highlight key aspects of the Romanian investment environment in the context of international economic environment and monetary policy transmission mechanisms in the Romanian economy. Following this approach, the study focuses on analyzing the financial position of banks operating in Romania, the evolution of lending by type of entity and positive/negative aspects about the impact of monetary policy measures and the NBR regulations on bank lending. The study shows conclusively the positive and the negative effects of lending evolution on the Romanian economy, on the solvency and bankruptcy risk of Romanian companies and on the behavior of debtors and creditors in credit relationships.

Keywords: *investment environment, transmission mechanism of monetary policy, interest rate channel, credit channel, lending to non-financial companies.*

1. Introduction

The period of global nuisance of banking and financial sector during the international financial crisis continues to have overwhelming implications in the current period, which requires careful research of monetary and financial phenomena locally and globally.

The paper aims to highlight key aspects of the Romanian investment environment in the context of international economic environment and also, the monetary policy transmission mechanisms in the Romanian economy. Following this approach, the study focuses on analyzing the financial position of banks operating in Romania, the evolution of lending by type of entity and positive/negative aspects about the impact of monetary policy measures and the NBR regulations on bank lending.

The study shows conclusively the positive and the negative effects of lending evolution on the Romanian economy, on the solvency and bankruptcy risk of Romanian companies and on the behavior of debtors and creditors in credit relationships.

2. Romanian economic environment after international financial crisis

A retrospective analysis regarding the period of 2000-2015[1] shows that in Romania, the average annual HICP inflation dropped from very high levels recorded in the early 2000s until 2007, when the trend downward reversed. In 2009, inflation recorded a further decline and then stabilized, generally at a high level, then dropping to historic lows of 3.4% and 3.2% in 2012, respectively 2013 and in February 2015 the average annual HICP inflation in Romania was 1.2%, the same as the reference value of 1.2% for the criterion on price stability in European Union at that time.

Romania recorded in 2009-2011 the largest budget deficits as a consequence of the global crisis, and the economic policies in the years before the crisis were characterized by: a) a fast liberalization of the capital account, by an economic growth based on consumption sustained by short-term external financing; b) cyclical fiscal and budgetary policies; c) delaying structural reforms in central and local administration and d) inconsistent political and economical decisions and actions[2], which generated major economic risks.

In the subsequent period, 2012-2014, budgetary policy took a prudent and cautious management of public expenditure and public debt so that in 2013 Romania emerged from the excessive deficit procedure; the budget deficit calculated according to the ESA 2010 methodology was reduced by 3.8 p.p. in the 2011-2014 period, namely from 5.3% in 2011 to 1.8% of GDP in 2014, Romania being thus well below the euro area average deficit of 2.4% of GDP and UE28 2.9% of GDP, as the third country with the lowest deficit at that time.

There has been a significant reduction in the structural deficit. According to estimates, the cyclically adjusted budget deficit was reduced from 3.6% of GDP in 2011 to 1.0% of GDP in 2014. The debt-to-GDP ratio was 39.8%, significantly below the benchmark level of 60%, but higher than the value in 2008 of 13.2%.

During the reference period 2000-2015, the Romanian national currency Leu did not participate in ERM II but it was traded under a flexible

* PhD, MBA, Faculty of Administration and Business, University of Bucharest (e-mail: **valentin.leoveanu@faa.unibuc.ro**).

[1] Banca Centrală Europeană (2014) *Raport de convergență iunie 2014, România*, Frankfurt am Main: ECB, p.97-100.

[2] Voinea L. (2009) Sfârșitul economiei iliziei. Criză și anticriză. O abordare heterodoxă, București: Publica, p.65.

exchange rate regime characterized by a managed floating. Romanian leu's exchange rate against the euro was characterized by periods with relatively high degree of volatility.

The cumulative balance of current account and capital balance of payments recorded significant adjustments in last years. Subsequently the progressive increase of the external deficit in 2004-2007, the cumulative deficit of the current account and the capital account has experienced an adjustment in 2009 and has continued to improve, reaching 3.0% of GDP in 2012 and in 2013 registering a surplus of 1.2% of GDP. At the same time, Romania's net international investment position deteriorated substantially, from -26.4% of GDP in 2004 to -67.5% in 2012, but was improved from -62.3% in 2013.

Although in 2009 Romania has lost access to international financial markets, requiring assistance from the EU / IMF, our country regained rapidly its financial markets access in 2011, in order to finance its deficit and debts. In 2013, JP Morgan Treasury bonds included Romania in its emerging markets index. In the same year, the all three major world rating agencies were given to Romania "the investment grade".

Analysis of the structure of the branches of the national economy during 2000-2015 emphasize the increase of the share of the industry in overall GDP (from 25-30%), showing a slight process of reindustrialization of Romania and a decrease in the share of agriculture in total GDP (11 to 6%). In terms of services, there is a relative maintainance of their level in 2013 compared to 2000, marked by a significant evolution in 2008 (70% versus 64% in 2013).

In 2013 Romania returns to exactly the same productivity per hour worked as in 2008, after crossing a minimum level in 2010. The Eurostat data shows a level of productivity in our country only 17.4% of the EU average and only 15% of the euro area average. In other words, to reach the European average productivity we should increase our labor productivity about six times, and to access the same terms as euro area countries about seven times. The explanation for this considerable disparity between the performance and productivity level of 54% GDP / capita compared to the EU average comes from the much lower price charged to a higher number of hours worked by a person.

An important issue for Romania is that it lacks high-quality infrastructure. The basic infrastructure of transport, which is weak, continues to hold back the economic growth of Romania. The motorway network is still small compared to that of countries with similar situations, despite the size of the country and it is insufficient for the needs of the economy to develop.

Development of infrastructure in Romania is affected by the low rate of absorption of EU structural funds, poor strategic management and central administration corruption. In the mid-2015 there was approved the Development and Transportation Master Plan as a strategic document that will underpin integrated investment and transport planning for the 2014-2030 period without which it will not be available structural funds for transport.

Romania Country Report 2015, prepared by the European Commission[3] highlights as conclusive the following:

- even though net international investment position of Romania shows that there are still some risks, major imbalances have been corrected;
- despite important reforms, weaknesses in the business environment and public administration could threaten much needed investment and export capacity of Romania;
- private debt is under control, and financial sector stability has been maintained, but vulnerabilities still exist, both external and internal;
- compliance with tax laws continues to be limited and fiscal policy to be unstable;
- dynamic labor market is showing signs of improvement, but structural problems persist; poverty and social exclusion affects a large part of the population;
- the main challenges for the economic policy are: accelerating structural reforms to improve competitiveness; increase public research capacity to develop new sources of growth in the medium term; optimal use of EU structural funds to increase investment, innovation and employment.

3. The financial situation of Romanian banks and its influence on bank lending

The Romanian banking system was defined by structural stability in the years after the international financial crisis and it managed to overcome the challenges associated with an increased rate of bad loans and credit portfolios optimization related to regulatory constraints.

Thus, banks in Romania had to cope with a deterioration of the economic potential, with developments of a volatile currency market (that had impact on real demand lending), with increased rates of credit risk and nonperforming loans (with consequences on financial results) and with the gradual implementation of the new Basel III requirements. Influences propagated by the foreign financial markets, led to changes in the Romanian

[3] European Comission (2015) Raportul de țară al României pentru 2015. Inclusiv un bilanț aprofundat privind prevenirea și corectarea dezechilibrelor macroeconomice, Document de lucru al serviciilor Comisiei, Bruxellex : EC, SWD(2015) 42 final, 26.02.2015, p. 1-3, 50-51.

banking system, regarding especially the volume and the nature of external funding, namely the relationship with the parent banks.

The financial stability was tracked since 2009, by a program of financial assistance for Romanian balance of payments (IMF-EU-IFI), which aimed to maintain financial stability; by strengthening the resolution of banking institutions and the safety nets available in the event of financial difficulties; by addressing the vulnerabilities associated with the granting of foreign currency loans and accelerate cleaning banks 'balance sheets and banks' funding diversification.

For the period 2008-2014, the Romanian banking system was characterized by adequate capitalization in relation to the volume of assets and level of risk, as a result of additional capital shareholding, the annual net profit allocations and conversion of subordinated loans into equity. Following the introduction of International Financial Reporting Standards (IFRS) in banking reports, a major role in ensuring the bank solvency have had the adjustments of positive capital/endowment through their growth both in nominal terms by 36,9% and in real terms by 33.6%.

During the crisis, the Romanian banking sector did not need support from public funds, and the main prudential indicators were placed at an appropriate level. The analysis of bank assets and liabilities at aggregate level, made by N.B.R., reveals some major trends over the period 2008-2014, namely: maintaining reluctance to resume lending; substantial improvement in domestic savings; the growing importance of investment in foreign assets and further deleveraging border, with beneficial effects on cost of funding[4].

As important indicators of the banking system can be highlighted[5]:

- Solvency ratio was maintained at a high level of 18.07% in June 2015, while the minimum threshold established under the European regulatory framework CRD IV / CRR is 8%.
- The level of financial intermediation is placed close to 32% at the end of 2014, expressed as a share of non-government credit in GDP, down from the 40% recorded in 2011, the decrease being due to the restriction of credit institutions' balance sheets.
- The share of gross bank assets to GDP amounts 60.8% and the net assets volume is about 82 billion euros at the end of June 2015.
- The ratio loans/deposits is placed at 93.56% in June 2015. The development was caused by: strict European regulations on lending, a reluctance of the propensity to save in contracting new loans due to a lack of confidence in economic developments and restructuring of banks' portfolios.
- Non-government loans continue to record annual declines, while the repayments of the principal and the balance sheets cleaning exceed the amount of new loans.
- The new loans in Lei of households and companies in June 2015 reached a record level of 5.4 billion Lei, up to 50% compared to June 2014. The Leu is the main currency for the loans.
- The companies said that they intend to maintain or reduce their bank debt: 64% of the companies would not take a credit in Lei and 68% of the companies would not take a loan in Euros, regardless of cost. Also, companies' ability to cope with any adverse developments concerning the interest rate is low. Factors that influence this are taxation, competition and lack of demand as pressing issues facing firms, according to the survey conducted by the National Bank of Romania
- Cleaning balance sheets and changing the calculation methodology of NPL (Non Performing Loans) led to a reduction by more than 9 percentage points in the rate of bad loans to 12.80% in June, 2015.

Analysis of loan quality highlights the vulnerability of the Romanian banking system in the field, due to rising non-performing loans to total loans, which require additional resources for their recovery and greater caution in granting new loans, ultimately leading to decreased profitability banking.

Rising unemployment, reducing significant decrease of wages and restriction or cessation of companies activity have contributed to the continued decline in the capacity to repay loans with direct consequences on the quality of the loan portfolio of banks and on the increase in the volume of provisions that they were have to make up.

Profitability analysis reveals that, faced with an unpredictable external environment and a modest development of the economy, the Romanian banking system has sought to maintain the level of performance by: exercising a tighter control on cost/income; careful management of risks in a volatile environment; resizing territorial network and the number of employees and alignment with customer requirements. The number of banking units was 5.304 at the end of December 2014, while the number of employees in the banking system was adjusted to 57.732.

Among the major challenges to the profitability of banking were induced the impairment of financial assets and the effect of revaluation of collateral for loans. Thus, the banking system scored three consecutive years of losses for the period 2010-2012, such as, from this perspective, the key indicators of aggregate

[4] Banca Națională a României (2014) *Raport asupra stabilității financiare*, București:BNR, p.27.

[5] Asociația Română a Băncilor (2015) Sistemul bancar din România, available at http://www.arb.ro/sistemul-bancar-din-romania/sistemul-bancar-din-romania/

profitability (ROE and ROA) were negative at the end of 2014 (-1.32% and -12.45%) after a relative recovery in 2013 (0.01% and 0.13%) but they became positive at the end of 2015 (+1,35%, respectively +12,82%).

Bank profitability has increased in 2015 amid the ongoing process of cleaning banks' balance sheets of bad loans, but profits are distributed asymmetrically in the banking system. High profits obtained in 2015 partially offsets the higher losses recorded in 2014.

Romanian banking system remains the main funder of the national economy, such as in Romania, it provides about 90% of financing of the economy and, as a result, its proper functioning is vital to ensure liquidity in the economy.

4. NBR monetary policy and bank lending

The inflation rate has decreased in recent years, reaching -0.4% in December 2015. Inflation turned negative in the context of cuts in VAT, but it is projected to return to positive values this year, as the impact of tax measures is phased out.

As a result, monetary policy rate has decreased significantly, while inflation subdued.

For the period 2008-2015, the central bank used a variety of monetary policy instruments, such as the interest rate of monetary policy and its symmetric corridor, the reserve ratio and the open market operations (repo) in order to ensure liquidity to the banking system. In this context, a study of the transmission mechanism of monetary policy in the Romanian economy had a great importance.

In the first study on the transmission mechanism of monetary policy, conducted by Antohi, Udrea and Braun in 2003, the authors conclude that central bank interest rate directly influences interest rates on term deposits without having a significant effect on the rate of interest on loans[6].

Tieman[7] revealed that pass-through interest rates in Romania were similar to that of other economies in the region. A further analysis of the IMF[8] concludes that the pass-through was improved (December 2007 - February 2012), being superior to other emerging economies.

In a 2009 study[9], the authors, researchers at the Centre for Financial and Monetary Research "Victor Slăvescu" from the National Institute of Economic Research of Romania (NIER), points out that "the high elasticity of the interest rates calculated by reference to the monetary policy interest rate shows that the interest rate channel of monetary policy transmission mechanism is functional, but only to the banking system. Due to the structural rigidity of the Romanian banking system, monetary policy signal is not sent with the same clarity to the real economy. There are several malfunctions of other channels (for example, the exchange rate channel) of the banking system and fiscal environment that disrupts the strong monetary impulse transmission to the real economy".

Among the more recent research regarding the period of 2005-2014 there is the work performed by Enache and Radu[10] at the NBR in 2015. They conducted an analysis of transmission policy rates on loans and deposits of non-bank customers in Romania and made empirical comparisons with similar regional framework such as other countries in the region: Czech Republic, Poland and Hungary. According to the authors, the estimates showed that changes in interest rate on Romanian interbank money market was fully transmited on long-term interest rates on new loans and new term deposits of non-bank customers in Romania.

Developments in interest rates on new deposits and loans in Romania compared to the interbank interest rate ROBOR 3M show a picture of the gap created by major difference between the interest rate on the money market 3M and the interest rate on new loans and the overlapping, almost complete, of the interbank rate with the interest rate on new deposits. There is also a significant margin between the interest rate on loans and the interest rate on deposits, still maintained at higher values, but declining.

As it was expected, these developments expressed the change in the banks business model in Romania, banks were focusing on ensuring their own liquidity (low remuneration of new deposits), covering losses incurred due to financial crisis (high margins between loans/deposits) and a rigorous selection of bank customers.

5. The evolution of bank lending in Romania during 2008-2015

The pre-crisis period in Romania has been characterized by an annual growth rate of loans of two digits that exceeded the local sources of funding

[6] Antohi D., Udrea I., Braun H. (2003) *Mecanismul de transmisie a politicii monetare în România*, Caiete de studii nr. 13, București: BNR.

[7] Tieman A. (2004) Interest Rate Pass-Through in Romania and Other Central European Economies, IMF Working Paper Series, W/04/211, Washington.

[8] International Monetary Fund (2012) *Romania Country Report No.12/73*, Washington.

[9] Glod A.G., Bălăşescu Fl., Moşneanu E. A. (2010) *An analysis on the monetary policy interest rate channel in the transmission of the monetary impulse*, în Studii Financiare nr. 4/2009, secţiunea Studii Monetare – Abordări teoretice şi modelare, Bucureşti: INCE.

[10] Enache R., Radu R. (2015) Transmisia ratelor dobânzilor în România. Estimări recente și comparații regionale, Caiete de studii nr. 37, București: BNR.

and made necessary the external financing of foreign parent banks with relative cheap capital[11].

The lending evolution is the consequence of Romania's entrance in the EU on 1 January 2007, as a result of intensification of Romanian business relationships with the European single market which Romania carries about 70% of foreign trade and access to a lower interest rate market.

The global financial and economic crisis negatively influenced the Romanian economy and the banking system by deteriorating both loan supply and demand, reducing lending activity with major concequences on debtor-creditor relationship.

In this context, after the crisis, the credit supply was influenced by:

- asymmetrical competition between the government and the companies in terms of access to funding sources (the crowding out effect) as a result of an accelerated growth of public debt;
- a high level of bad loans which led to an increase in banks provisions;
- an NBR monetary policy easing by lowering minimum reserve requirements and reducing the policy rate;
- a tightening of credit standards for both household and non-financial companies;
- an increase of the banks' prudential measures motivated by the worsening of economic and financial conditions, the growing risk of adverse selection and the reassessment of the customers' risk profile.

On the other hand, the credit demand was marked by:

- the reduction of indebtedness capacity of companies due to financial deadlock;
- the deterioration of companies' creditworthiness as a result of restrictions on both domestic and export markets;
- a slump of companies' profitability and of households'income;
- a high indebtedness of households;
- a volatility of the national currency exchange rate against the major international currencies.

The evolution of the global crisis and the subsequent sovereign debt crisis in the euro area have clearly changed business models of the banking sector in the countries of Central and Eastern Europe. Thus, domestic lending was slowed down and the foreign banks branches have had to rely increasingly on local sources of funding, mainly on retail deposits and domestic debt instruments, instead of parent banks financing.

NBR attempted to give impetus, through its monetary policy, on the resumption of lending to the real economy on a sustainable basis, by lowering the interest rate monetary policy and the reserve ratio, as well as by providing liquidity to the money market.

At the end of 2008 the ratio of government credit on non-government loans was 8.56% in contrast to the end of 2014 when this ratio was 36.92% as noted NBR reports on lending, indicating a growth of government financing by the banking sector to the detriment of the real economy[12].

The accommodative monetary policy of the National Bank of Romania has had a limited impact on the resumption of lending activity, although the monetary policy interest rate gradually reduced to a record low of 1.75% in May 2015 (still in force today), corresponding to HIPC trends and anticipating a reduced rate of inflation. Meanwhile, the reserve requirements for liabilities denominated in RON were reduced from 18% in October 2008 to 8% in May 2015, while the minimum reserves for liabilities denominated in foreign currency were reduced from 30% in June 2009 to 12% in January 2016.

There were some peculiarities that marked lending to households[13] in the period under review, such as:

- the indebtedness of households increased for the period 2000-2010, so that the ratio of household debt and their disposable income was increased from 1% in 2000 to 37% in 2010;
- the debt service of the households remains high due to the fact that one third of total household spending in Romania is allocated to pay home loans;
- in spite of the fact that the number of the consumer loans declined in 2009, they continue to representt half of total loans in 2014;
- there were major influences in obtaining mortgage loans by households due to housing price developments which, adjusted for inflation, decreased by 50% between 2008 and 2013, reaching a level below that of 2005;
- the exchange rate volatility remains high as a result of contracting foreign currency loans by households.

From 2012 until the end of 2014, lending activity to non-financial companies has experienced a sharp decline, highlighting a major difference between lending in foreign currency and lending in national currency. The negative dynamics of lending to the private sector (-4.1% in real terms at the end of 2014 compared to 2013) was caused by: the extension of foreign currency credit contraction, the removal of bad loans from the banks balance sheet at the same time with provisioning tne bad loans left, the persistent deficit of eligible application, the high

[11] European Comission (2015) Raportul de țară al României pentru 2015. Inclusiv un bilanț aprofundat privind prevenirea și corectarea dezechilibrelor macroeconomice, Document de lucru al serviciilor Comisiei, Bruxellex : EC, SWD(2015) 42 final, 26.02.2015, p. 46.

[12] Banca Națională a României (2008-2014) Structura în profil teritorial a creditelor și depozitelor clienților nebancari, neguvernamentali, București:BNR.

[13] Banca Națională a României (2000-2014) *Raport asupra stabilității financiare*, București:BNR.

indebtedness of the companies and the number of companies in insolvency.

The main features of the lending activity to non-financial companies for the period 2008-2014 are highlighted by the following aspects:

- the share of loans to the enterprises in GDP is relatively low (48% of GDP in 2014), even though that type of loans constitutes more than half of private sector debt in Romania;
- the indebtedness of non-financial companies is low due to the ongoing adjustment in their balance sheets and to the restrictions in lending activity made by NBR and the Romanian credit institutions;
- the analysis of indebtedness depends on the company size, so that the indebtedness of SMEs increased between 2012 and 2013 from 4.5 to 4.8, while large corporations have reduced their indebtedness in same time as a result of capital increases; also, large companies have reduced debt by 1.26 to 1.14 thus explaining the decrease of non-performing loans for that period of time;
- the repayment of loans is influenced by the payment discipline of the companies according to their size and their activity. As such, the construction and real estate sector had the highest levels of non-performing loans (28% in August 2014), followed by commerce and trade (24%), industry (21%), services and agriculture (18%). Micro-enterprises and SMEs have an NPL rate of over 20% of total;
- in 2013 and 2014, almost 72% of the bad loans of the companies were due to insolvency or bankruptcy.

The last two years was characterized by the private sector credit growth, especially in households and the fact that loans in lei is the main driver of credit growth in Romania.

6. Conclusions

As a conclusion to the issues outlined above, they could be highlighted some strands for the central bank and credit institutions, in a bid to increase sustainable level of lending in Romania and to achieve a sustainable economic growth, such as:

- exploiting the high potential of funding companies in certain areas, such as businesses with export activity, high-tech sectors, which provide 30% of Romania's annual exports and a third of gross value added generated by IT sectors;
- improving the terms of lending for start-up companies as so a higher volume of credits to be directed to them for a sustainable long term;
- refining the availability of financing conditions for all companies with respect to lending standards: lending terms such as interest rates, fees and maturity; the amount or type of collateral requirements, indebtedness accepted by the banking institution;
- improving the companies and housholds access to finance from commercial banks, not so much by sizing the appropriate territorial level network of banking units in accordance with the needs of customers, but especially through integrated business services, transparency and timeliness of information available about lending, diversity of methods and means of payment which customers may use;
- decreasing the funding costs for SMEs by government grants for a specific percentage of the interest payment and / or elimination of fees or charges that are less justifiable in terms of performing loans;
- increaseing the training programmes for the bank employees in terms of corporate financial analysis, business plans and feasibility studies, risk modeling, business knowledge and specificity of different economic sectors;
- alleviating imbalances on the bargaining power of companies to banks by introducing the credit institution mediator and by involvement of the Office for Consumer Protection and Competition Council in the relationships between banks and their customers;
- reducing the information asymmetry in the biunivocal relationship customer - bank by improving the transparency of information and the explanation of credit conditions as quasi-exhaustive query for the exact customer creditworthi-ness;
- ensuring and monitoring the soundness of each bank in the system by the National Bank of Romania;
- ensuring and maintaining price stability in the national economy by the central bank, in close correlation with financial stability according to regulations at national and European level;
- stimulating bank lending by the central bank using suitable monetary policy instruments and regulations.

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EXCHANGE RATE DIFFERENCES-THE ACCOUNTING TREATMENT AND ITS INFLUENCE ON THE FINANCIAL PERFORMANCE OF AN ECONOMIC ENTITY

Nicoleta Cristina MATEI[*]
Andreea Paula DUMITRU[**]

Abstract

Currency rate differences arise when there are certain debt rights or obligations in foreign currency of an economic entity which are collected, i.e. paid for at a different course from the one displayed by the Romanian National Bank on the date of their establishment. Such differences, according to the situation, generate expenditure or revenue which affects a company's financial result and, consequently, the accountant result as well.

The results registered by an economic entity presented in the Profit and Loss Account provide information about its financial performance. This performance can be influenced by the favorable or unfavorable exchange rate differences existing when an economic entity carries out transactions or has incurred foreign currency loans having a significant share in the total amount of transactions or in capitals. The present paper shows the accounting treatment of the exchange rate differences and its impact on the financial performance.

Keywords: *exchange rate differences, financial result, accounting result, financial performance.*

Introduction

The relationships that economic units have with customers, suppliers and lenders generate debt rights and payment obligations or commitments. Depending on the field of activity, some or all transactions with customers and/or suppliers may be in foreign currency. Some economic units resort to foreign currency loans to finance their working activity. The accounting law stipulates that all transactions in foreign currencies be expressed in Romanian currency (lei), at the exchange rate displayed by the National Bank of Romania, an exchange rate that may undergo alterations from the date of lodging the claim/debt in foreign currency and the time of settlement. Therefore, exchange rate differences may appear.

The study undertaken aims at presenting the concept of exchange rate differences, the possible situations that arise, their recognition in accounting in accordance with the national rules in force, as well as their influence on the financial performance of an economic unit.

The importance of this study lies in highlighting the impact of exchange rate differences on the results obtained by an economic unit and presented through the profit and loss account indicators.

In order to highlight the impact of exchange rate differences on the accountant results and, consequently, on the performance of an economic unit, we have analyzed the situation of a company having foreign currency long-term loans, receivables and payables to suppliers.

Regardless of the business field, an economic unit must be competitive in order to remunerate its production factors and ensure its development.

The term "performance", as supplied by general language dictionaries, is referred to as an accomplishment in a specific field of activity. At the level of an economic unit, performance include the ability to gain access to resources, to allocate and optimally use them with a view to make sufficient payments to cover the risk undertaken and to justify the interest, on the trajectory of future sustainable development[1]. Therefore, the economic performance of a unit lies in the efficiency and effectiveness with which resources are used and results are generated. Efficiency involves maximizing the results of an activity in relation to the resources used, while the effectiveness shows the degree of achievement for the scheduled objectives, as well as the relationship between the provisioned effect and the outcome of the activity carried out.

The assessment of the financial performance can be equally achieved by means of profitability indicators. The first step in the evaluation of profitability is to determine the results as the difference between the income and the consumption of resources pertaining to it. The main result indicators from the profit and loss account of an economic unit are the operation result, the financial result and the gross result of the exercise.

[*] Lecturer, PhD, Nicolae Titulescu University, Bucharest (e-mail: **cmatei@univnt.ro**).
[**] Lecturer, PhD, Nicolae Titulescu University, Bucharest (e-mail: **andreeadumitrupaula@gmail.com**).
[1] Monica Petcu, Economic and Financial Analysis of the Company. Problems, approaches, methods, applications, Ed. Economică, Bucharest, p. 313.

The operating result represents the difference between the operating revenue and the expenditure of the resources allotted to the operation, while the financial result is determined by deducting the financial expenditure from the financial revenue. The two results, the operation and the financial ones summed up, form the gross result of the exercise or the accounting result.

The accounting profit provides information relating to the company's ability to control costs and to achieve revenue that is higher than the expenditure.[2]

The exchange rate differences may be financial income or expenses, as appropriate. Therefore, their existence and amount influence the financial result and, consequently, the gross profit of the exercise.

Currency rate differences – accounting treatment

In order to carry out activity, some economic units make foreign currency transactions. Foreign currency represents any currency, but the national one.

In Romania accounting is held in the national currency, therefore foreign currency transactions must be initially recorded at the exchange rate communicated by the National Bank of Romania on the date of the transaction.

A foreign currency transaction is a transaction that is expressed in or requires settlement in a currency other than the national currency (lei), including transactions arising when an entity:

- buys or sells goods or services whose price is expressed in currency;
- borrows or loans funds, and the amounts to be paid or cashed are expressed in currency; or
- purchases or gives in assets in any other manner, contracts or pay debts denominated in foreign currency.[3]

The differences arising from the conversion of a certain number of units of a currency into another currency at different exchange rates represent exchange rate differences. The currency exchange rate refers to the exchange ratio between the two currencies.[4]

According to the accounting regulations in force, exchange differences arise:

- upon settlement of foreign currency receivables and payables to rates that were different from those at which they were initially recorded;
- upon evaluation at the end of each month of the claims, debts in foreign currency, foreign currency availability and other treasury values, such as state currency titles, letters of credit and deposits in foreign currency at the exchange rate of the currency market, communicated by the National Bank of Romania in the last banking day of the month.

When the claims or liabilities in foreign currencies are settled in the same month in which they occurred, the resulting difference is recognized in that month. In the case when these claims or liabilities in foreign currencies are settled within a subsequent month, the difference is recognized in each month, which intervenes by the month of settlement and is to be determined taking into account the modification of exchange rates in the course of each month.

Exchange rate differences can be favorable and are recorded in accounting as income from the exchange rate differences or they can be unfavorable and are recognized as expenses from he exchange rate differences.

The change of the exchange rate may generate expenses from the exchange rate differences or income from the exchange rate differences depending on the type of the transaction as follows:

Tabel 1

Transaction in foreign currency	**Exchange rate trend**	
	Ascending	**Descending**
Incurred loans	Exchange rate differences expenses	Exchange rate differences revenue
Offered loans	Exchange rate differences revenue	Exchange rate differences expenses
Goods delivery/services	Exchange rate differences revenue	Exchange rate differences expenses
Purchase of goods	Exchange rate differences expenses	Exchange rate differences revenue
Bank deposits, deposits in the current account, cash	Exchange rate differences revenue	Exchange rate differences expenses

From the normal course of the activity of an economic unit there may result receivables and payables denominated in lei, whose settlement is to

[2]Tabără Neculai, Dincu Roxana-Mauela, "Performance Indicators in the Context of International Accounting Regulations", Al. I. Cuza University, Iaşi, p. 368.

[3]O.M.F.P. 1802/2014 ACCOUNTING REGULATIONS concerning the individual annual financial statements and the consolidated annual financial statements, art. 317, par. (1).

[4]O.M.F.P. 1802/2014 ACCOUNTING REGULATIONS concerning the individual annual financial statements and the consolidated annual financial statements, art. 317, par. (2).

be made depending on currency rates. At the time of the settlement of such claims and debts there may arise differences in value due to an exchange rate different from that at which they were originally recorded, differences which are to be recorded in the accounts as other financial expenses/revenue.

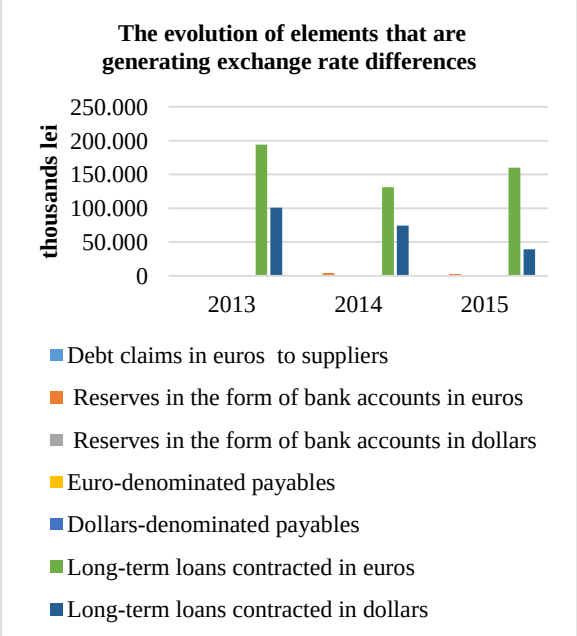
The influence of the exchange rate differences on the financial performance of an economic unit

At the time of the settlement of foreign currency receivables and payables or on a monthly basis, both in their assessment and in the assessment of the foreign currency reserves at the exchange rate communicated by the National Bank of Romania, in accounting there can be registered expenses or income resulted from the exchange rate differences. These expenses, financial income affects the result respectively obtained an economic entity.

In order to analyze the influence of the exchange rate differences over the financial performance we have studied the case of economic unit with euro-denominated payables, debt claims in euros and dollars to suppliers, long-term loans contracted in euros and dollars, reserves in the form of bank accounts in euros and dollars.

The evolution of assets, payables and foreign currency deposits as well as the debt-items, i.e. debts to suppliers and long-term debts is presented as follows:

Graph 1



The euro and dollar currency exchange rate at the end of the 2013, 2014 and 2015 financial exercises varied as follows:

Table 2

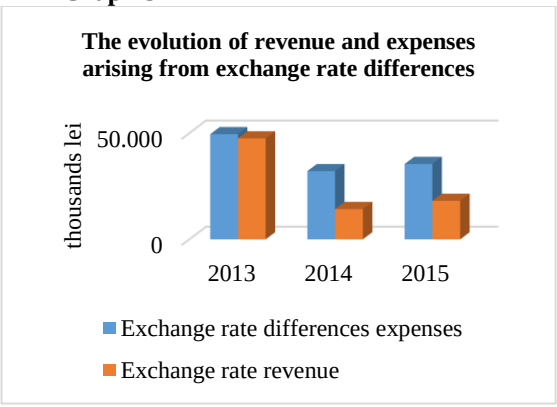
Currency	Financial exercise		
	2013	2014	2015
Dollar	3.26	3.69	4.15
Euro	4.48	4.48	4.52

As it can be noticed from the above table, the exchange rate had an ascending trend over the analyzed period for both currencies in which the economic unit made transactions.

The devaluation of the Romanian currency in comparison to the US dollar and the euro led to the recording of exchange rate differences expenses larger than the exchange rate differences income at the end of each year, as euro and dollars loans have the largest share in the total foreign currency transactions.

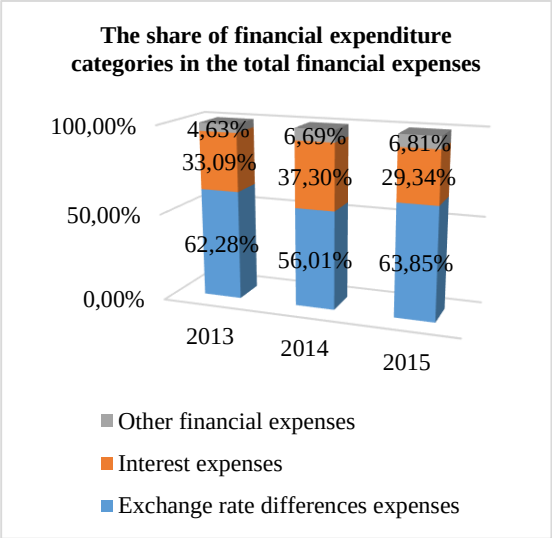
We present below the evolution of the expenditure and income from exchange rate differences:

Graph 3



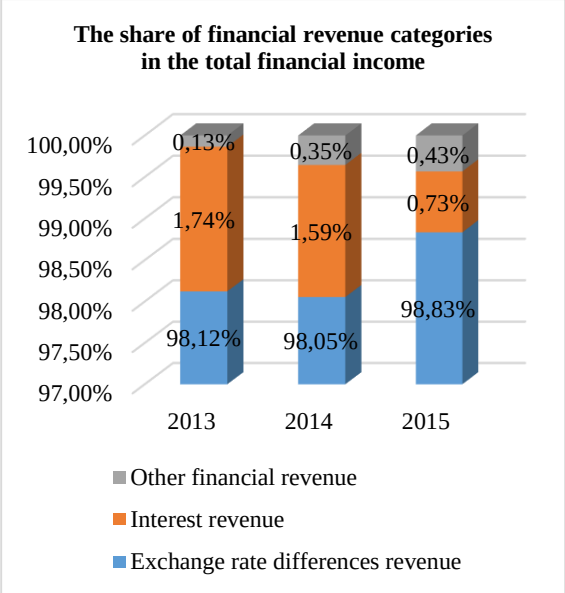
In addition to the expenses from the exchange rate differences, the determination of the financial outturn includes the interest expenses and the other financial expenses, but the former have the largest share in the total financial expenditure (Graph 4), consequently having a huge impact on the financial result.

Graph 4



The structure of financial income is as follows:

Graph 5



The information presented above implies that both expenditure and income from the exchange rate differences hold the largest share among the items that participate in establishing the financial result, so that its evolution depends largely on the expenses and income from the exchange rate differences. Exchange rate fluctuations that are reflected in accounting as revenue and expenditure according to which the economic unit's results are determined, have a significant impact on its financial performance.

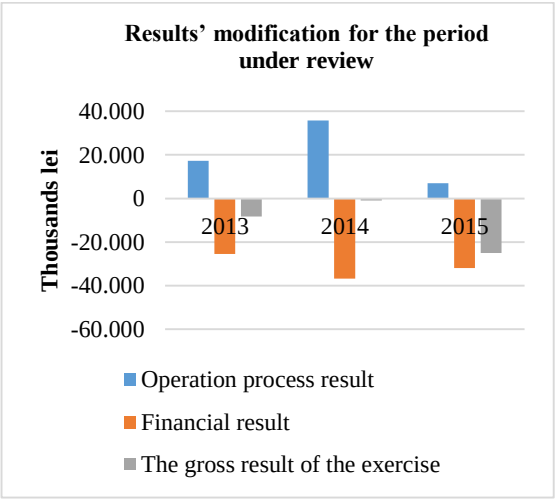
The elements of expenditure and revenue from the exchange rate differences negatively influence the evolution of the financial result because of the larger amount of the expenditure as compared to the revenue, due to unfavorable currency exchange rate evolution.

The operational activity of the economic unit, throughout the period under review, ended with profit, while the financial activity ended in loss. The loss from the financial activity was larger than the profit generated by the operational activity, therefore, the gross profit of the financial exercise, the accounting outcome, amounts to loss nevertheless.

Table 3 **- thousand lei-**

Indicator	Financial exercise		
	2013	2014	2015
Operational activity result	17,248.84	35,795.33	6,949.34
Financial result	-25,533.25	-36,735.07	-31,931.46
The gross result of the exercise	-8,284.41	-939.74	-24,982.12

Graficul 6



A business is competitive when it covers both its operating costs and the cost of capital. The economic unit studied through the positive operating result shows that it has the ability to cover its operating expenses, but the negative financial result indicates an inability to cover the cost of borrowed capital.

The long-term financing of a company can be made from its own resources or from borrowed resources. The respective company holds loans in foreign currency, so that the rate of foreign currency debt in permanent capital has a significant impact on its financial performance.

The capital of the company is represented by both its own capital subscribed and paid up by shareholders, legal reserves, reevaluation reserve and other reserves, as well as by the loan represented by long-term credits in lei and in foreign currency.

The structure of the permanent capital (the company's own capital and long-term debts) of the company is given in the tables below:

Table 4 **- thousand lei -**

Indicator	Financial exercise		
	2013	2014	2015
Long-term debts in euro	194,390	131,191	160,062
Long-term debts in dollars	100,879	74,549	39,196
Company own capital	622,701	634,869	609,126
Permanent capital	917,971	840,610	808,384

Table 5

Indicator	Financial exercise		
	2013	2014	2015
Long-term debts in euro	21%	16%	20%
Long-term debts in dollars	11%	9%	5%
Company own capital	68%	76%	75%
Permanent capital	100%	100%	100%

Long-term credits in foreign currency generate costs, namely interest costs, but also expenditure caused by exchange rate fluctuations. These expenses are to be covered from the financial revenue and the operating profits. The extent to which the operating profit and the financial income have covered financial expenses:

Table 6

	Financial exercise		
	2013	2014	2015
The proportion of covering the expenditure from the operation process result and the financial income	88.79%	98.16%	50.23%

Throughout the period under review the company hasn't covered its financial expenditure on account of the profit from operations and the financial income, thus obtaining gross accounting loss at the end of each financial exercise.

We present below the value of the result from operations, financial income and the financial expense categories:

Table 7 **- thousand lei -**

Indicator	Financial exercise		
	2013	2014	2015
Operational activity result	17,249	35,795	6,949
Financial revenues total	48,387	14,463	18,266
Exchange rate differences expenses	46,036	28,675	32,050
Interest costs	24,461	19,098	14,727
Other financial expenses	3,423	3,425	3,421
Financial expenses total	73,920	51,198	50,198

As shown in the table above, for each financial exercise, the operation profit and the financial income entirely covered the interest expenses and the other financial expenses and only partially the exchange rate differences expenses. Therefore, the revenues recorded by the company from both its operation activity as well as from the financial activity, cover the operation costs, the interest charges on loans' expenses, other financial expenses, but it does not entirely cover the unfavorable rate differences generated by the monthly assessment of loans, receivables, payables to suppliers and the amounts available in foreign currency.

In the case of the studied company the significant share of foreign currency loans in the total amount of patrimonial elements which give rise to differences in exchange rates linked with the evolution of the exchange rate has led to a high level of financial expenditure so as to generate a financial loss that is not covered in the exploitation result. In this way, differences in exchange rates have a significant impact on the financial performance of the economic unit.

Conclusions

The economic units engaged in foreign currency transactions must record these in the national currency at the exchange rate communicated by the National Bank of Romania at the date of the transaction. Fluctuations in currency exchange rates between the transaction date and the settlement date give rise to exchange rate differences that are either favorable or unfavorable to the economic unit. These differences are recognized in accounting as follows: the favorable ones in the financial income accounts, and the unfavorable ones in the financial expenses accounts.

The debts and/or claims in foreign currencies can be settled in the month of their establishment or in a subsequent month. National accounting regulations stipulate that at the end of each month claims, debts, and liquidity reserves in foreign currency owned by the economic units are to be evaluated at the exchange rate communicated by the National Bank of Romania. As a result of this, exchange rate differences appear both on the settlement of claims/debts, as well as at the end of each month.

The competition for any market segment has become increasingly fierce, therefore the market position depends on the performance of economic units, including their financial performance.

The performance measurement indicators include the gross profit of the financial exercise or the accounting result. This result is determined by subtracting the total expenses from the total revenues recorded by a company over a period of time, a year, in most cases.

The accounting result is influenced by the operation result calculated as the difference between the revenues and expenses related to the operating activity and the financial result obtained by deducting the financial expenses from the financial revenues.

The exchange rate differences are recorded in the accounts as financial expenses when:

- the settlement of debts towards suppliers is carried out at an exchange rate higher than the one existing at the time of their incurrence;
- the monthly evaluation of debts to suppliers and/or foreign currency credits is to be made at an exchange rate higher than the one communicated by the National Bank of Romania upon their incurrence/establishment;
- the collection of receivables in foreign currency are to be carried out at an exchange rate lower than the one existing at the date of their establishment;
- the monthly assessment of claims and/or reserves in the bank accounts in foreign currency are to be carried out at an exchange rate lower than the one released by the National Bank of Romania at the time of their establishment/of their previous assessment.

The exchange rate differences are registered in accounting as financial revenues when:

- the settlement of debts to suppliers is carried out at an exchange rate lower than the one existing at the date of their establishment;
- the monthly assessment of debt to suppliers and/or loans denominated in foreign currency must be carried out at an exchange rate lower than the one released by the National Bank of Romania on the date of their establishment/their commitment;
- the collection of receivables in foreign currency is to be carried out at an exchange rate higher than the one existing at the time of their formation;;
- the monthly assessment of claims and/or reserves of bank accounts in foreign currency is to be carried out at an exchange rate higher than the one released by the National Bank of Romania at the time of their establishment/ their previous assessment.

The larger the amount of the debt to the suppliers and foreign currency loans the higher the exchange rate differences expenses where the exchange rate has an ascending trend. The exchange rate differences expenses together with the other financial expenses such as interest expenses must be covered on account of the financial revenue, otherwise they will generate a loss from the financial activity. This loss must be compensated with a positive result from the operation activity in order to get the accounting profit.

Differences in exchange rates have a significant impact on the financial performance only in the case of companies that carry out transactions in foreign currency or hold foreign currency reserves, and they have a large share in the total transactions/availability.

In addition to exchange rate differences, the financial performance of an economic unit may also be influenced by other elements that have no direct link with the operation activity such as expenses/income from the re-evaluation of fixed assets. We consider it to be worth studying in further research.

References:

- Monica Petcu, Economic and Financial Analysis of the Company. Problems, Approaches, Methods, Applications, Ed. Economică, Bucharest, p. 313;
- Tabără Neculai, Dincu Roxana-Mauela, "Performance Indicators in the Context of International Accounting Regulations", Al. I. Cuza University, Iași, p. 368;
- Accounting Law no. 82, December 24 , 1991, republished with amendments;
- O.M.F.P. 1802/2014 A*CCOUNTING REGULATIONS concerning the individual annual financial statements and the consolidated annual financial statements.*

CONSIDERATIONS ON ACCESS TO FINANCE FOR NON-FINANCIAL COMPANIES IN ROMANIA

Nicoleta Georgeta PANAIT *

Abstract

The main purpose of this paper is to understand the mechanisms involved in bank lending activity and the effects that this activity has on profitability and business companies. One of the main sources of funding of their work for Romanian companies is the bank lending. Lending is based on the viability of business plans and the debtors' ability to generate revenue, respectively liquidity as the main collateral and source of repayment of loans and payment of interest, commitment to shareholders, management experience and financial stability company. Increasing of the role of major national banks, caused mainly corporate development and financing environment state and the living standards of Romanian benefiting from banking services. However, the European core reforms in recent years has changed substantially all the activities of the banks active in Romania and partnerships with customers and stakeholders and increased both their strategic ability and professionalism.

Keywords: *business lending, banking risks, the strategy of the banks, credit, bank guarantee.*

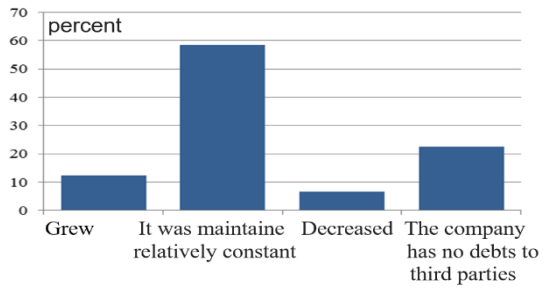
1. Theoretical aspects of lending

In recent years, among the majority of entrepreneurs there was a reluctance to invest in their own business or new business or to the increase in production capacity or increase current assets, in the last year this trend was reversed and still sees interest clear to resume investment.

For the private sector to generate growth and create new jobs, it needs long-term and affordable financing. Purely commercial credit, high interest rates and short repayment periods affects return on investment and business development in general.

Because of the crisis, some lenders have become more cautious in granting loans to SMEs, sometimes too cautious while investing too low could cause a credit crunch. In addition, new and stricter rules on, for example, financial institutions and capital requirements, implemented both by national authorities and the EU to make more difficult the access of SMEs to financing. Also, SMEs are often at the end of a long chain of distribution and therefore are most affected by payment delays and payment periods currently used.

Evolution of the ratio debt / asset during April-September 2015, non-financial companies



Source: BNR

Note: The term net balance is calculated as the difference between the percentage of those who have noted an upward trend as the share of those who have noted a downward trend as

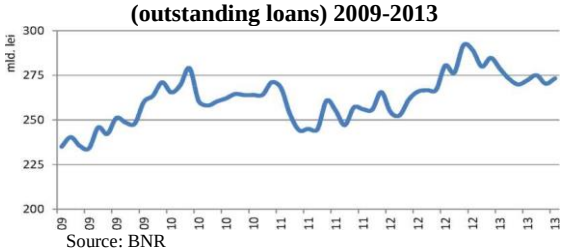
One way of obtaining finance is bank lending or requests a loan from microfinance companies. For small business are better set microcredit institutions that are ready to assume greater risk, because it works with own equity. These lender in a relatively short time and under less rigid compared to banks, however, even if these companies are ready to provide you loan without collateral, attention to interest which is usually much higher than a commercial bank, in some cases exceeding 21%.

There are several types of loans: investment loans (for the purchase of land, buildings, equipment, machinery); credit lines (to support the firm's current activities and needs); co-financing European projects (which aims to ensure the beneficiary's own contribution to the investment project); guarantee funds.

Romania's National Bank published the results of surveys on lending to SMEs [1].

According to these polls approx. 65% of companies do not seek loans from banks or NBFIs and does not intend to request a loan in the near future (62%). Basically two out of three are not interested entrepreneurs to access credit to finance businesses.

Evolution of credit in Romania (outstanding loans) 2009-2013



Source: BNR

* Assist. PhD, Faculty of Economic Sciences, "Nicolae Titulescu" University of Bucharest (e-mail: **nico.panait@gmail.com**).

The data in the chart above refers to loans to both non-financial institutions or population, and non-monetary financial institutions or public administration.

Microenterprises (businesses with fewer than 10 employees) used in the last six months mainly internal funds or, in other words, as the number of employees a company grows, the company increasingly turning increasingly to external sources (attracted) financing and less on domestic services.

In terms of sector, industrial enterprises were more interested in using both internal sources and sources attracted. Also, companies with innovative potential were more active in searching and combining those attracted domestic sources (37% vs. 31% for non innovative firms).

On the other hand, companies newly established (active for less than two years) are those who, willingly or not, using mostly domestic sources to finance their operations (22% versus 17% for companies with a history of more than two years).

According to statistics they are showing an increased maturity this being possible with the following implications: the need to finance more frequently targeting businesses to invest, but also a lower appetite of the banking system in Romania to finance the current needs of businesses.

The correlation between the currency and maturity of the loan is as follows:

DECEMBER 2013				
TERM	RON	EUR	OTHER CURRENCIES	TOTAL
under 1 year	50.20%	25.45%	57.40%	37.11%
1-5 years	28.82%	31.65%	19.65%	30.10%
over 5 years	20.97%	42.90%	22.95%	32.80%
January 2007				
under 1 year	55.38%	35.66%	50.70%	45.83%
1-5 years	31.65%	31.86%	24.92%	31.30%
over 5 years	12.96%	32.48%	24.39%	22.87%

Source: BNR

The credit is a factor of growth velocity of money by streamlining economic, credit and on the other hand is a tool for supporting foreign trade by promoting export propensity operations, and import [2].

2. Aspects of the low rate of business lending

Banks have realized the sectors with the most problems and haven't reduced the aid by lending to entrepreneurs.

The largest decreases in the balance of loans and commitments in excess of 20,000 lei were recorded in the sectors of industry, financial and insurance services, according to the National Bank of Romania (BNR).

In contrast, those who received the most loans are public institutions: public administration and defense, compulsory social security, education, health and social assistance.

Even if the government came up with measures and programs designed to support the construction sector, one of the most affected engines of the Romanian economy, the loans granted by financial institutions have been low.

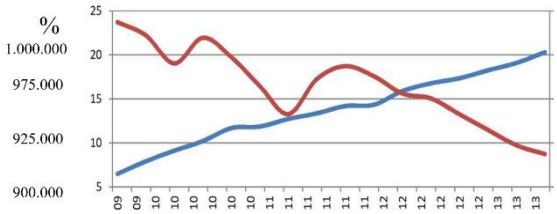
The financial blockage still affect many companies (especially in construction, according to BNR data that over half of firms are affected by this phenomenon), and to resolve this situation theoretically loan is the best solution.

The blame for this situation have both parties bankers believe that the companies are too risky for them to lend and employers to avoid too much into debt in order to avoid companies in insolvency or bankruptcy. The pace of lending fell viewed from two viewpoints, banks and bankers.

In terms of the bank's main reasons that led to blocking lending business in Romania they would be:

Low recovery rate loans due to the large number of companies entered insolvency. Since the crisis have began and until now, according to the National Office of Trade Registry went into insolvency a number of more than 100,000 companies, but what is worse is that although we came out of the crisis phenomenon continues. It is estimated that the number of companies entered insolvency will remain high.

The evolution of non-performing loans and number of borrowers, 2009-2013



Source: BNR
NPL - the left hand scale
Number of borrowers (individuals and businesses) - right hand scale

The impact of insolvencies is and will continue to be a major one, considering the record number of medium and large companies entered insolvency. About 40% of companies have brought loss insolvent banking system, representing the main reason for the growth rate of bad loans to companies, while the remaining approximately 60% had a powerful impact on their partners (suppliers, customers, etc.).

Entry into default, by domino effect, strikes in numerous other companies which in turn have loans from banks.

Bad financial management of many companies, according to analysis from COFACE

only four out of 10 companies have a working capital needs over 50% of the operating companies of which two values are the limit, but in decline. The remaining six companies are recording a negative working capital (70% of them) or they can not cover its current liabilities from current assets liquidation.

This lack of liquidity is due to the economic crisis of recent years but also from Romanian entrepreneur's habits to get money from companies in order to buy luxury cars and to build huge villas.

In terms of business lending decrease was due to:

- The level too high of interest rates and fees charged by financial institutions, according to the central bank survey, 47% of respondents believe the interest rates and fees above the threshold of affordability and is the main obstacle to access to finance.
- Excessive bureaucracy. Bureaucracy has always existed in the banking system in Romania, but was less visible during the boom. Now that Romania went through a deep economic crisis obtaining a loan has become an ordeal for entrepreneurs. The number of documents required is huge and always you need to bring a new document, transforming all into a nightmare. Initially you are asked to present certain documents needed for analysis (which is logical and perfectly normal), but then almost weekly the bank calls for new documents, and so on until quit. If the borrower still has a few months of patience to bring all required documents, in the end is asked to wait, because it follows an entire procedure of analysis which is done by the central HQ of the bank.
- Lack of transparency of banks. Generally, banks do not disclose all the criteria for granting loans so that company managers to realize in advance if you have a real chance to get this credit. Even worse is that, if the credit is happy approved, the company will be informed on the total cost of the loan only when will be signing the loan.
- Fairly long duration up to provide an answer. In business you do not have time to lose and is important to react quickly to market requirements. If you cannot get hold fast to take advantage of some business opportunities will disappear. A loan request analysis may take 2-3 months, which may be considered in business loss of opportunities.
- The amount of collateral required. Many entrepreneurs consider that banks require collateral too large in relation to appropriations requested. According to the central bank survey that we mentioned earlier in this article about 36% of employers felt that this issue prevents them from accessing credit.

Highly affected by the requested guarantees are companies in rural areas, whose buildings are usually taken in collateral to symbolic values, far below their real value.

The current situation is not good for business. Without bank credit without the support and development opportunities of a company, are they small or big business are reduced.

It is important that credit institutions to lend more companies, to support investment and make investments in government bonds higher, to reduce dependence on foreign funding.

3. Bank guarantees and their role in lending

Lending activity consider that the bank should assume to risks related to loans and credit analysis must give assurances that such risks can be accepted under certain risk conditions and guarantees or risks are too high and significantly influence the financial condition of the bank and is not recommended by taking them.

Credit risk involves the assumption of the risk by the bank that, that at maturity of loan, the customer will not be able to meet its financial obligations to it [3]. To this end the bank by its experts, must form an cautious opinion about the real possibility of repaying the loan, the bank must take into account not only the main source of reimbursement for the payment obligation, but also a possible secondary source of recovery receivables (mainly regarding material and financial guarantees to the customer) [4].

Because of stricter requirements on capital, lenders often require additional personal guarantees, in addition to ordinary bank guarantees. It can still create a barrier to entrepreneurs regarding the establishment of an SME or additional investments in their enterprises.

The bank guarantee is therefore the ultimate source of repayment of loans and used only where no other possibilities to reimbursement and payment of interest due.

To recover a credit by using security means making the bank a certain risk, due both to internal factors of security (for example, a security may be theoretically always liquid at the appraised value, but when recovery cannot be traded, with no interest market) and some elements of answers, which Romania takes an aspect of liquidity actual collateral (eg, its market price no longer covers the time of redemption, the value of debts to the bank due to impairment in itself guarantee or depreciation of its market value).

It also requires agencies capitalization of the bank's financial efforts and delays in recovering debts.

According to the law „in the activity of lending, banks shall ensure that applicants present their credibility to repay at maturity. To this end, banks require applicants to guarantee credits under conditions established by their lending standards "[5].

Lending activity is based on the viability of business plans and the debtors' ability to generate revenue, respectively liquidity as the main collateral and source of repayment of loans and payment of interest, provided that the cash flow to be divested their bank and take place through accounts opened it [6].

Debtors' ability to generate revenue can be estimated in different ways to this purpose is compiling a study solvency. In this study, the bank must assess the commitments that debtors have towards others, technical organization and administrative ratio between equity capital and capital raised, the economic areas of activity are targeted credits, why their request, their destination real and immediate way in which debtors split their profits [7].

Credit guarantees is considered one of the basic principles of lending market economy and guarantees requested most often are:

- collateral;
- personal guarantees.

Collateral are legal means to guarantee the obligations of the debtor by treatment of an asset in order to ensure enforcement of the obligation assumed.

Good set up as collateral is protected from pursuing other unsecured creditors (whose claim is not accompanied by any form of warranty, guarantee or has a degree of priority lower than the bank) that is designed to prosecute and satisfaction a priority secured claim.

Bank lending collateral gives the following rights:

- right of preference, based on
- which, in foreclosure, the value of the property up as collateral will ensure full satisfaction of the bank first, and only what will abound for other creditors;
- right of preference, based on
- which, pursuant to which the bank will be able to track asset in the hands of whoever they are, to the extent necessary to satisfy the obligation secured [8].
- pledge (collateral itself, which can
- in turn be affected by dispossession borrower's property as collateral or without dispossession brought its good warranty);
- real estate collateral (mortgage).

Personal guarantees are legal means of guaranteeing obligations through a third person or entity undertakes, in an ancillary agreement concluded with the creditor bank, to pay the debt of the debtor where it will not pay himself.

Personal guarantees take two main forms:

- surety ship;
- bank bail.

Surety ship can be used only when based on a credit agreement concluded fideiussor undertakes to guarantee the debts of the debtor complies with all its heritage and at the same time the following conditions:

- is a free lancer or a legal person legally constituted;
- It is creditworthy;
- It has sufficient assets to ensure that in case of enforcement, the bank to be able to recover all debts.

The bank security materializes, usually a bank guarantee letter which must contain in its content (mandatory):

- name and address of the bank that sustains the guarantee;
- name and address of the person guaranteed by the bank;
- amount of the collateral;
- term
- validity, etc.

Letters of guarantee may have destinations such as the supply of raw materials for duty for participation in tenders, to secure a loan for the establishment of a letter of credit etc.

4. Conclusion

In a functioning market economy, a company should be enduring so we can conclude that "companies must show dynamism, flexibility, innovation, adapt easily to changes in the economy and also to quickly grasp market trends".

On the other hand, the activity of any company is profit-oriented and maximizing value for its investors. Achieving these goals is not easy, firms acting in a highly competitive and dynamic environment.

Operation conducted by a company depends to a large extent to the funding policy it promotes. Any business, regardless of its degree of development, involving direct contact with the financial market, specifically with the institutions that mediate mobilization of capital resources and services they provide.

Understanding the financial system of specific financing mechanisms through which savings are allocated to support capital investments and the costs and risks involved is essential for the development of a business on solid foundations.

The financial system is subject to constant changes, adapting to the new requirements of businesses, providing financial resources they need in terms of maximum efficiency in terms of risk and cost.

Financial managers must provide the financial resources necessary for business in a timely manner with the lowest cost place them with the lowest risk and get by using their profits to thank all parties involved in existence and operation of the company.

Currently, temporarily available capitals are fewer and more expensive, and expected profits are

harder to come by, accompanied by high risk and difficult to predict.

So, even in conditions of economic crisis for firms in Romania, financing through bank loans is the main solution to cover the financing needs of both current activity and development of their projects.

There is no universally funding solution, one of them could be to develop a wide range of programs, tools and initiatives adapted to cover both equity (such as business angels, financing collective solidarity "crowd funding" and multilateral trading facilities) quasi equity (mezzanine finance) and debt securities (such as bonds for companies with small loans systems and platforms guarantee) and partnerships between banks and other operators involved in financing SMEs (auditors, business associations and SMEs or chambers of commerce) to support enterprises in their start-up phases, growth and transfer, given the size, turnover and their financing needs;

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THE NEED TO IMPLEMENT BASED III IN THE AFTERMATH OF THE GLOBAL FINANCIAL CRISIS

Mădălina Antoaneta RĂDOI[*]
Alexandru OLTEANU[**]

Abstract

Prudential regulation has as ultimate objective securing protection of a bank's clients, shareholders and creditors by defining a sufficient level of bank capitalization. Given the particular importance of the banking sector's vital functions for any economy, the prudential regulations of the key components of the banking system become an essential condition for securing the economic and financial health of a country. Having become aware of the particular importance of a sound legal framework for the banking system, the international authorities have come up with proposals of improvement to the Basel II Agreement

Keywords: *financial stability, Basel Committee on Banking Supervision, Basel III, systemic risk, shadow banking.*

1. Introduction

The Basel Committee for Banking Supervision, initially referred to as the Committee on Banking Regulations and Supervisory Practices, was established in 1974 further to some big cries of the major international currencies and the financial crises experienced by large banking institutions. Thus, the very first regulations laying down the minimum capital requirements to cover for the banking risks were defined in 1988 by the representatives in charge of supervising the banking activities from the G10 countries, and were captured in the Basel I Agreement.

Due to the ever-changing content and scope of the global financial sector, the volatility seen by the financial market over the last decade, and the development of the degree of financial innovation, and further to the economic turmoil which triggered the financial crisis, the increasingly more complex risks faced by the bank, it was concluded that the Basel I Agreement of 1998 was no longer capable of efficiently ensuring that the capital requirements matched the true risk profile of a bank. Further to these critics, the Committee brought to attention a new capital adequacy scheme, in June 2004 under the Basel II Agreement.

The **Basel II Agreement** brought along several innovations in the prudential supervision plan, by defining a 3-phase risk assessment and monitoring system, as well as in consequent determination of the optimal capitalization level. The key objective of Basel II was to provide a more flexible framework for determination of the capital requirements, matching the risk profile of the credit institutions.

The **three pillars** are:

- Minimum capital requirements
- Supervision of capital adequacy
- Market discipline

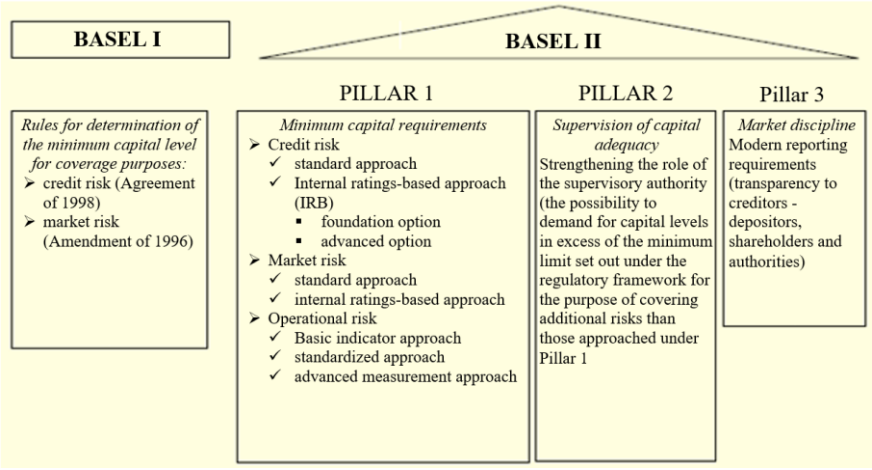


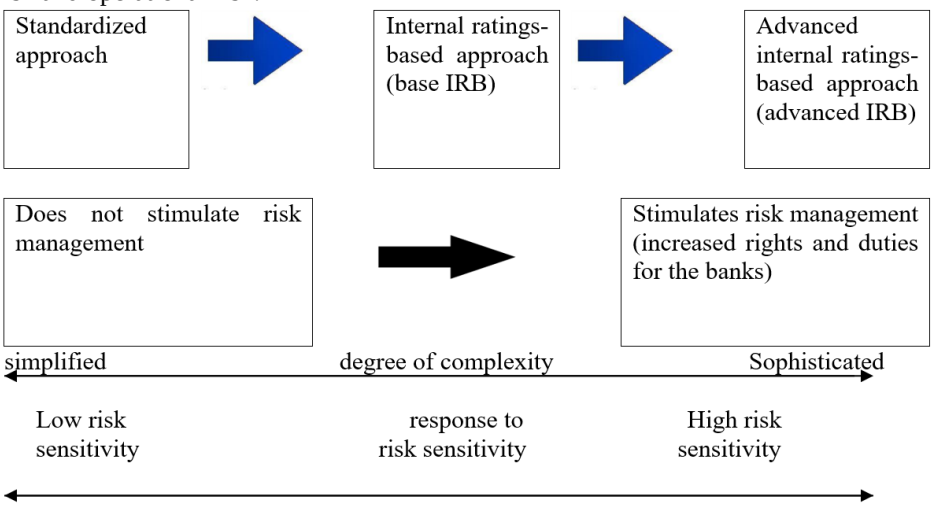
Figure 1.1. Pillar 1 - Minimum capital requirements

[*] Mădălina Antoaneta Rădoi, Associate Professor, PhD, Faculty of Economic Studies, "Nicolae Titulescu" University of Bucharest (e-mail: **madaradoi@gmail.com**).

[**] Alexandru Olteanu, Professor, PhD, Faculty of Economic Studies, "Nicolae Titulescu" University of Bucharest (e-mail: **alolteanu@univnt.ro**).

The capital adequacy rate remains 8%, whereas the assets are weighted term of the credit risk, market risk and operational risk.

The three approaches to risk entail either a low or a high sensitivity to risk, as follows:



The methods and requirements of Basel II Agreement regarding the credit risk are aimed at calculation of the risk-weighted assets and, and consist of the following alternatives:

Standard approach is the revised alternative, but significantly more complex than the one of Basel I Agreement. The most important categories of debtors are: states, including central banks, local authorities, banks and corporations. It basically provides for attachment of risk levels to each balance-sheet and off-balance-sheet asset term of the type of risk organization and the related securities based on the external evaluations carried out by the international rating agencies and other relevant institutions. The figure below shows what the standard approach of credit risk could involve:

Credit risk - Standardized approach

Exposure to central authorities and central banks

AAA to AA-	A+ to A-	BBB+ to BBB-	BB+ to B-	Under B-	not rated
0%	20%	50%	100%	150%	100%

Exposures to banks

	AAA to AA-	A+ to A-	BBB+ to BBB-	BB+ to B-	Under B-	not rated
Option 1 - standard	20%	50%	50% (20% actual)	100%	150%	50%
Option 2 - short-term exposure	20%	20%	20% (idem to date)	50%	150%	20%

Exposures to

	AAA to A-	A+ to A-	BBB+ to BB-	Under BB-	not rated
corporations	20%	50%	100% (idem)	150%	100%
retail	75% (100% actual)				
housing mortgages	35%; 50% actual (only subject to meeting certain conditions)				
mortgages on retail spaces	100% (idem), subject to approval of the central bank and meeting certain conditions, a risk weight of 50% can be applied				

Figure 1.2.

Internal rating-based approaches allow higher risk term of the ratings internally determined by the credit institutions.

The **basic and advanced internal rating-based approach** reflects the credit risk management across the global banking sector.

The **foundation Internal Rating-Based (IRB) approach** allows a bank to use its own rating system, including its own determinations of the probabilities of default (PD), but the losses incurred when the partner is in default (LGD) are supplied by the supervisory authority.

The **advanced Internal Rating-Based (IRB) approach,** when the banks determine their capital requirements employing their own methods, and have such validated by the supervisory institutions, including the determinations of the probabilities of default (PD), but the losses incurred when the partner is in default (LGD).

Ratios showing the probability of loss relative to each type of loan and partner are used. These ratios are:

PD = Probability of Default;

LGD = Loss given Default – the loss incurred by the bank (as percentage from the exposure amount) in the event of the debtor's default; In case of the basic approach, LGD is determined by the supervisory authority, whereas in case of the advanced approach, LGD is determined by the credit institution, based on the historical performance of its customers.

EAD = Exposure at default

M = Effective Maturity

The Probability of Default occurs when the analysis showed the possibility that the debtor would no longer carry out its payment obligations to the bank in full, or the debtor has overdue debts to the bank for longer than 90 days. The PD estimates must rely on a monitoring period of at least 5 years. Considering that the debtor's probability of default fails to provide a complete picture of the potential loss relative to the respective loan/facilities, the banks' desire is to measure how much they would lose if a customer's liabilities become outstanding.

For a bank to be able to use its own figures for *PD* and *LGD*, they must meet a set of strict regulatory criteria which set out the minimum requirements to be met for implementation of a credit risk management system based on internally generated ratings. The principle underlying these requirements says that the risk rating and estimation systems and processes should supply:

- a relevant assessment of the counterparty and the characteristics of the transaction;
- a relevant risk differentiation; and;
- a reasonable and consistent accuracy of the risk quantitative estimates.

Additionally, systems and processes must be consistent with the internal use of such estimates. The Basel Committee, having acknowledged the differences between markets, rating methodologies, and banking products and practices among the various countries, left it to the national supervisory bodies to develop the procedures required for implementation of the internal rating-based system.

Pillar 2 - Supervision of capital adequacy demands active participation of the supervisory authorities in: revisiting the bank-internal capital adequacy assessment processes; identification of the risk factors and, later on, the necessary leverages to determine the banks to maintain an capital levels in excess of the limits set out under the quantitative regulations of Pillar 1; and adoption of measures aimed at preventing capital dropping below the minimum level imposed for risk coverage.

Pillar 3 - Market discipline demands active involvement of the supervisory authority, as well as other institutions and entities in: building the mechanisms required to make use of the market information as a tool in supervision of the banks and harmonizing reporting in line with IFRS **(International Financial Reporting Standards).**

Basel II brings along new elements, such as enlargement of the range of credit risk weights, from 4 to 8 categories, that is 0%, 10%, 20%, 35%, 50%, 75%, 100% and 150%, and diversification of the credit risk hedging tools. With the flexibility this agreement afforded to the credit risk analysis procedures, we see a shift from "one size fits all" thinking to a new approach relying on a customized risk profile.

On the other hand, Basel II facilitates expansion of retail as diversification of the credit risk portfolio helps mitigation of the global risk level. The new methodologies ask for the use of more detailed information about loan applicants, in particular in what their former behaviour in the relation with the banks and creditworthiness are concerned.

With the visible and increasing effects of the crisis, we also saw unhealthy banking practices surfacing. The lack of, or insufficient regulation of highly volatile segments of the capital market, insufficient control of hybrid financial products, as well as inadequate practices of risk management in banks were surfaced.

Specifically, the limitations of Basel II in the context of the economic and financial crisis were:

- insufficient calibration of the internal models which were unable either to predict or
- signal the financial crisis due to the underdevelopment of the stress test for the macroeconomic variables (lack of a macro-prudential component);
- underestimation of material risks and overestimation of the credit institutions' capacity to have such managed properly;
- underestimation of the true nature of the assessments run by the rating agencies in absence of any minimum professional standards or any supervision thereof;
- unreasonable up-taking of an oversized volume of risks against the capital basis (excessive emphasize of the leverage effect);
- inefficient management of the market liquidity and the interaction between credit risk and liquidity risk;
- procyclical nature of the capital requirements magnifying the market decline.

2. Content

Literature Review

The international financial crisis which started in the US as a subprime crisis, continued with a number of banking failures and was prolonged by the

sovereign debt crisis caused a large-scale effort both across the EU and at international level, in pursue of practices able to solve the root causes thereof: the weaknesses of the current regulatory and supervisory framework, characterized by deregulation, light capital requirements, and unsustainable credit growth.

Thus, in December 2010, BCBS (*Basel Committee on Banking Supervision* - BCBS)[1] published new detailed international regulatory standards on capital adequacy and liquidity of credit institutions, collectively known as **Basel III**.

The legislative package CRD IV/CRR adopted by the European Parliament, which implements the new requirements under Basel III represents a fundamental overhaul of the regulatory and supervision framework of the banking industry, the future goal being to strengthen the financial system's stability. The need to introduce Basel III relies on the following considerations (Walter, 2011, pp. 1-2):*f*

- adverse effects of the banking crises (the economic literature shows that the result of the banking crises materializes in a loss of economic production accounting for approximately 60% of pre-crisis GDP);
- frequency of banking crises (since 1985, there have been more than 30 banking crises in the members states of the Basel Committee, which translates into a 5% likelihood that a member state would be faced with a crisis in a given year);
- Basel II benefits outtake the implementation costs because a stable banking system is the building block of sustainable development, with beneficial effects in the long run.

The new Basel III Agreement aims to consolidate the stability of the banking system by applying sound standards designed to enhance its capacity to absorb shocks from the economic and financial sector, as well as mitigate the risk of contagion from the financial sector to the real economy (Walter, 2010). The new standards deal with advancement of risk management, enhancement of transparency and publication requirements imposed to credit institutions, as well as addressing the problems of the banks of systemic importance. First of all, the measures envisage stricter standards for banks in respect of capital adequacy, liquidity requirements and leverage effect, with the ultimate goal of mitigating the adverse effects of the financial crises. Basel III attempts to combine micro and macro-prudential supervision, while providing a risk management framework at bank level (taken over from Basel I and Basel II) and a systemic risk management framework at banking system level.

At microprudential level, the measures target (National Bank of Romania (NBR), 2011, p. 124): *f*

- enhancing the quality of the capital base by increasing the minim equity requirement (ordinary shares, profit or loss carried forward, and reserves), and the requirement for the minimum own funds in tier 1 (equity and hybrid instruments), while reconsidering the eligibility criteria for the instruments considered in determination of the own funds in tier 1;
- enhancing hedging requirements with a major focus on the risks highlighted during crisis: exposures in the trading book, counterparty credit risk (CCR, secured exposures and securitization positions;
- mitigating the leverage effect as an additional measures on top of the capital requirements determined term of risk;
- provision of international liquidity standards which would be able to support resistance to shocks/liquidity crisis in the short run (30 days), and a sound profile for the structural liquidity in the long run (1 year).

On the macroprudential side, the measures have a counter-cyclical nature and envisage (NBR, 2011, p. 124): *f*

- introduction of an counter-cyclical capital buffer to protect the financial system against the systemic risks associated with the unsustainable credit growth (at 2.5% above the minimum capital requirements-own funds in tier 1 formed of ordinary shares, profit or loss carried forward, and reserves), as well as a fixed capital conservation buffer tasked with covering the losses in the event the bank is faced with financial problems (it varies within a range which reaches the maximum 2.5% term of the phase in the economic cycle). The counter-cyclical capital buffer is directly proportional with the systemic risk, and determined as the credit/GDP ratio;
- determination of a leverage effect for the purpose of limiting the debt to the level of the banking system during booms;
- the banks of systemic importance, with focus on reducing the likelihood and impact of them failing, cutting down the costs of intervention in the public sector, and imposing fair competition conditions by reducing the competitive edge of these banks in the financing segment. The Committee further considers other additional requirements aimed at absorbing losses, as well as a potential introduction of capital surcharges for these banks.

[1] **The Basel Committee on Banking Supervision** is a forum for regular cooperation in banking supervision. It aims to promote and consolidate, at global level, the supervisory and risk management practices. The Committee comprises of representatives from Argentina, Australia, Brazil, Canada, China, RAS Hong Kong, India, Indonesia, Japan, Korea, Mexico, Russia, Saudi Arabia, Singapore, South Africa, Switzerland, Turkey, United States and nine EU Members States: Belgium, France, Germany, Italy, Luxembourg, the Netherlands, Spain, Sweden and United Kingdom.

The provisions of the new agreement are due to be fully implemented by the end of 2018. Since implementation of the new agreement implies increasing the capital of the banks, the extended implementation period is critical in order to afford institutions sufficient time to raise such additional capital. Globally, it is essential that all the countries follow the application process of BASEL III Agreement.

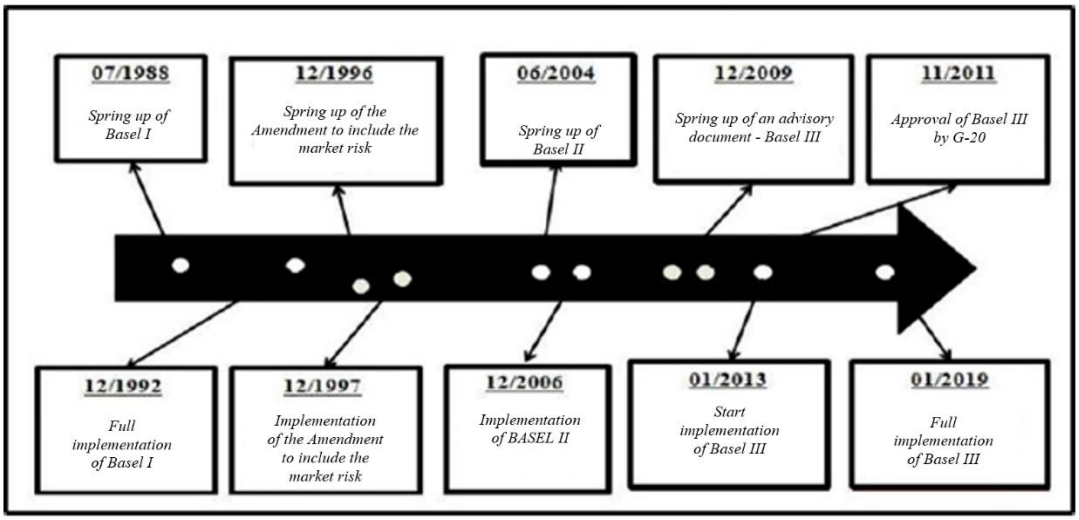


Figure 1.3 Developments in regulation of banking capital

Source: Basel Committee on Banking Supervision (November 2010), Herve Hannoun: The Basel III Capital Framework: a decisive breakthrough, p. 2.

Status of adoption of Basel III by certain states, as of end-March 2013, is as follows:

Status of adoption of Basel III (capital) regulations (as of end-March 2013) Table 1

Country	**Basel III**	**Implementation plans**
Argentina	3,4	(3) Final Pillar 3 rules published on 8 February 2013 will come into force on 31 December 2013. (4) Final rules for Pillars 1 and 2 came into force on 1 January 2013.
Australia	4	
Belgium	(2)	(Follow EU process)
Brazil	3	Final rules published on 1 March 2013 will come into force on 1 October 2013.
Canada	4	Footnote[2]
China	4	Footnote[3]
France	(2)	(Follow EU process)
Germany	(2)	(Follow EU process)
Hong Kong SAR	4	Final rules on minimum capital standards took effect on 1 January 2013. Rules on capital buffers expected to be issued in 2014. Disclosure rules scheduled to take effect on 30 June 2013.
India	4	
Indonesia	2	Consultative paper on Basel III, which contains draft regulation released in June 2012 for industry comments.
Italy	(2)	(Follow EU process)
Japan	4	Rules covering capital conservation buffer and the countercyclical buffer not yet issued. Draft regulations expected in 2014/15.

[2] Final rules for the credit valuation adjustment (CVA) issued on 10 December 2012 will come into force on 1 January 2014.

[3] Rules on banks' exposure to central counterparties (CCPs) will be issued shortly.

Korea	2	Draft regulation published on 27 September 2012. Final regulations are ready and will be implemented at an appropriate time to ensure a level playing field with other major countries.
Luxembourg	(2)	(Follow EU process)
Mexico	4	Footnote[4]
The Netherlands	(2)	(Follow EU process)
Russia	3	Final regulation for capital definition and capital adequacy ratios published in February 2013. Reporting under the new capital rules starts from 1 April 2013 with 1 October 2013 being the expected effective date of their implementation as a regulatory requirement. Draft regulations for leverage ratio are planned to be published for public consultation in 2013.
Saudi Arabia	4	
Singapore	4	Footnote[5]
South Africa	4	A directive has been recently issued which has the effect that the capital charge for credit valuation adjustment (CVA) risk on banks' exposures to ZAR-denominated OTC derivatives and non-ZAR OTC derivatives transacted purely between domestic entities will be zero-rated for the course of 2013, ie until 31 December 2013.[6]
Spain	(2)	(Follow EU process)
Sweden	(2)	(Follow EU process)
Switzerland	4	Footnote[7]
Turkey	2	Draft regulations issued on 1 February 2013 covering capital requirements. Further drafts covering buffers will follow in 2013.
United Kingdom	(2)	(Follow EU process)
United States	2	Joint notice of proposed rulemaking approved in June 2012. The US agencies intend to finalise the rule after consideration of public comments. Basel 2.5 and Basel III rulemakings in the United States must be coordinated with applicable work on implementation of the Dodd-Frank regulatory reform legislation.
EU	2	The European Parliament and the EU Council have reached an agreement on the legislative texts implementing Basel III and further measures regarding sound corporate governance and remuneration structures. The legislators agree that the acts should enter into force before the end of the first half of the year, allowing for a date of application of 1 January 2014.

Source: http://www.bis.org/publ/bcbs/b3prog_rep_table.htm

Regarding the status of adoption of the Basel III Agreement, as of end-March 2013, most of the European states are in the second stage, hence the draft regulation was published, while Brazil, Argentina and Russia are in the third stage, so that the final regulation was published and distributed to banks. The remaining countries are in the most advanced implementation stage (fourth stage - the regulation was adopted).

For implementation of Basel III, the governors of the US Federal Reserve adopted in 2013 a draft which favoured small and medium banks (they **serve smaller communities and holder lesser assets, which is why the collapse of such an institution cannot threaten the stability of the financial**

[4] Rules on banks' exposure to central counterparties (CCPs) not yet issued.
[5] Final rules on capitalization of banks' exposure to CCPs have been issued, but will come into force from 1 July 2013.
[6] This came about as a result of the limited time between the finalization by the Basel Committee of the proposed rules and the intended date of implementation, and the absence of a domestic central counterparty for domestic OTC derivative transactions.
[7] Parallel application of "Swiss approach" allowed for small banks until end-2018.

system), and introduced measures to control the very large financial institutions, the standings of which can influence the stability of the system.

Thus, Fed prepared a set of four aggressive measures which target an even stricter control of the eight American banks rated as of systemic importance, namely JP Morgan, Citigroup, Bank of America, Wells Fargo, Goldman Sachs, Morgan Stanley, Bank of New York Mellon, and State Street.

The regulation narrows down the definition of the capital considered for determination of the hedging rates, and assigns the derivative agreements and mortgage-backed securities a higher risk than the former regulations. The banks with assets up to USD 15 billion are allowed to include in the capital reserves some securities which are excluded under Basel III. Similarly, many small and medium banks shall be able to exclude certain types of debts from determination of the capital reserves. System-wise, the minimum tier 1 capital adequacy ratio shall go up from 2%, as before, to 7%.

Nevertheless, the impact of the new rules is considerable because, in absence of any mitigation action, a capital deficit of EUR 600 billion is excepted for the USA (Härle et al., 2010, p. 3). The estimated deficit of own funds in tier 1 for the United States is approximated at EUR 600 billion, whereas the long-term financing gap is expected to be EUR 2,200 billion. These shortcomings shall affect the profitability of the American banking sector, translated into a ROE lower by approximately 3 percentage points. Conversely, the leverage effect contemplated under Basel III does not amount to a major additional constrain.

Implications of Basel III on the Romanian banking system

The impact of introducing the new Basel III capital requirements of the Romanian banking system is seen as limited. In 2014, the measures adopted by NBR for the purpose of attaining the macroprudential milestones were: (i) requirements for the banks to calculate the Debt Service-To-Income (DSTI) looking into adverse foreign exchange, interest rate risk and income risk scenarios; (ii) explicit LTV limits, differentiated on loan use and currency; (iii) limitations to the maturity of consumer loans; (iv) requirements or the bank to apply stricter conditions to loans extended in foreign currencies to non-financial companies uncovered in respect of currency risk; (v) stricter risk weighting in case of mortgage loans. Other important macroprundential measures in NBR's portfolio are: (i) counter-cyclical capital buffer; NBR decided not to activate it[8]; the operationalization of the instrument was fined-tuned in 2015 to allow a careful risk monitoring, and it is to be applied whenever it shall prove necessary, and (ii) capital buffer for systemic risk - set at 0% as of 1 January 2014[9], contingent upon the balance-sheets of the banks providing for consistent capital reserves further to application by NBR of the domestic regulatory instruments within the flexibility limits permitted under CRD IV/CRR legislative package, by continuing application of the prudential filters.

Capitalization of the Romanian banking system has constantly improved since 2014, having as key contributors:

- (i) new capital contributions from shareholders, amounting to approximately EUR 394 million;
- (ii) 20% reduction in the volume of prudential filters deductible from own funds for determination of the prudential banking indicators (in accordance with the provisions of the calendar set out under the domestic legislation for gradual implementation of the new capital requirements applicable to credit institutions under the European CRD IV/CRR regulatory framework);
- (iii) maintaining of a prudent approach to lending, with positive effects on the non-performing loans' dynamics.

As of 2014, the capital requirements are regulated under the CRD IV/CRR legislative package[10] applicable across the European Union, which require credit institutions to meet the following conditions: a) a Common Equity Tier 1 ratio of 4.5%[11]; b) a Tier 1 capital ratio of 6%[12]; c) a total capital ratio of 8%[13]. The new requirements are to be gradually implemented by the end of 2018.

Consequently, across the banking sector, the capital requirements were comfortably met - the Common Equity Tier 1 capital ratio was at 14.6% in the end of 2014, similar to the Tier 1 capital ratio,

[8] NBR Order no. 7/2013 (Article 1, letter a).

[9] NBR Order no. 7/2013 (Article 1, letter b).

[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, repealing Directives 2006/48/EC and 2006/49/EC, 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 648/2012.

[11] The Common Equity Tier 1 capital ratio is the Common Equity Tier 1 capital of the institution expressed as a percentage of the total risk exposure amount; the ratio was introduced under the CRD IV/CRR legislative package.

[12] The Tier 1 capital ratio is the Tier 1 capital of the institution expressed as a percentage of the total risk exposure amount.

[13] The total capital ratio is the own funds of the institution expressed as a percentage of the total risk exposure amount. The ratio is regulated under the CRD IV/CRR legislative package, being equivalent to the "solvency rate" ratio regulated under Basel II, applicable by the end of 2013 for the Member States of the European Union.

whereas the total capital ratio was at 17.59%, going up by 2.1 percentage points as compared to the figure reported in the end of 2013, and it increased even more to 18.69% in the of September 2015 (as per the table below). These figures give the banking system a high capacity to absorb the potential shocks.

The comfortable level of the capital adequacy ratios reflect the goods quality of total capital available to the Romanian credit institutions, thanks to the prevailing Common Equity Tier 1 capital, the high capacity to absorb the potential loss resulting from the banking business (these consisting mainly in paid capital instruments, share premiums, profit or loss, reserves, the fund for general banking risks). The gradual surrender of the prudential filters, supported by the flexibility afforded under the CRD IV/CRR legislative package, as a toolkit available to the national authorities over the transition period pending full implementation of the new regulatory framework, shall have the major consequence of increasing the capital adequacy ratios in the period to come.

In what the lending business in 2014 is concerned, it was influenced by: (i) reduction of the amounts raised by the parent banks further to the continued financial disintermediation and enforcement of the new prudential requirements imposed under the CRD IV/CRR regulatory framework, (ii) the banks maintaining credit standards characterized by restrictiveness and increased prudence in the context of a demand deficit, as well as (iii) prevalence of internal short-term funding in the balance-sheet, which can limit the availability of the banks to extend loan maturity.

A major influence on the credit stock evolution came, however, from loan outsourcing and selling, as well as the actions taken to reduce the number of non-performing loans.

Although the banks have often turned to restructuring/rescheduling and foreclosure in an attempt to reduce the rate of non-performing loans, the efficiency of these non-performing loan management techniques was but limited. In this context, in order to set the ground for a sustainable resumption of the lending business, this time on more prudent bases, the National Bank of Romania recommended the credit institutions to clean-up their banking portfolios based on a 4-stage plan: (i) the first stage consisted in the written recommendation sent to the banks to write off the fully provisioned non-performing loans (with the bank preserving the right to recover the debt); (ii) the second stage targeted loans with a debt service in excess of 360 days, in respect of which the banks have not taken any legal action, and for which full provisioning followed by writing off was recommended; (iii) the third regarded the loans taken by insolvent companies, for which establishment of additional provisions and writing off the provisioned exposures were recommended; (iv) the fourth stage implied performance of an external audit on the IFRS provisions related to the loan portfolio in balance as at 30 June 2014, as well as on the collateral valuation. The writing off of the non-collectible non-performing loans resulted into a decreasing trend for the rate of non-performing loans - the key indicator for the quality of the portfolio - from 20.4% in March 2014 down to 13.94% in December 2014, and 12.33% in September 2014 (as of Q2 2014, the ratio "Credit risk rate" has no longer been determined).

Aggregate ratios regarding credit institutions **Table 2**

	Sept. 2014	Dec. 2014	Mar. 2015	Jun. 2015	Sept. 2015
Number of credit institutions	40	40	40	40	39
of which, branches of foreign banks	9	9	9	9	8
Total net assets *(billion Lei)*	351.4	364.1	361.0	363.3	359.6
Assets of private-owned institutions *(% of total assets)*	91.7	91.3	91.5	91.6	91.4
Assets of foreign-owned institutions *(% of total assets)*	80.5	89.9	90.1	90.2	76.8
Capital Adequacy Ratio (≥8%) *(%)*	17.06	17.59	18.64	18.07	18.69
Leverage ratio[14] *(%)*	7.63	7.38	8.26	7.97	8.34
Impaired debts *(% of total loans)*	10.15	9.39	9.08	8.45	7.93
Impaired debts *(% of total assets)*	5.77	5.10	4.97	4.72	4.46
Impaired debts *(% of total debts)*	6.44	5.65	5.56	5.26	5.00
ROA[15] *(%)*	-0.60	-1.32	0.91	0.66	0.83
ROE[16] *(%)*	-5.58	-12.45	8.88	6.44	7.98
Operating income/operating expenses *(%)*	181.16	180.19	170.43	165.91	168.05

[14] Tier 1 Capital/Total average assets.
[15] Annualized net profit/Total average assets.
[16] Annualized net profit/Average own capital.

Loan-to-Deposit Ratio *(%)*	99.65	91.33	93.68	93.56	92.67
Credit Risk Ratio[117] *(%)**	-	-	-	-	-
Non-performing Loans Ratio [218] *(%)**	15.33	13.94	13.85	12.80	12.33

Due to the fall in the value of collaterals (a trend caused also by the limited possibilities of turning such to accounts), the banks have updated the collateral sale rate, with additional consequences on the need for provisions and, implicitly, the profit or loss. The profitability ratios worsened as compared to 2013, with the return on assets (RAO) reaching -1.32% in December 2014, and the return on equity (ROE) at -12.45%. In 2015, these ratios improved to 0.83% and, respectively, 7.98% in September 2015.

For reasons of financial stability, NBR decided that supervision of branches' liquidity should be the responsibility of the competent authorities in the host Member States, and liquidity standards should be applied at individual level too, despite such being met at consolidated level. The credit institutions are expected to react differently before the new standards, term of the transition period needed to meet the requirements. If the transition period is shorter, the banks might favour reducing their credit offering to increase the level of capital, adjusting the structure of their assets. Gradual implementation of the new standards may mitigate the impact, with the banks having the possibility to adjust by capitalizing profits, issuing shares, and modifying the debt structure.

The financial and banking groups shall be faced with the challenge of adapting to the solvency and liquidity requirements imposed under Basel III, which could lead to limiting exposures and changing the business model.

3. Conclusions

Adoption of Basel III brought along also enforcement of binding rules on the countries which approved international standards, by implementing regulatory requirements at regional and national level. The current prudential regulatory requirements were strengthened also by extending them to new areas.

Important progress was reported also in respect of the banks which were too big to fail with development of a methodology to define the banks of global systemic importance and determination of stricter internal control and reporting requirements. To this end, the Financial Stability Board published in 2011 the document "Key Attributes of Effective Resolution Regimes for Financial Institutions" which laid the foundation for recovery and resolution of systemic banking institutions.

Nevertheless, special attention needs to be paid to regulation of the shadow banking represented by the financial intermediation companies involved in lending, such as hedging funds and private equity funds, which employ comprehensive financial instruments, but remain outside any regulation.

IMF warns that this is a risk to the global financial stability, and monitoring of this sector is inadequate. The half-yearly IMF report on global financial stability shows that "shadow banking captures USD 15,000 to 25,000 billion in the USA, USD 13,500 to 22,500 billion in the Eurozone, USD 2,500 to 6,000 billion in Japan, and approximately USD 7,000 billion in the emerging economies". For comparison, the global GDP in 2013 amounted to nearly USD 75,000 billion. In the USA, shadow banking accounts for at least one third of the overall systemic risk (measures as extreme and very unlikely losses in the financial system), almost matching the formal banks. The risks faced by the Eurozone and the United Kingdom due to shadow banking are significantly lower than those caused by the formal banks, which shows that many of the companies active on this market rely more on bank financing than those in the USA.

The importance of this sector can be enhanced by the strengthening of the prudential requirements applicable to banks. According to the Global Financial Analysis Division of IMF: "Shadow banking tends to gain momentum when strict banking regulations are imposed. It develops also when the real interest rates and governmental bond spreads remain low, the investors seek to gain higher returns and there is a high institutional demand for safe assets, for instance from insurers and pension funds".

In response to the calls directed to it in the G20 meetings in Seoul (2010) and Cannes (2011), the Financial Stability Board (FSB) is currently drawing up recommendations regarding supervision and regulation of these entities and businesses.

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[18] Determined based on reports from all banks: both those which use the standard approach in assessing credit risk and those applying internal rating models.

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THE U.S. NATIONAL INTEREST REDEFINITION AND THE FUTURE OF ITS LEADERSHIP IN CRITICAL REGIONS. STRONG AND SUSTAINABLE AMERICAN LEADERSHIP?

Iñigo ARBIOL OÑATE*

Abstract

In the last half of the 20th century, the United States provided a strong centripetal leadership that brought the country to form an economy that remains the bedrock of the global financial system. America's military superiority remains unrivaled. While far from perfect, the U.S. has the oldest democratic constitutional regime, as well as strong institutions and rule of law to accompany it, as Americans continue to enjoy an unmatched quality of life. In general the U.S. enjoys still a privileged position in the world today.

For the last one hundred years, American foreign policy has rested on a commitment to use its power. Nevertheless, many criticize that over the last two decades, the U.S. has scaled down its presence, ambitions and promises in the world.

Is the U.S. abnegating its leadership? Are U.S. national interests changing and refocusing towards home affairs? Or will the 21st century, due to fragile alternative powers (EU, China, Russia, …) be again an American century?

Keywords: *US, national security, foreign policy, leadership, American hegemony.*

Introduction

For the last one hundred years, American foreign policy has rested on a commitment to use its power to guarantee the post WWII international system in general, and particularly the interests of the U.S. and its allies abroad. Nevertheless, many criticize that over the last two decades, the U.S. has scaled down its presence, ambitions and promises in the world. An increasing number of analysts and academics understand that this is not temporary and that humanity is probably witnessing the birth of a new international order. Its structure is still vaguely defined but already includes a redistribution of global power, a change in the center of gravity towards the Asia-Pacific region, and an expansion in the number of players: state, non-state, intra-state, transnational, groups and even individual actors.

On the first part, this brief paper intends to consider, examined the nature of the challenges posed by US adversaries, how is the United States current role in the world. In this new status-quo, is the U.S. abnegating its leadership? Is the refocusing of U.S. national interests towards home affairs an option?

On the second part and starting from the existing literature and public papers on the geopolitical challenges, the paper introduces some critical issues for the immediate future of U.S. decision-makers strategic thinking. First, to what extent can the United States retreat in the face of committed adversaries? Is the United States capable of maintaining a firm stance, given the reality of defense budgets today and a public opinion hesitant to act? Could a more collaborative one, taking into consideration the weakness of its closest allies, substitute the current approach?

Inexorably within 6 months we will all witness a change in American leadership. This new leader will take a very short period of time, foreign policy decisions of great significance. These decisions will be critical for the strategic future of the United States and its allies in some of the most critical regions of the world.

Content

American hegemony has sustained an unprecedented global peace and prosperity, despite well known negative consequences that irremediably this hegemonic position has occasionally caused. After a post-Cold War period in which the United States assumed the role of hegemon of the international order, 9/11 opened metaphorically a new historical period. For Washington, this date marked the end of the 90s "strategic pause", a term popularized by Secretary Les Aspin as a way of justifying measures to be taken after the end of the Cold War, and the long-term fight against the USSR. The shocking images of the attacks on New York put an end to a model of national security that had extended successfully throughout the 90s Clinton administration, and forced the new administration to face a situation it was not prepared for.

Through eight years, as Gray explains[1], America was exposed to the new face of war: The limits of American military power were revealed, the apparent unipolarity of the international order of the

* PhD Department of International Relations and Humanities, University of Deusto, Spain.

[1] Gray, C. (2010) 'War: Continuity in Change, Change in Continuity', Parameters 40, 5-13.

post-Cold War ended and the consolidation of new powers capable of limiting the influence and challenging the hegemony of the previously ubiquitous United States, at least in some regions, was facilitated. Last, but not least, the "War on Terror" over-focus on specific objectives, left large strategic issues unattended for around eight years.

Obama doctrine: reset and re-engage

With the arrival of the Obama administration and the historic elimination of Bin Laden, the war on terror ended de facto, advancing the reduction of presence in Iraq (2011) and Afghanistan (2014) and facilitating the replacement of exhausted national security policies - previously focused on "democracy building" and counterterrorism - by a new paradigm aimed at "reengaging diplomatically" and maintaining supremacy against any future adversary as the core of a polymorphic foreign policy. Conceived and described in the 2010 National Security Strategy, this new approach was consolidated militarily in early 2012, when President Barack H. Obama presented the "Strategic Defense Guide"[2], a roadmap which sets the guidelines for defense policy and military organization for next years.

Despite being accused by republican and democrat critic voices for being a soft-foreign policy promoter, Goldberg explains brilliantly[3], Obama has maintained a pragmatic interpretation of the U.S. role in the world. Throughout the approved public documents, this administration has never accepted that diminishing western hegemony would inspire and motivate the world to follow. Indeed, Washington has assumed throughout these years that the reduction of American military, political and financial force could create a vacuum of power that would lead to a far more dangerous and unstable world where mass destruction weapons users, and wishers, would exponentially proliferate.

Even when it took almost 3 years to the current administration to "reset and re-engage"[4], and some major operations still consume a part of the American military manpower and financial resources, a new list of challenges in critical areas concerns Washington. In nowadays almost post-Obama strategic moment, the most important challenge to be faced by the United States is the resurgence of conflicts with a series of renewed potential adversaries; first between the U.S. and other great powers and second, between the U.S. and some rogue states or proto-states. On one hand, the still most powerful nation, faces on one hand, a risk of conflict with strong adversaries. On the other hand, America faces an extremely fragmented and diverse group of radical actors, mostly with misinterpreted religious inspiration. An excellent example of this is how the country is trying to negotiate and lead an alliance to implement a military campaign against the Islamic State (ISIS). Finally it is also required to take into consideration the potential (and plausible) combination of some of these opponents, hypothetically creating a far more complex challenge for the United States.

There are great differences between these new potential challenges in terms of their ability to threaten vital US interests, and therefore it has been Washington's priority, during the Obama administration, to design policies adapted to the different levels of threat of each enemy.

With President Obama, the risk of social fracture provoked by an antiwar intense consensus is gone, but a close to a trillion dollars deficit[5], a society recovering from an unemployment rate close to 10%, and domestic disputes are still conditioning the foreign policy turn. In other words, America still remains in a serious unbalanced financial condition that affects its foreign and security policy projection capabilities.

Surrounded by a diverse group of advisers and having reoriented the previous doctrine, Obama has provided a touch of realism that has put an end to the arrogance of the 90's and 00's and has forced to rethink the foreign and security policy of the country. He has lost some of the aura of idealism that characterized the "Yes We Can" campaign and that earned him the Nobel Peace Prize, as he has shown in recent years as a pragmatist understanding the need of maintaining American leadership. Similar to the polemic decisions made by the Clinton team in the early 90's, and in part counseled by some of the same then NSC advisers, Obama has considered the extreme difficulty of a solid democracy to use armed force in defense of its national interest and the infeasibility of maintaining long and costly military campaigns. As a result, the President has promoted an strategy containing at least five main points: geographical expansion of drone strikes, reduction of the military presence on European soil, limitation of the range of its military actions, resistance to use ground forces and pivot towards Asia preparing for a potential confrontation against regional adversaries.

[2] Department of Defense. *Sustaining U.S. Global Leadership: Priorities for 21st Century Defense*. Washington DC: U.S. Government Printing Office, 2012.

[3] Jeffrey Goldberg. "The Obama Doctrine. The U.S. President talks through his hardest decisions about America's role in the world". *The Atlantic*. April, 2016.

[4] The White House. "U.S.-Russia Relations: "Reset" Fact Sheet". *Office of the Press Secretary*. June 24, 2010. Accessed March 2016: https://www.whitehouse.gov/the-press-office/us-russia-relations-reset-fact-sheet

[5] Schlesinger, Jill. "12 Scary debt fact for 2012". *CBS News*, February 17, 2012. Accessed March 2016: http://www.cbsnews.com/news/12-scary-debt-facts-for-2012/

New challenges and patterns

While America was intensively reconstructing its relations, other countries and non-state actors have experienced an spectacular economic growth and have emerged as competitors on the international chessboard. More explicitly, the United States now has to focus in defeating ISIS, deterring North Korea, containing Russia, contracting Iranian power, and finding an approach to China as cooperative as the Asian giant permits it to be.

As previously explained, the Obama administration has prioritized global engagement, but the next president will have to manage global responsibilities with limited resources. Various authors have catalogued the possibilities of the post-Obama foreign policy strategy. Using the Rand Corporation study terminology[6], the United States could take: an "assertive approach" focused on American values and limiting compromise with potential adversaries; a "collaborative engagement" in which the United States would act based primarily on its interests and would seek to harmonize its policies with its major allies and strategic partners; and a "retrenchment" approach reducing its ambitions and focus on only the most critical challenges to its own vital interests.

In practice, the next executive will obviously suffer limitations to implement any of these theoretical alternatives. Assertive engagement would be constrained by the current U.S. defense budget and the reluctance of the American public opinion to re engage in large military operations they do not understand. Retrenched engagement would mean that the U.S. should make significant concessions to adversaries and to adjust commitments to partners, seriously undermining its credibility as a superpower. Finally, a collaborative engagement would be restrained by the fact that most allies will most likely not be ready to take up an acceptable share of the global responsibility burden. Washington has argued for a greater burden sharing for decades, but only the new threats of potential adversaries have created enough concern among US partners that could mean a greater load distribution. Some of the U.S. allied nations, not only Europeans but Southeast Asians, Australians, Middle East traditional allies etc. are in more danger than the United States itself, but if the U.S. is brought into conflict (something that could easily happen in the near future) is likely to be to defend its allies and assuming a serious risk of escalating and involving any of the three nuclear powers (Russia, China, and less likely, North Korea).

Whatever approach is taken, the United States will deal with a situation of overextended responsibilities and ascending threats with the resources devoted to national security shrinking and with no big collaboration from its partners expected.

Critical areas

Europe

Well integrated institutionally and with a low sense of threat, since 2008, Europe is combating a deep economic crisis. Inside the European Union, as well as among European non-member states, there are profound divisions on how to focus national security, specially after some exhausting military missions abroad. The two strongest allies in Europe, the United Kingdom and France, are drained because of the defense of the Mediterranean and Baltic states. This situation creates a tension, as the United States feels forced to maintain a significant force structure in Europe even with European partners contributing. This problem has been temporarily solved by improving NATO capabilities: force structures operating flexibly, new efficiencies, "smart defense" and, above all, a commitment to a larger defense spending by the allied nations. In this regard, United States' European allies now spend roughly 50% of what the United States spends on defense[7], including the European one. At the September 2014 NATO Summit in Wales, they agreed to balance this situation, and those countries with the lowest defense budgets agreed to increase a 2 percent of GDP by 2025.

A review of 60 years of national security burden sharing, shows that only in the 1970s did the Europeans drastically increase their share of defense spending of NATO. The United States had about 350,000 troops in Europe in the 70s, while today they have been reduced to 65,000.[8] An insufficient deployment to deter an increasingly aggressive Russia? Many defense analysts are already considering how to increase US forces in Europe.

Being realistic, European commitment and therefore, American commitment are going to be limited by numerous factors such as Russian participation in Ukraine, Germany's eroded leadership, Turkey's Islamic drift, ISIS consolidation in Northern African territories, Britain's potential divorce from the European Union,

[6] Binnendijk, Hans. *Friends, Foes, and Future Directions: U.S. Partnerships in a Turbulent World*. *Strategic Rethink*. Santa Monica (CA): Rand Corporation, 2016.

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[8] U.S. Department of Defense. "Total Military Personnel and Dependent End Strength By Service, Regional Area, and Country". Defense Manpower Data Center. Accessed February 2016: https://www.dmdc.osd.mil/appj/dwp/index.jsp

which could profoundly affect the future of the transatlantic relationship.[9]

Asia

To counter a future security disturbance requires developing closer multilateral cooperation among the U.S. and Asian allied nations. Unfortunately, the lack of strong collaborative security institutions is the ultimate limitation in the U.S. posture in the region.

Japan, South Korea, and Australia are the three strongest U.S. partners today and American "pivot to Asia" has focused on strengthening current security mechanisms, also reassuring South Korea, the Philippines, Singapore and Vietnam. Unfortunately, American security arrangements in the region are predominantly bilateral and there are no sufficiently developed regional institutions comparable to the European Union, or even less to NATO. For a collaborative engagement that guarantees U.S. leadership in Asia, it would be required the strengthening of such institutions, therefore, the United States cannot retrench from its Asian strategic positions. This is tough and limiting in times of strategic redefinition, but necessary. Let us consider this, the second big decision for the next president.

Unfortunately for Foggy Bottom's and the Pentagon's decision makers and planners, American allies and partners in Asia are feeling increasingly vulnerable to Chinese expansionism and are getting closer to the United States for protection. American reinforcement in response to Chinese behavior in the South China Sea has inevitably led China to conclude that the United States and its partners in Asia are encircling it.

One of the most reactive U.S. allies is Japan. Under Prime Minister Abe, the country has increased its defense spending, reinterpreted Article 9 of its post-war constitution to allow it to perform a wider regional defense role, and developed it first national security strategy[10].

It is to be seen whether China will react with more aggressive policies or with compromise.[11] The United States could help design a procedure to resolve maritime claims in the region before they transform into a major conflict, but in case China decides to go for an aggressive attitude, the U.S. leadership and determination would be more necessary than ever before.

The Middle East

The Middle East presents a much more complicated partnership problem than does Europe or Asia. During the previous republican two terms administration, the U.S. posture in the region was assertive. Recently, Washington has shown a complete different attitude, not only in terms of the intensity of the regional involvement but also in terms of traditional alliances' maintenance.

On one hand, none of the four most important traditional U.S. allies in the greater Middle East: Israel, Egypt, Saudi Arabia, and Pakistan, do maintain easy relations with the United States. For many countries, the Obama administration has carried out a major alteration of traditional American policy in the region. Since 2008, Washington has had no problems in leaving in the lurch President Hosni Mubarak in Egypt; taking sides with the Shiite opposition in a time when the Gulf countries were sending protection forces to Bahrain to support the monarchy, or not intervening when Syrians rose against President Bashar al Assad, an Arab leader that the Arab countries wanted to get rid of.

On the other hand, imports of oil from Saudi Arabia and other countries in the region have gradually dropped over the years, and revolution in oil and shale gas industry will probably further reduce them. That is, the United States soon will not be dependent of oil imports from countries who are distrustful allies and who doubt the sincerity of the U.S. commitment and are reluctant to unconditionally endorse the leadership of Washington. While this will reduce U.S. dependence and commitment in the long run, in the short term, most of the Middle East countries are still counting with the United States to maintain security in the region with its presence.

The case of Israel requires special attention; both because of the historical bilateral relationship and the criticized political turn made by the Obama administration in recent years. Away from the role Israel played during the Cold War, the main factor currently pushing America to intervene on behalf of Israel is domestic policy: Israel has indefatigable and well-organized pressure groups in Washington. Consequently, although theoretically United States has joined many of the actions of his government, especially the expansion of settlements in the West Bank and East Jerusalem, in practice it has tolerated them and will continue doing so in an electoral year. Unfortunately, it is precisely this unconditional and enduring US commitment to protect the State of Israel,

[9] North Atlantic Treaty Organization.*Wales Summit Declaration*. Issued by the Heads of State and Government participating in the meeting of the North Atlantic Council in Wales. Press Release (2014) 120. September, 2014. Accessed March 2016: http://www.nato.int/cps/en/natohq/official_texts_112964.htm

[10] Ministry of Foreign Affairs of Japan. National Security Strategy (NSS). Accessed March 2016: http://www.mofa.go.jp/fp/nsp/page1we_000081.html

[11] Two different views on the "Pivot to Asia" policy effectiveness can be found in Schiavenza, Matt. "What Exactly Does It Mean That the U.S. Is Pivoting to Asia? And will it last?". *The Atlantic.* April 2013. And Ross, Robert S. "The Problem With the Pivot Obama's New Asia Policy Is Unnecessary and Counterproductive". *Foreign Affairs*, November/December, 2012.

which limits the possibility for Arab countries and Iran, to perceive a potential ally in the United States.

Iran

Searching for renewed partners in the Middle East, and seeking a new relationship with Iran at the same time, will be a demanding diplomatic challenge for the U.S. In Iran the nuclear deal appears to be working, with the country meeting the nuclear commitments required by the international community to lift the sanctions. For supporters as well as for detractors, there is a common assessment: this agreement stabilizes the situation but does not create a new permanent framework. This raises questions about whether U.S. policy needs to plan a post-deal reality. On one hand, U.S. military bases in this region still constitute the base of U.S. containment policy towards Iran, something that has not basically changed since the nuclear deal. On the other hand, some in the U.S. political establishment[12] believe that a larger international engagement with Iran can help shape the Iranian domestic struggle and favor moderate stakeholders, especially important now that a quasi-civil war is going on between Shia and Sunni Muslim world.

Finally, the expansion of Salafi terrorist activity, a reality that provokes that U.S. partners throughout the region become even more vulnerable, have complicated the Iranian influence in the Middle East, the ongoing civil wars in the region (Iraq, Afghanistan, Libya, and Yemen) and the Syrian conflict.

To this respect, articulating previous actions such as Department of State Pan Sahel Initiative[13], Trans-Sahara Counterterrorism Partnership[14] with current efforts to fight the stream of terrorism from North Africa to the Middle East, is a third pending issue in the agenda for the next President.

Conclusions

For the last two decades, the U.S. has supposedly scaled down its global presence. Most likely, this situation is not temporary and represents the birth of a new international order, in which the United States will have to play to guarantee an hegemonic position. The American commitment of the Bush era, to preside over a unilateral world with a single dominant power, opposes to the current multilateral world with regional power centers.

With the transformation of the missions in Iraq and Afghanistan on its way, the United States, guided by the paradigm of "leading from behind", has interiorized the end of unipolarity and accumulated a number of lessons learned during the last years. Since 2008, despite the critics, the Obama administration has reaffirmed its commitments to Europe, Asia the Middle East, and against the threating challenge of fanatic terrorism. Since the end of unipolarity, some regional actors have risen and consolidated as potential adversaries to the interests of the United States. Specifically, the U.S. relations with China and Iran have shown as a first priority largely because America still feels the need to protect its regional partners, a reality part of a mid-long term strategy based on selective engagement.

Connected with this strategic collaborative approach, the next leader of the United States will certainly have to reinforce its relationship with traditional partners, focusing on strengthening security architectures that work on maintaining the United States hegemonic position with an assumable and shared cost.

Discussions on the possible decline of the US as a global hegemon must not lead, however, to the false perception that is the end of American power. Other actors have gained powerful positions; nonetheless, the advantages possessed by the United States remain immense. Open society and individual promotion based system remains an endless source of talent and creativity that puts the country at the forefront of knowledge and progress. His system based on respect for fundamental freedoms, remains attracting millions of people who enrich the American society. Its natural resources are extraordinary, and it is still unresolved what role they can play in strengthening the American strategic possibilities, domestic and abroad.

We will need to further analyze the future arrangements to describe American foreign policy. Nevertheless, in conclusion, it seems that if the United States people elect a leader capable of maintaining American opportunely engaged and far from populist isolationism, the 21st century could be American again.

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ROMANIAN KNOWLEDGE SOCIETY DEVELOPMENT. A PROPOSAL

Mirela CERKEZ*

Abstract

This article is an argument for the applicability of the Finnish model of knowledge society oriented public policy-making and not a detailed recommendation on the specific steps Romania should make in order to become a knowledge society. The article is elaborated as a synthesis of the Finnish knowledge society oriented public policies and an analysis of the adequacy of policy transfers from Finland to Romania. Data on Romania are not rich as the task of the article is not to make a diagnosis on Romania's stage of development. Its main contribution consists of the identification of Finnish public measures meant to foster knowledge society that may be a best practice example for Romania.

The introductory part briefly introduces the reader into the theoretical understanding of the concept of knowledge society. Then, I argue that there are several types of knowledge societies and Romania should look for European examples given the resemblance of the starting conditions. The main part of the paper presents the Finnish knowledge society development as an experience modeled by public intervention and I mirror these developments with the Romanian case. In the end, I explore the differences between the two countries that may interfere with the application of the Finnish model. Still, my conclusion is that those differences do not make the Finnish model less applicable. The efforts might need to be more intense and the results might show up later.

Keywords: *knowledge society development, Finland, Romania.*

1. Introduction

Given the various approaches of the concept, and the economy of this article, I will not review the theories concerning the knowledge society. I will only briefly review the most important issues around the concept of knowledge society. To my understanding, the most important idea is that the knowledge society is based on a new type of economy in which knowledge is a new mean of production; unlike the classic economic theory that considered production as a result of three factors: land, capital and labor. According to Tilak[2], Hayek underlined the role of knowledge in the development of the society and Fritz Machlup analyzed its role in economic development. Then, in the '90, the World Bank and OECD reasserted knowledge as a key factor to economic and societal development. What distinguishes today's trends from early accounts on the contribution of knowledge to development is the speed in knowledge production, dissemination and application. There are also analyses on the different types of knowledge and their contribution to the development of the society, like the World Bank[3] distinguishing between codified and popular knowledge, but this is not relevant for the purpose of this paper. Another point in the literature concerns the differentiation of the knowledge society from the knowledge economy. But, while separable theoretically, the two are intertwined in practice. The economic development in a knowledge economy is dependent on the development of certain societal factors. In my opinion, an essential differentiation is that between the knowledge economy / society and the information society. While ICT development is a necessary condition for a knowledge economy, it is not sufficient. In fact, the development of an information society can happen very fast and thinks might stop there, without an evolution towards the knowledge society. To my understanding, Romania is the most illustrative example in that respect.

Although the USA represents *the model* for a knowledge-based society, one could not be more wrong than to try to import the USA knowledge society style in Romania. We are a European country; meaning that we share certain cultural and economic characteristics, which make the USA model unsuitable for Romania.

The issue of knowledge-based growth dominated the Special European Council from Lisbon in May 2000. Unlike the USA, Europe lacks both the labor market and the capital market conditions necessary for a knowledge economy. According to Watson[4], the success of the USA is due, among others, to certain labor market flexibility that cannot be found in Europe. The special capital market condition of the USA consists mainly of the well-developed venture capital market.

* Lecturer, PhD, Faculty of Social and Administrative Sciences, "Nicolae Titulescu" University of Bucharest (e-mail: **cerkezmirela@gmail.com**).

[1] This paper continues early work on this issue presented at the International Summer School on European Peripheries, organized by Jean Monnet Centre of Excellence, Tampere University, in 2005.

[2] Tilak, 2002.

[3] World Bank, 2003.

[4] Watson, 2001.

Because of these conditions, the governments of the European countries need to be involved in the development of a knowledge society in ways that are unthinkable to the USA government and public opinion. As Schneider[5] states, in the USA policy context, the active involvement of government and public sector was to a large extent reduced to symbolic promotion and coordination of private initiatives and to regulation of negative externalities. Unfortunately, the European governments cannot reduce their contribution to a symbolic promotion of private initiatives. For example, giving the low developed venture capital markets, the European governments have no way but to finance themselves knowledge economy start-ups. At the moment, a leading player in the European Venture Capital market is the European Investment Fund, thus confirming my view on the need for governmental involvement.[6]

Those are some of the reasons Romania needs to look for a European model of knowledge society development strategy. Romanian knowledge society is lagging behind. One quick look at the literature and the few data available on Romania clearly show that what we developed is mostly an information society, not a knowledge-based one. This is why I think that Romania needs a public approach on knowledge society development. By way of public policies, the Romanian government should help the development of the knowledge society in order to foster economic growth and competitiveness on the European market.

Finland built its knowledge society in response to dire economic times and became one of the EU's most developed knowledge societies. This is the reason why, from all the well-developed European knowledge societies, I argue for the application of the Finnish model in Romania. Finnish knowledge society is based both on the welfare state and on a good public-private partnership. This country succeeded to be one of the leading countries in knowledge society development despite of the fact that it had exactly the opposite conditions from those present in the USA. What laggs behind in the Finnish knowledge society is, according to Eurofound[7], the lack of entrepreneurship. This means that there is a low economic exploitation of the innovations, but entrepreneurial spirit is not something that the state can plant into the society.

Benner[8] described the Finnish type of knowledge society as "based on universal access to tax-financed social services and social insurance, full employment secured by expansive macro-economic policies and active labor market policies, highly organized labor markets, corporatist interest mediation, and so on." The importance of welfare policy in knowledge society development in Finland is also mentioned in a Eurofound[9] document.

2. Finland – a model of knowledge society development through public intervention

According to Ducatel, Webster & Herrmann[10], Finland had three waves of knowledge-based growth. The first one, between 1970 and 1990, is named the ICT revolution. The second, starting from 1991, is characterized by concern for competitiveness, economic growth, access, regulation, privacy, security, and intellectual property rights. The third, from late '90, is characterized by the preoccupation that technology policies and social policies need to be complementary.[11]

As Romania is in the phase of the ICT revolution, we must search for ways to speed up the process of economic and social transformation. This is what I will explore next.

2.1. Institutions

In Romania, the only institution that seems to be aware of the necessity to become a knowledge society is the Ministry of Education. Other Ministries and public institutions may promote policies that foster the knowledge society but that is only because of the natural course of mechanisms acting in our economy and society. What I mean by that is that our public institutions do not have a guiding plan for building a knowledge society, a plan towards which the public policies should converge. Building a knowledge society is not a focus for our policies. As a result, the policies designed and implemented by our public institutions are rarely complementary, as they should be. The only existing coordination is the annual allocation of the state budget. The first RDI strategy in Romania was designed for the 2007-2013 period, as a result of EU membership. According to the current strategy[12], innovation is not key to Romania's economic and social development. The strategy mentions the small number of researchers, the small involvement of private parties in research and the small connection between different research fields.

[5] Schneider in Tuomi, 2001.
[6] It is true that the EIF is self-financed, but it owes its existence to a decision of the European Council.
[7] Eurofound, 2004.
[8] Benner, 2003, p. 132.
[9] Eurofound, 2004.
[10] Ducatel, Webster & Herrmann in Tuomi, 2001.
[11] Ducatel, Webster & Herrmann in Tuomi, 2001.
[12] available at http://www.cdi2020.ro/, accessed 1.04.2016.

As the Finnish Science and Technology Policy Council stated in its 2003 report, "the ministries must be able to operate as a network. Achieving set aims requires that decision-making on information and knowledge systems is sufficiently centralized to ensure compatibility."[13]

But the up-to-date language of the Ministry of Education and its agencies does not necessarily reflect in practice. For example, the "third mission" of the universities is not a reality in Romania.

To my understanding, Romania does not have the right institutions that could mould the transformations in our country into a knowledge society. The consequence of not having the right institutions is lack of coordination in our public policies and the missing collaboration between the state, the private sector and the universities. That is why I consider it useful to look at Finland's institutions and public policies in order to learn from the experience of other countries.

Research and Innovation Council, former *Science and Technology Policy Council.* This governmental body, founded in 1987 to continue and enrich the task of the 1963 founded Science Policy Council, has the coordinating role within the innovation policy field.[14] The main tasks of the Council include directing science and technology policy, dealing with the overall development of scientific research and education, and issuing statements on the allocation of public science and technology funds to the various ministries and fields.

Being chaired by the Prime Minister and having a membership that consists of ministers and other members specialized in science or technology from public and private sector[15], the Council is a good institutional solution for creating the overall vision of the future development of the country. The Council publishes reviews summarizing main trends and presenting targets for future developments.

I think that the Council could be a successful solution for Romania because, as stated earlier, the targets of our institutions are rarely complementary and lack common vision. This type of governmental body would get them to think of a common path.

Tekes – Finnish Funding Agency for Technology and Innovation. Founded in 1983, Tekes is the key planner and executor of the new technology oriented policy.[16] Tekes is the main R&D funding body in Finland[17] with a budget of around 390 millions Euro per year[18] and is subordinated to the Ministry of Employment and the Economy.[19]

Some might say that we do not need to burden our state budget by creating new agencies when we might as well leave the funding mission to the Ministry of Finance or to the other public institutions already involved in industry or economy in general. My opinion is that this would not be a constructive strategy and that because of the limited capacity of any institution to process information. What I mean is that a ministry, being caught up in its daily assignments, may not be efficient, or successful, in selecting the most promising projects that should receive public funding. That is why an agency like Tekes, that has developed a special competence in fostering innovation, would be the second institutional solutions that may help Romania transform its society.

In Romania, the National Authority for Scientific Research is under the Ministry of Education. NASR's tasks are complex as it is involved strategic thinking regarding research and innovation as well as financing. Its president is secretary of state[20] and is named by the prime minister based on a minister of education proposal. Thus, this is an isolated institution with low political power and, although it may have a great influence on allocating research funds, it does not have a significant impact on the share of RDI funds from the total public funds. A leaflet of the Ministry of Education in Finland that explains the Finnish research and innovation system[21] clearly shows that the Research and Innovation Council has the same power as a Ministry, it is subordinated only to the Parliament and the Government.

Sitra. Founded in 1967, Sitra is a public organization with venture capital operations that was mandated to make equity investments in SMEs as a way to support growth.[22] Among the organization's tasks was to increase the efficiency of public investments, to foster the application of new technologies, and to support innovation.[23]

Sitra was an institutional solution meant to compensate the small private venture capital market in Finland. Compensation for the small venture capital market is the target of various public policies in Romania but the non-existence of a specialized organization in the field of financing new

[13] Science and Technology Policy Council, 2003, p. 15.
[14] Koch and Oksanen, 2003.
[15] the Academy of Finland, the National Technology Agency-Tekes, industry, and employers' and employees' organizations.
[16] Koch and Oksanen, 2003.
[17] Tekes shares its funding mission with the Academy of Finland.
[18] Tuomi, 2001.
[19] http://www/minedu.fi/export/sites/default/OPM/Julkaisut/2013/liitteet/Competitiveness_and_wellbeing.pdf, accesed 1.04.2016.
[20] In Romania, secretaries of state are next in rank after the ministers.
[21] available at http://www/minedu.fi/export/sites/default/OPM/Julkaisut/2013/liitteet/Competitiveness_and_wellbeing.pdf, accesed 1.04.2016.
[22] Koch and Oksanen, 2003.
[23] Koch and Oksanen, 2003.

technologies and innovation made the effect less concentrated.

TE-Centres. Another institutional solution in Finland regarded the regional level administrative structures and the empowering of regional bodies. The solution consists of the creation of regional Employment and Economic Development Centres in 1996.[24] The TE-Centres are also involved in regional foresight studies.[25]

The TE-Centres, unifying several regional administrative structures, would be a good solution for the unequal regional development in Romania. This type of centres could be used in order to identify regional strengths and weaknesses as well as solutions for stimulating regional development. Although Romania has regional employment agencies, they are not involved in economic development and have rather re-active strategies, not pro-active such as foresight studies.

Committee for the Future. Established in 1993, the Committee for the Future belongs to the Finnish Parliament.[26]

Belonging to the Parliament, and not to the government – as is the case of the Science and Technology Policy Council, the Committee for the Future is a good instrument for preventing a single political vision to take its course. In fact, according to the above-mentioned leaflet regarding the Finnish research and innovation system, the Parliament is at the top of the coordinating hierarchy.

If we look at the structure of the Romanian Parliament we can easily notice that the various dimensions of the knowledge society are dealt with separately, they are spread over the Parliament's commissions.[27]

Association of Members of the Parliament and Scientists. Also known as Tutkas, this association helps the Finnish Parliament to take advised decisions concerning the development of the Finnish knowledge society. It was created in 1970 and comprises 600 scientists and 200 MPs.[28]

Of course, these are not all the institutional elements in Finland that lead to success in research and innovation, but my focus was on the central public institutions.

From my point of view, all the above-mentioned institutional instruments are meant to confer public policy coherence by the centralization of decision-making. The idea of centralization might not be attractive for the Romanian decision-makers or for the Romanian public because of the bad past experience we had with centralization during communism. But, studying the Finnish institutional solutions for the centralization of decision-making, I have reached the conclusion that the type of centralization implied in Finland's institutions is different from the classical understanding of centralization as one person or small group taking the decisions. The idea of centralization underlying the Finnish institutions is that of creating special institutional structures where public and private stakeholders work together in order to reach to a common plan of development that suits everybody's interests. Networking with stakeholders and other partners is a role that Romanian ministries should assume too.

2.2. Actions

The main public policies that Finland adopted in order to have a knowledge-based society were all channeled towards the same idea – building a national innovation system. According to Eela,[29] the concept of national innovation system reshaped the role of the state. In the new policy framework, the role of the State is to be a providing actor, which supports other actors in the innovation system to achieve the targets they have set for themselves.

Regional development and innovation policy. The main trend in Finland's regional innovation policy is to devolve more decision-making power to the regional level. The actual regional policy had its start in the 1994 Regional Development Act that increased the importance of local government.[30] The 1994 strategy for regional development is carried out through the national Centre of Expertise Programme, which aims to enhance regional competitiveness and increase the number of high-tech products, companies and jobs.[31] This programme is "an umbrella-like instrument assisting regions in targeting resources in areas which are defined as strategic", and in channeling the EU funding that is meant for regional development. [32]

Another part of the regional policy is the TE-Centres that are financing their client companies' investment and development projects.

Cluster programmes. Finland's strategy was to identify industrial clusters and then use them as a tool for targeting technology policy.[33] The cluster programmes, administered by various sector

[24] Koch and Oksanen, 2003.
[25] Kaivo-oja et al, 2002.
[26] https://www.eduskunta.fi/EN/lakiensaataminen/valiokunnat/tulevaisuusvaliokunta/Pages/default.aspx, accessed 1.04.2016.
[27] www.parlament.ro
[28] https://www.eduskunta.fi/EN/kansanedustajat/verkostot/Pages/default.aspx, accessed 1.04.2016
[29] Eela in Koch and Oksanen, 2003.
[30] Koch and Oksanen, 2003.
[31] Benner, 2003.
[32] Koch and Oksanen, 2003, p. 156.
[33] Science and Technology Policy Council, 2003.

ministries, are meant to promote cooperation in certain industrial fields, or around certain themes.

As stated in the 2003 report of the Science and Technology Policy Council, the particular assets of Finnish business and industry are the ICT cluster, the forest cluster and the metal cluster. During communism, Romania had a chaotic industry that was meant to produce everything in order to create an autarchic economy. That implied the lack of serious studies on what is most profitable for Romanian industry to produce. After the 1989 fall of communism, that industrial structure remained unchanged due to social pressures. A profound change in our industry would have provoked, at least in the short run, social unrests due to unemployment.

This industrial structure has consequences not only on cooperation and networking but also on the regional development. The communist industry was not built on economic grounds in the sense that factories were not always built close to the resource of the raw materials needed for that factory to function. For example, alumina, a raw material needed to produce aluminum, was processed at a very long distance from the plant that produced aluminum. The consequence of that was that our regions, with small exceptions, do not have specific industries.

The Romanian Cluster Association[34] states that "in Romania, experience has proved that the three natural partners of the "Triple helix" model[35] not only do not cooperate, but they also do not know each other and do not get to discuss with one another." The Association's website lists around 40 clusters, but not all of the clusters in Romania are members of this association. For example, Atlas Cluster Romania is not listed. Despite the Associations's statement cited above, these clusters have public authorities as partners, but my undocumented guess is that their membership is just formal. In fact, I think it would be interesting to gather some empirical data on the actual activity of these clusters because what I have noticed is that, with few exceptions, these clusters did not exist before 2007, when Romania joined the EU.

Industrial policy. Finland's redefined industrial strategy dates back in 1993. The goal of new industrial policies was not to improve the reallocation of current resources but to influence the quality and quantity of future resources by strategically financing R&D activities. The Finnish industrial policy "was transformed into a policy which touched upon the goals and activities of society as a whole – the perspective of industrial policy broadened from industrial sector policy to national social policy."[36] Thus, the 1993 Finnish industrial strategy is a very good example of government as a network. There are large societal goals and all the policy areas are designed to reach them, even if that may sometimes mean reaching compromise on some of the issues. As stated earlier, the most important context in which the Romanian ministries are coordinated is when it is decided what part of that year's budget everyone would have.

Research funding. Funding R&D has not become a top issue in Romania as it has in Finland. A big share of Finnish public R&D expenditure was gained from the privatization of the public companies.[37] During the first years after the fall of communism, Romania chose not to sell the public companies, but to maintain them by subsidies. After that, part of the public companies has been sold but the process was too slow to have an effect on R&D activities; supposing that the money would have been channeled in that direction.

Finland does not use tax concessions as a way to induce R&D[38] and I think that Romania should not do that either. The market development in Finland is based on large allocations of public resources to financial programmes and contributions to industrial research. Although the ideal solution for Romania would be to have private financed R&D activities, we need to search for public solutions because of the economic strategies of the companies in Romania. The vast majority of the companies with Romanian capital are too small to develop R&D activities and the big companies, with foreign capital, are not interested. They are motivated by inexpensive employees and the market to sell their goods. That is why Romania needs to look for public solutions in order to make public R&D funding more efficient.

Education policy. A general European and Finnish trend seems to be that borders between universities, government research institutes and companies in knowledge production are becoming more blurred.[39] Education may be the only domain in Romania where the issue of funding and developing research activities is a top concern, but the positive effects are not going to show in the near future due to several factors. First, the education system is underfinanced. Second, it is unstable due to countless reforms. Third, there is very low involvement of the universities in society and the vice versa.

[34] http://clustero.eu/romanian-cluster-association/
[35] companies; universities and research institutes; local and regional public authorities.
[36] Koch and Oksanen, 2003, p. 154.
[37] Benner, 2003.
[38] Koch and Oksanen, 2003.
[39] Eurofound, 2004.

3. National differences

Although Finland's model might seem perfectly adjustable to Romania's needs, there are some features that differ between the two countries.

The first important difference that I can notice is Finland's small population compared to that of Romania. The smaller scale makes things easier. For example, one or two national champions, like Nokia, were enough to make a difference. In Romania, the national economy cannot be given a big push by one company. Another implication is the fact that the population is rather homogenous and that makes (political) compromise a lot easier.

The second important difference is that the process of knowledge society building in Finland was "marked by a relative lack of social and political disintegration and conflict."[40] For example, "the labor market parties have, to a varying degree, formed 'social pacts' to enact wage restraint and improve the international competitiveness of firms."[41] In Finland, public policies, especially those that provoke structural changes are agreed upon with the opposition and, the government should change, the policy takes its course. In Romania, major public policies do not have continuity. They are built around sensitive issues and are subject to change even during the 4 year term of a given government. It also happened several times for a political party to disagree with a public policy when it was an opposition party, even if it was the same one it proposed while being the leading party.

The third difference consists of the lack of Romanian researchers' interest in the subject. The few studies made are usually under the coordination of IFIs or other international organizations, but those studies are mostly diagnosis of the current situation and not policy proposals. "Finnish researchers have found the development and theoretical underpinnings of the national technology policy an interesting research theme."[42]

Despite those differences, Finland's institutions and policies may still serve as a model for Romania because they are differences that do not render the model inapplicable. Romania might need more time and effort to reach political agreement on the development of knowledge society or it might take more time for the effects to show.

4. Conclusions

Knowledge societies are diverse due to cultural, political and economic background. As presented at the beginning of the paper, unlike the USA, in Europe there is need for larger public intervention in order to foster knowledge society development due to this background. This is why countries, like Romania, who are less developed knowledge societies and need solutions to boost this kind of growth, should look for models according to other criteria than who are the champions of the knowledge society.

In my opinion, Finland is a good example for Romania because its knowledge society was not due to the evolution of the economy. In fact, it was a change induced through public policy in order to save the economy. More so, like Romania, the venture capital market was low and the state needed to compensate.

The most useful thing Romania may learn from Finland is the institutional structure that governs the development of the knowledge society. It enables the creation of a common vision, the political will to apply it, as well as policy coherence. Unlike Romania, the institutions in Finland that contribute to the development of the knowledge society have decision-making power.

It is true that structural transformations in Finland might be easier than in the case of Romania because it is a small country, but I think that this influences the duration and intensity of the transformations and not the applicability of the model.

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[40] Benner, 2003, p. 137.
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[42] Koch and Oksanen, 2003, p. 144.

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POLITICAL PSYCHOLOGY – NEW CHALLENGES IN ANALYZING FOREIGN POLICY

Karin MEGHEȘAN[*]
Teodora DOBRE[**]

Abstract

The art of governance, the relationship between the governed and the governing, the impact of a social and political system on coherent foreign policy-building is significantly influenced by the distribution of power and the type of decisional unit existent within the state. New subjects of study, such as political psychology, have proved their utility both in theoretical and practical study of international relations. Being a frontier subject, political psychology tries to offer answers to a number of questions regarding different issues among which the way character features influence the decision maker's behavior, the role of the operational code in foreign policy and the utility of psychological profiles in the international relationships and in intelligence. Leading from the types of power distribution and decisional units existent in the professional literature, the present paper narrows the narrative and focuses on examining the importance of the individual level of analysis in explaining foreign policy decisions, analyzing the decision of the Russian Federation to veto the intervention of the international community in the Syrian civil conflict.

Keywords: *individual level of analysis, operational code, political psychology, decision-making, foreign policy, Russian Federation.*

1. Introduction

In the study of international relations, foreign policy encompasses not only the projection of power outside the borders of a state, but also it enables the consolidation of internal security and determines internal adjustments to the changes occurred in the international arena. In foreign policy analysis, understanding the decisional mechanisms that trigger certain political decisions play a crucial factor and can enhance one's ability for prediction and prognosis. By knowing and understanding the particular form of manifestation of a decisional unit, the factors that influence it and the variables which are influenced by relevant changes in the decisional process, foreign policy analysts can develop decisional patterns regarding the expected behavior of an actor in the international arena.

The present paper seeks to analyze the conditions under which the leader can influence foreign policy analysis and in which degree he can exert his influence, focusing on the Russian decision to veto the Syrian intervention.

In the professional literature, there are three main approaches to foreign policy analysis:

- Focus on the decision – inspired by the work of Snyder, Bruck and Sapin in the 50s, this approach orients the analytical process towards the bureaucracy existent within an organization and how decisional mechanisms are built on it.
- Focus on psychological and sociological elements – it leads from the premises laid out by cognitive psychology, organizational psychology, politics and sociology and tends to focus on the organizational culture that influences the decision-making process.
- Comparative analysis.

The individual level of analysis, which inventories the psychological and sociological elements, based on which the organizational culture is formed and which influences the decision-making process, leads from the premise that international politics is a mere expression of the human instincts. Cognitive psychology and the use of information processing framework can provide insights into political behavior. The individual level of analysis seeks to understand the motivations of the empowered individual and the context within which they were formed. It places the individual in relation with its organization, in terms of social interactions, hierarchy, and personality, cultural and social background. Thus, the security dilemma, as put into words by Arnold Wolfers, facilitates the process of understanding and decoding the opponent's behavior whether they have a different decisional pattern or not. Security, as it was defined by Wolfers in 1952, is bi-dimmensional, encompassing an objective dimension – if the threat really exists and a subjective dimension – if the threat is perceived. The decisions are taken not based on reality, but on perception, and history has proven many times that the image one creates about the intentions, capabilities and will of the enemy are not always in sync with the reality of the international arena. Psychologists studying the analytical errors in intelligence and security defined this cognitive error

[*] PhD, National Institute for Intelligence Studies, "Mihai Viteazul" National Intelligence Academy (e-mail: **kmeghesan@dcti.ro**).
[**] National Institute for Intelligence Studies, "Mihai Viteazul" National Intelligence Academy (e-mail: **dobret@dcti.ro**).

to be mirror-risk imaging and referred to it as being the assignation of an incorrect intention to the enemy, projecting one's own framing of a situation on to another, and/or assuming one's own risk-profile (i.e. risk tolerance) to be shared by others. (Heuer, 1999, 70).

The foreign policy decisions are ultimately influenced by individual options and perceptions, as it is individuals who make decisions, not states, which Jensen (1982, 13) describes as a "legal abstraction". In assessing the strategic impact the decisional unit has upon foreign policy analysis, the professionals in the field of strategic intelligence have created a taxonomy which includes biographic intelligence (Baud, 1997, 23). Thus, among military, economic and political component of strategic intelligence lies biographic intelligence. The data collection pertained to biographic intelligence refers to the leader's opinions, behavior, competencies, professional experience relations established so far, allowing the analysts to tessellate the data into a complete image of one's preferences in matters of political options.

The main limitations of this analytical method are due to the empirical difficulty of collecting complete and correct data, in a timely fashion manner. In most of the cases, this method has a rather historical utility than a predictive one, because the majority of the relevant data becomes available once the event has been consumed. However, the emergence of Internet and the fast-paced technological advancement, occurred in a context of exponential globalization, have allowed free access to vast amount of data in real time. If in the past it would have been close to impossible to gather information about opponents, now the process of collecting data has been simplified by the use of dedicated software and instruments.

2. The foreign policy of matryoshka

2.1. Russian Operational Pattern

Among the first analysts who focused on decision-making patterns is Nathan Leites, which approached in the Operational Code (1951) the issue of Russian foreign policy, from the perspective of leader's cognitive patterns and the way they are influenced by the desire to obtain power. Although the paper of Leites does not focus on Vladimir Putin, one of the most controversial leaders at the moment, the observations he made on the Russian operational code remain relevant in the current context, as Vladimir Putin is a result of the environment within which he developed.

His political options and perspective on security were greatly shaped by the transformations of the Russian society at large, Kremlin's status of power and its evolution within the international system, the failures and successes of Putin's predecessors, as well as own cognitive biases. His place in history is rather unusual, as he missed perestroika while conducting his activity in KGB (as being involved in intelligence operations in Dresden) (Taylor, 2015).

Hill and Gaddy identified the main elements of biographic intelligence that could tesellate into a comprehensive image of the Putin's leadership and structured them into six different identities: the statist, the history man, the survivalist, the outsider, the free marketer and the case officer (Hill, Gaddy, 2013 apud Taylor, 2015).

The Russian Federation is a federative democracy, with a republican form of governing, within which the executive is represented by the president, prime minister and Government. The Fourth Chapter of the Russian Federation Constitution establishes through article 80 the prerogatives of the president. Standing surety for the human rights and civil liberties, the president is invested with the power to implement policies through which the sovereignty, independence and territorial integrity of the state are ensured. The president of the Russian Federation establishes the guidelines for development both internally, and externally, being the representative of the state in matters of foreign affairs.

Pursuant to Boris Eltin's resignation in 1999, Vladimir Putin became interim president of the Russian Federation. In the following year, he wins the elections, and in 2004 is re-elected for a second mandate. As the Russian Federation Constitution envisages as a maximum number of consecutive mandates two, Vladimir Putin was not eligible for the 2008 elections, Dmitri Medvedev becoming president. During Medvedev's mandate, Putin occupied the function of prime-minister, thus maintaining a key position within the executive power. In 2012 won the presidential elections for the extended period of 6 years.

The current prime minister of the Russian Federation is the former president, Dmitri Medvedev. During his mandate, and especially, after the 2012 elections, there have been several debates on the power distribution within the state and on who really takes the most important decisions. A poll conducted by Levada Center in 2009, among 1600 Russian citizens, revealed the fact that only 13% believed the power belongs to Medvedev, compared to 32% who still perceived Putin as the key decisional figure. 49% of the respondents considered that the two politicians represent a sole power entity, within which decisions are taken by consensus. (Levada Center, 2009)

In *Who Makes Foreign Policy Decisions and How*, Margaret and Charles Hermann (1989) identify three types of decisional units, within which the decision making process, the decisional

mechanisms and influencing factors manifest differently.

According to Hermann's taxonomy, the decisional unit of the Russian Federation can be defined as a singular group. In this situation, the decisional power belongs to a small group, among which the political vision on a specific situation is shared. The most important element to be taken into consideration in this situation is the rapidity of reaching consensus.

The probability of reaching consensus is determined by a series of factors, like common ideology and the size of the group. In other words, if the members of the group share the same vision, values and have the same interests, it is easier to take a decision.

The ideology in the case of the Russian Federation has historical and doctrinaire sources, the Russians being animated by a strong nationalistic feeling and by the desire to recreate the image of a great Empire. The entire Russian policy revolves around the idea of consolidating the central government, determining economic development and reconstructing Russia – the imperial nostalgy. (Lo, 2003, 2).

The current Russian political elite was brought up under a Marxist-Leninist worldview where there was a strong tradition of regarding capitalist instruments as bourgeois oppression. The leitmotif of the recent Russian history is the enemy of the West, placed in opposition with a united Russia. Putin noted in his biography, it was his "sacred duty to unify the people of Russia, to rally citizens around clear aims and tasks, and to remember every day and every minute that we have one Motherland, one people and one future". Having that in mind, and combining it with a realist-anchored perception of international relations, the expansion of NATO and EU towards East after the Warsaw Pact dissolved and the Cold War ended transformed the West into the main enemy.

The colored Revolutions and the involvement of the Western democracies, which determined structural changes in the countries that once were in the Russian sphere of influence and their orientation towards pro-occidental views have been perceived as coordinated subversive strategies of the West to weaken Russia.

Thus, the message conveyed in the public sphere in Russia associated enemy and threat with the West, thus inducing the population the idea of a constant Western threat. This phenomena became obvious in the context of the recent events in Ukraine. The arguments sustaining Russian intervention in Ukraine rely mainly on ethos, appealing to identitary, non-negotiable values like Christianity and invoking historical facts. Leading from NATO and its continuity as a military alliance, although the threat which determined its formation was eliminated, and ending with examples of political activity developed by Western forces in former Soviet states, so as to encourage the administration to oppress Russian-natives, Putin has divided the world into heroes and villains and identified himself with the hero of the story. The efficiency of his narrative derives from the fact that it exploits the history and the historical desire of the Russian society, which has been perpetuated along generations within a security-centric system. At the moment, a survey conducted by Levada Center revealed that almost 88% of the Russian population consider the Western democracies are conducting informational warfare against Russia and are perceiving it as a threat (Levada Center, 2009).

2.2. Decision-making process – Foreign policy

When discussing about matters of foreign policy, the members of the group are also sharing the perception of the threat and of its generating factors, choosing the most effective response strategy based on that: intervention, non-intervention, support. The smaller the group, the higher the probability of a common vision. In what regards the Russian Federation, the debates and discussions existent within the political ruling elite are altered by the influence the president exerts within the group (Taylor, 2015). "Putin orders with an unprecedented authority, since the death of Stalin in 1953" (Lo, 2003, 5). Although we may consider the decisional unit as being the singular group in Russia, Putin exerts its dominant power among the members of the group.

His political personality is greatly influenced by his professional evolution. Starting as a graduate of Leningrad State University, department of Law, Putin became a KGB officer, which greatly shaped his future personality as a leader. Military structures are widely recognized for their inflexibility in hierarchy, being defined by two elements: centralization and formalization.

Centralization reflects the authoritative nuclei and limits the communication channels existent within the organization. Activities in a military structures are conducted in accordance with very strict hierarchical orders. Putin consolidated his privileged position gradually during his mandates. He became the sole exponent of Russian foreign policy, assuming the role of observation, orientation, decision and action, thus reducing almost completely the decisional mechanisms.

Although Vladimir Putin has approached foreign policy matters from an ideological perspective and appealed to the history of the nation and to elements which define national identity, his decisions were always based on an equation of interests and advantages. Putin's ruling system is authoritative rather than autocratic, being based not on legislative consolidation of autocracy but on the

authority of the person who created the system and makes it work effectively.(***, What does Putin..)

The strategic direction of development is dictated by his voice, and elements of nature to prejudice its position are eliminated. Putin remains the key component of the system, as the people invested their trust in him personally (***, what does Putin).

However, Putin is not a dominant leader by excellence, his political orientation and the environment in which he acts creating the probability of outward input. From this perspective, we can argue Putin is rather a pragmatic leader than a dominant one. He considered the collapse of the Soviet Union the biggest geopolitical failure of the XXth century (Galeotti, Bowen, 2014) and aware that Soviet reunification was an impossible goal, he sought to consolidate Russian position in the international arena. It has been observed that Russia appeals to international cooperation, if common interest are at stake.

Perhaps the most relevant example in that matter is the case of the 9/11 attacks. Facing a common enemy- terrorism – Russia has enhanced its cooperation with the US in preventing and mitigating terrorist threats. This approach of foreign policy has been observed in relation with Japan, with whom Russia has a historical conflict over the Northern territories (rapprochement) (Ferguson, 2008, 79).

The political objectives are emphasized in the New National Security Concept, implemented in 2000 (***, the Foreign Policy Concept) by Vladimir Putin. Concept 2000 offers transparency and predictability in what regards foreign policy, in terms of political realism (Ivanov, 2003, 161), structuring courses of action in accordance with national interests and benefits. Adapting in accordance with the changes observed within the international arena and with the new forms of conflictual manifestation, Russia aims at attaining financial prosperity. By gaining (competitive) economic advantages, it seeks to become a pole of influence in a multipolar world, thus regaining its status of power. In matters of foreign policy, Kremlin continues the directions of action set in 2000 in the programmatic documents implemented in 2008.

2.3. Russian- Syrian relations

Narrowing the narrative and focusing on the relationship developed between the Russian Federation and Syria, one must analyze the historical evolution of Russia in the Middle East. The 2008 doctrine approaches, in articles 14 and 15, the problem of cultural differences, thus individualizing Middle East North Africa as being a region in which the process of globalization seems to have been inversed. The population fights for re-gaining cultural identity, underlining the desire for returning to the core cultural roots and Islamic values. The recurrence of this type of process in proximity has determined Kremlin to consider MENA a priority in international affairs. As the Russian Federation has approximately 10-15% of its population of Islamic belief (CIA World Factbook), it has sought to demonstrate its capacity for inclusion and integration, without altering their belief and value system. Under this conditions, it blames the process of imposing a hierarchy and a governance institution by an outward force, perceiving this as an intrusive intervention in the internal affairs of a state, premise for increased xenophobia, intolerance and tensions.

The Doctrine identifies as core element of global instability the desire of international powers to manage conflicts through sanctions, coercive measures and unilateral military interventions carried out beyond the auspices of United Nations Security Council. In this context, the problem of the Syrian state becomes, from the perspective of the decisional process, a relative simple one. The members of the political elite share a common vision, therefore consensus is rapidly achieved and Russia's political objectives in the region are set in accordance with its historical ties with the Middle East.

Although MENA has not represented an area of interest for pre-Soviet Russia or for the Russian Empire, this approach has changed once the Second World War ended. The Russian geopolitical ambitions focused on the Arab world, especially on the Middle East. The Soviet Union sought to connect with Arab states, whose political regimes and orientations were sharing common grounds with the communist ideology. Models explaining the socialist orientation and non-capitalist development were elaborated, so as to explain the attractiveness of the Soviet model in Arab countries. In 1980, Hafez al-Assad signed a Treaty of Cooperation and Friendship with Russia, through which the two states established strategic ties. The implementation of perestroika in 1985 has destabilized the position of the Arab states in the Russian policy, switching from a central element into a periphery one (Malashenko, 2013, 12). Post-Soviet Russia no longer has the resources necessary to maintain productive relations with all the countries of the Middle East. However, Syria remained an important pier in the vision of Moscow. Since the beginning of his mandate, in 2000, Putin sought to regain its influence in the Middle East. Without any sounding success in establishing and consolidating strategic relations with Syria, Russia exploited the opportunities inferred by the revolutionary wave.

Systematically and in accordance with a neo-imperialist doctrine, Putin aimed at transforming Russia in a distinct pole of influence. Russian motivations did not revolve around the massive energetic resources available in the region, but focused on the need to consolidate strategic points. The support Russia offered Assad is a good representation of the pragmatic vision adopted by Kremlin, who perceived the revolution as an

opportunity, whose proper exploitation would allow an increase in regional influence. For attaining this objective, the Russian Federation estimated it is required for the ruling regime to remain in function. Its take down and the replacement of the Baath party with another form of ruling would have determined a break in the geostrategic relations established between Damascus and Moscow.

Russia's discourse revolved around the idea of inefficiency. Kremlin invoked the precedents of Afghanistan, Iraq and Kosovo, where interventionism has generated further conflictual manifestations and determined regional instability. Russia's main objective was maintaining stability in the area, and the US-led interventions have proved their efficiency in taking down a regime, but not in implementing a stable one. Although the Russian reactions used the concept of responsibility to protect to argue their veto position within the Security Council, Russian leader's pragmatism could have been translated into more tangible objectives.

First of all, Russia controlled the Tartus port, the only military base outside the former USSR territory and the only naval point for fueling Russian ships in the Mediterranean. In 2008, Assad agreed to convert the port into a permanent military base for war ships with nuclear cargo. In 2009, RIA Novosti announced that the port will become operational in matters of anti-piracy activities, as it served as a base for multi-directional projectiles. (***, Russia set to build up) In this context, controlling the Tartus port was conditioned by maintaining the Assad regime in power.

Secondly, the Middle East has been a conflictual epicenter for a long time, thus becoming an area of interest for Russian arms export industry. Starting with the 50s, Kremlin has made deals with the states in the region, which implied the presence of Russian consultants on national territories and their direct involvement in the conflict. Through these agreements, Russia has pursued its strategic objectives in the region, gaining both major economic advantages and access to foreign military infrastructure. After the fall of the USSR, the relations with the Middle-Eastern countries deteriorated, the main demand being consisted of Syria and Iran. The estimations regarding the value of the contracts signed between Rosoboronexport (Russian arms export industry) and Assad regime indicate a profit of 4 billion USD. Stockholm International Peace Research Institute estimated that the amount of money obtained by selling Russian arms on Syrian territory rises up to 162 million USD in 2009 (Katz, 2012), 700 million in 2010 and 960 million in 2011.(Yan, 2013)

Lastly, Putin feared the most the diffusion of Islamist radicalization towards North Caucasus and Volga region. The triumph of the Arab Spring and of the pertained social movements has reached to the Russian Muslim population, generating and encouraging the development of an opposition movement.

3. Conclusions

In approaching the Syrian conflict, the Russian Federation formulated its foreign policy leading from two main questions: who will dominate Syria and who will become the new regional power core. The Assad regime was a strategic ally for Kremlin. The motivation that lied behind the use of the veto right for three time within the United Nations Security Council, thus blocking interventionist resolutions, were based on the strategic objective of maintaining relative stability in the region. The emergence of the Islamic State, both geographically and demographically, prove the fact that the Russian strategy was efficient, if it can be evaluated in the given situation.

The military intervention against the Assad regime would have determined increased instability in the country and would have created the political framework favourable for allegedly democratic elections. In countries like Syria, with poor democratic history, where the concept of democracy is diluted and understood only in terms of social welfare and health services, history has proven that democratic elections end up replacing a dictator with another.

In the context of the increasing street violence and popularity of groups/militant groups with extremist views, organizing such electoral events would have, most likely, created a political arena for legitimizing extremist movements.

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CONSERVATISM IN A POAST-SOCIALIST COUNTRY: THE INTELLECTUAL ELITE AND THE EXTREME RIGHT IN ROMANIA

Valentin Quintus NICOLESCU[*]

Abstract

My paper focuses on the sensitive point of intersection between the far-right orthodox autochthonous conservative school of thought and the pluralist, European center-right Popular ideology in the case of the contemporary Romanian conservative intellectual elite. How this tension does shape the conservative discourse in contemporary Romania?

This issue becomes especially relevant within the particular post-socialist political and ideological context of Romania. In the years following the 1989 Revolution, the Romanian the dominant discourse of the anticommunist intellectuals turned towards the right. Major figures, like Andrei Pleşu and Gabriel Liiceanu inspired an ideological turn towards an autochthonous conservative school of thought that originated in the 19th century and which reached a peak during the interwar period with the nationalist ideological strand that, amongst other things, inspired the far-right Legionar Movement. During that period a particular name comes to attention, that of Constantin Noica. Persecuted by the communist authorities, he managed to organize a small group of philosophers that will later be known as "the Păltiniş School". Amongst the young people recruited were the above mentioned Pleşu and Liiceanu. After 1989 they embarked in a series of various projects that encouraged the emergence of a strong group of young right-wing orthodox conservative intellectuals currently associated with the Christian-democrat strand within the Romanian Popular movement.

In order to reach my research goal, I will analyze the contemporary Romanian conservative discourse, mainly relying on published texts, interviews and opinion pieces of the most representative intellectuals of this ideological strand.

Keywords: *conservative discourse, Romania, orthodoxist nationalism, public intellectuals.*

1. Introduction

For those who usually follow the Romanian political discourse, it comes as no surprise finding in the right wing Christian-Democrat positions a number of elements that seem to originate with the interwar extreme right Orthodoxist views. Embedded in wider models, which are seemingly ideologically attuned with contemporary conservative Christian discourse, they create the somewhat strange general picture of an ideological mixture concealing behind the pro-European and democratic discourse an authoritarian and intolerant filiation.

This observation however creates the necessity of an extremely important classificatory question: to what extent could we speak of a conscious apprehension of these radical elements in contradistinction with the manifestation of some other type of phenomenon? In other words, could we speak of an ideological undertaking assumed as such by the respective individuals/groups, or are we dealing with a structural feature that shapes this particular type of conservative discourse?

The thesis which I presently developed in order to deal with this issue is that the obvious discursive tension between the far-right Orthodox autochthonous conservative school of thought and the pluralist, European center-right Popular ideology specific to the new Romanian conservative intellectual elite, reflects a deeper reality, one which involves specific structuring ideological frameworks which essentially mould both the direction and the substance of this discourse. In light of this observation, beyond certain self-expressing inabilities of some political individuals, or eventually specific to the general model of the Romanian political discourse, in the particular case of the right wing conservative doctrine we can speak of the existence of a radical ideatic core that ideologically nourishes this political orientation. The seemingly European (pluralist, tolerant, socially involved) Christian-Democratic discourse professed by the representatives of this political direction appears to be a mere cover for a completely opposed (intolerant, authoritarian and elitist) background.

In this paper I attempt to identify two possible sources for this background – 1. The cleavage between autochthonism and modernism, respectively 2. certain elements originating with the interwar extreme right intellectual elite, particularly with its philosophical wing (Mircea Eliade, Emil Cioran and especially Constantin Noica). First, I will outline the ideological cornerstones of the Romanian conservatism and afterwards I will try to identify some elements which it holds in common with the interwar nationalist right wing perspective. Secondly, I will attempt to determine the reflection of the aforementioned aspects on the thought of the New Right School in post-communist Romania.

[*] Lecturer, PhD, Faculty Political Science and Administrative Studies, "Nicolae Titulescu" University, Bucharest (e-mail: **valentine.nicolescu@gmail.com**).

2. Peripheral conservatism and nationalism in Romania

2.1. The conservative frame

The first of these origins represents in fact the expression of a historically constituted cleavage, namely one previous even to the creation of modern Romania, more precisely emergent at the beginning of the 19th century, that implicitly forged the main ideological positions, (Liberalism and Conservatism) – i.e. the one between modernism and autochthonism. The Liberals (and later on, at the end of the century, the Socialists) represent the modernizing, pro-Western pole, while Conservatism roughly corresponded to the autochthonistic one. To get a better picture of this dichotomy, we could say that it involves two inter-related themes: that of national identity and the other one concerning Romania's peripherality with respect to the West, both being structuring elements of the Romanian ideological context.

At first glance at least, in Romania we are dealing with the political reflection of the same tensions which can be found in the Western countries and which Rokkan and Lipset defined as the industrial/agrarian cleavage[1] – i.e. the one between the dynamic forces of industrial capitalism and the world of landed aristocracy. However, from a cultural and historical perspective, things look more complicated as we are dealing with three basic elements – our belonging to the Ottoman Empire and to the Orthodox world, combined with the absence of the capitalistic development. These elements, on the one hand, mold the structure of the national identity and, on the other, affect the local instantiation of the general ideological spectrum, of Conservatism in particular.

With respect to the national identity, we are dealing with the integration of two elements constitutive to the national discourse, both derivative of one of the great European models (German – the ethnic and cultural one, respectively French – the civic one). Interestingly, both can be provided with a geographical determination, as the French influences are characteristic to Moldavia and Walachia, while the German influence is quite obvious in Transylvania. Moreover, subsequent to the emergence of the modern state, the two models will be alternatively incarnated by the two main political parties – the Liberals and the Conservatives: in the former case, the civic-national element will be most significant, while in the latter, the ethnic and cultural one. With regard to the nature of the entire ideological spectrum, the most important fact is that, irrespective of its ideological nature, it does not evolve outside the nationalistic thought. This is a structural cornerstone of the entire political history of modern Romania, its most common and obvious manifestation residing in the names of the main political parties – the *National* Liberal Party, the *National* Peasants' Party etc.

On the other hand, the construction of the national identity produced probably the lengthiest political debate in Romanian history, i.e. the one concerning modernization. However, given the country's peripherality[2], the aforementioned dispute did not necessarily concern the economic tension involved with the emergence of capitalism, but rather a completely different process, i.e. the Europeanization or, in other words, the Westernization of Romanian society, especially with regard to its political, legal institutions and so on. As such, modernization has only a secondary relationship with the actual industrialization process in Romania, or with the creation of an infrastructure similar to the Western one, while in fact being perceived rather as the explicit adoption by the Romanian political environment of a set of political institutions, consequently as political modernization. The most notorious example is probably the almost full imitation by the Romanian Constitution of the 1831 Belgian one. This model, fundamental to the liberal vision, led to a rapid transition of the society from the traditional institutions to the modern state (in the Western European sense of the word), generating a wide wave of (not exclusively political) consequences. Thereupon, the Conservative reaction mainly centered around accuses of institutional duplication incompatible with the national background, eventually generating the "background-less shapes" theory, concerning not only the political aspects, but especially the cultural ones. Initially drawn up by Titu Maiorescu, in the paper entitled *Against the Contemporary Tendency in Romanian Culture* (*În contra direcţiei de astăzi în cultura română)*, it was inherited and developed by Mihai Eminescu, a poet and editor of the "Timpul"("Time") conservative newspaper.

2.2. The Nationalist frame

Mihail Eminescu, considered by his posterity as Romania's national poet[3], developed in his political writings a radical conservative and reactionary view, based on xenophobic nationalism, the (Romantic) valorization of the traditional organization, norms and institutions (as opposed to the imported ones) and on value autarchy. Although the success of his political writings was rather

[1] S. Lipset, S. Rokkan, „Cleavage Structures, Pary Systems, and Voter Alignments", in S. Lipset, S. Rokkan (eds.), *Party Systems and Coter Alignments: Cross-National Perspectives*, New York: Free Press, 1967.

[2] See Aldcroft, D. H. *Europe's Third World. The European Periphery in the Interwar Years*, Ashgate, 2006, chap. 1-4.

[3] And therefore having an implicitly tremendous influence on later Romanian society, especially regarding education and heavily contributing to the construction of national identity.

limited in his days, Eminescu will gain national political relevance along with his "rediscovery" by Dumitru Murărașu in 1932[4] and with his integration with the thought of the young post-war nationalist intellectuals (M. Eliade, N. Ionescu, E. Cioran, N. Crainic, later C. Noica etc). From this perspective, the extreme right wing borrowed, continued and developed on its own account some of the previous models of the conservative thought by selective (and implicitly limitative) adaptation, specifically looking for those aspects and elements relevant to the national ideological construction as well – Romanian identity, Orthodoxy, the traditional peasant communities, xenophobia, anti-Semitism, misogyny and so on[5].

An important aspect for the analysis of the post-1989 conservative discourse is represented by the activity of one of the aforementioned intellectuals – Constantin Noica. While the others, either died, either chose to leave Romania and break with their extremist *drift* (as is the case of Mircea Eliade or Emil Cioran), Noica had remained in the country, was politically persecuted and afterwards initiated one of the most fascinating intellectual projects – that of the School of Păltiniș. Here, where he retreated from the long arm of the Communist state, he co-opted some of the young philosophers of the 70's, in a spectacular attempt, on the one hand, of preserving certain values, on the other, of creating an elite capable of contributing to Romania's intellectual rebirth in the eventuality of the fall of the communism[6]. The extent to which Noica broke with his legionary past is still debated, but the certain thing is that the *Romanian nature* and the national/universal tension remained the main concerns of his philosophy. After the nationalistic drift of the Ceauşescu regime, Noica will be significantly rehabilitated, his works started to be published by the communist state as now they overlapped with the general national-communist ideological direction, fact which also raises serious questions with respect to the compromise to which the old philosopher subscribed in order to make his ideas known[7].

After 1989, two of his school's representatives – A. Pleşu and G. Liiceanu - will carry on their masters' ideas, grounding the so called Group for Social Dialogue, overtaking the former Political Publishing House of the Romanian Communist Party and renaming it Humanitas[8], enabling the emergence of the New Europe College, and getting involved in high politics (e.g. A. Pleşu was the minister of culture and, later foreign minister. In the last presidential mandate he was appointed as presidential counselor and so on). Thereby they greatly succeeded in initiating the emergence of an entire current of thought, on the background of an intellectual and doctrinaire void resulted from the communist era. In other words, much of the mainstream intellectual public discourse nowadays originates in their endeavor.

3. The case of the New School of the Right

After 1989, conservatism, as an ideological orientation, was mostly associated with a pejorative perception – conserving what? Communism and its inheritance? Nevertheless, especially after the beginning of the 2000's, a new debate emerged in the public space, continuing the pre-and inter-war one and preserving to a certain extent the (conservative) argumentative structure of that time: how do we want to shape Romanian politics, or the institutional and political construction of the state, respectively, how can we overcome the identity crisis caused by the four decades of communist dictatorship? Anew, a debate about political modernization and national identity emerged, but in a wholly different context, namely regarding European identity and more precisely the reclaiming of a Romanian European identity which had been lost during Ceausescu's Asiatic type communist regime. This time, the issue of the *background-less shapes* regarded the ideological imports (Western Liberalism vs. autochthonism), the implementation of the E.U. aquis (which was actually perceived as an uncritical duplication of a foreign set of values and institutions) or reinstating a traditional value-

[4] D. Murărașu, *Naționalismul lui Eminescu*, București: Ed. Pacifica, 1994 (first ed. 1932).

[5] V. Nicolescu, R. Pircă „Femeia în gândirea națională românească: patriarhalismul indiferenței", in *Patriarhat și emancipare*, Iași: Polirom, 2002, 149-205; L. Volovici, *Nationalist Ideology and Antisemitism. The Case of Romanian Intellectuals in the 1930s*, Oxford&New York: Pergamon Press, 1991, 56-61.

[6] This was a project he worked on sporadically from 1944 onwards. It took him a long time to refine his methods of selection, sometimes having entire cahiers filled with information regarding philosophy students that had in his view the potential to become the new Romanian intellectual elite – see A. Laignel-Lavastine, *Filozofie și naționalism. Paradoxul Noica*, București: Ed. Humanitas, 1998, 35

[7] From 1970 onward, Noica will manage to get published again, taking advantage of the re-emergence of nationalism in Socialist Romania. The most important tiles are: *Rostire filosofică românească* (*Romanian philosophical expression*, 1970), *Creație și frumos în rostirea românească* (*Creation and beauty in Romanian expression*, 1970), *Eminescu sau gânduri despre omul deplin al culturii românești* (*Eminescu or thoughts on the complete man of Romanian culture*, 1975), *Sentimentul românesc al ființei* (*The Romanian sentiment of being*, 1978), *Spiritul românesc în cumpătul vremii* (*The Romanian spirit at crossroads of time*, 1978).

[8] Also creating one of the very first cases of high corruption in Romania, due to the fact that the former Political Publishing House (Editura Politică, the official publishing house of the Romanian Communist Party) was transformed into the Humanitas Publishing House by an ministerial order issued by Andrei Pleşu, then Minister of Culture, and also putting Gabriel Liiceanu in charge of the newly created institution - http://www.cotidianul.ro/andrei-plesu-l-a-cadorisit-pe-gabriel-liiceanu-cu-tot-patrimoniul-editurii-politice-209751/

system that was considered lost during the communist era.

The New School of the Right was founded towards the end of 2000, while being proposed as the ideological driving engine of the liberal-democrats, the main governing party between 2008 and 2012. Although the public statements of its members cover a wide range of ideological positions[9], the latter find common ground on two essential directions: an outspoken conservatism and the reverence shown to the representatives of the Paltinis School (A. Pleşu, G. Liiceanu)[10], whom they recognize as their mentors.

This thought trend first coagulates in various formulas, around the Liberal Democratic Party or around some of the latter's foundations, like the Christian-Democratic Foundation or the Institute of Popular Studies. After the first period, during which the overlapping with the main governing party had been almost total, some of the intellectuals supporting this school of thought started an independent political career (such is the case of Mihail Neamtu, who started a short-lived new political party – The New Republic) or they became alienated from the party (such is the case of Cristian Preda, who was excluded from PDL as a consequence of his critical remarks brought to the party's management).

No doubt that the conservative speech or elements of the latter have been found and are to be found in various regions of the Romanian political specter, but the Christian approach was only seen on two occasions after 1989 – in the case of parties associated with Christian-Democracy and in the case of right wing extremist parties[11]. While the latter failed to make the subject of my presentation, as they hold a marginal position in the Romanian political system, the first offer two relatively opposite ideological manifestations, although both parties are affiliated to the European People's Party (EPP) – PNT-CD is the heir of one of the centre-left parties from the interwar period, while PD-L is a party which was founded after 1989 and which decided to exit the Socialist International after 2000 and to join the EPP, thus delivering a dramatic ideological twist. After this moment, PD (which became PD-L after the merger with a faction broken from the liberals) has found itself on a never-ending quest for an original speech which would identify it on the right political specter, a speech which would be different than those of the liberals or of PNT-CD[12]. This is the period when intellectuals like A. Pleşu, G. Liiceanu or H.R. Patapievici decided to support the party's ideology, while taking it upon them to help PD-L construct a distinct doctrine and identity. This event generated a snowball effect, as a wide range of young disciples joined the seniors, thus giving birth to the New School of the Right.

What is interesting when making the above mentioned comparison between the Christian-Democracy of PNT-CD and PD-L is the Christian nationalist spark originating in the interwar radical views of C. Noica and which was passed on by the Păltiniș School to its disciples. PNT-CD is offering (or it offered to be more precise, in the context of its long and troubled history after 2000) an ideological position close to that of other similar European parties and especially to that of the German Christian Democratic Union (CDU), to which the social component present since the party's interwar existence was added. From this perspective, PNT-CD is a modern, democratic, secularist party with a significant communitarian component. The new School of the Right, on the other hand, is caught between the democratic pro-European speech and the radical positions present in the though of its interwar forefathers. The effects of this dissonance are quite visible, especially through the contradictions created by such a position.

The segments where this type of tension becomes most visible are the following: the state-church relation, intellectual intolerance seen as an expression of elitism; the vision regarding national identity and the values of the post-communist era.

In the case of the state-church relationship, perhaps the best example was the proposed project of the law regarding the state-church partnership[13]. The latter aimed to externalize the social services provided by the state by using the Church and the initiative was saluted by then Christian-Democratic Foundation President and Minister of Foreign Affairs Th. Baconschi, by Radu Carp[14], Mihail Neamţu and Radu Preda who argued that "after 50 years of atheist ideology, the time had come for the

[9] That span from the neoconservatism of Cătălin Avramescu, to the classical conservatism of Ioan Stanomir's ideology, which is based on Burke's thought.

[10] The best reference in this respect is probably represented by the volume of interviews edited by C. Pătrăşconiu, *Noua şcoală de gândire a dreptei* (*The New School of Thought of the Right*, Bucharest: Humanitas, 2011). Among others, in this volume, the main supporters of this trend – Th. Baconschi, M. Neamţu, Dan C. Mihăilescu, Cătălin Avramescu, C. Ghinea, S. Voinescu, C. Preda present their position on conservatorism, while mentioning the influences of the main representatives of the Paltinis School. For example, on page 49, Sever Voinescu states: "Andrei Pleşu is my mentor".

[11] Such is the case of the Legionary Movement, under its various names, a party still active today or of the more popular Great Romania Party, an initial national-communist party which has shifted towards a strange Christian version of the latter before the death of its leader, Corneliu Vadim-Tudor.

[12] It is very interesting that Th. Baconschi believes that the PD-L managed to integrate the Transylvanian voters of PNŢ-CD and of PUNR (The Romanians' National Union Party, a right-wing party which was merged with PRM) – C. Pătrăşconiu, op. cit., p. 55.

[13] Proposed by Raluca Turcan, member of the Chamber of Deputies and Vice-President of PD-L.

[14] Mrs. Turcan's legal councilor for the drafting of the respective law.

Romanian society to discover the Church's historical contribution to common good"[15]. The project clearly favored the Orthodox Church by granting it two sources of financing derived from its quality of recongnized cult and from specific charity projects which would have used money from the GDP. This initiative would have clearly increased the *politicization* of the Church, but it was sent back to Parliament by the President after it had been approved by the MPs.

As for the second dimension, the best examples are offered by the above mentioned book, *The New School of Thought of the Right*, where Sever Voinescu said that, in Romania, "nobody has ever had the strength to be conservative to the end". Also, while invited to the "Voice of Basarabia" radio station, Mihail Neamţu spoke of the "Christian-Democratic principles which we want to reinstate today", from his position at the time, that of Scientific Director of the Institute for the Investigation of Communist Crimes and for the Memory of Romanian Exile (IICCMER). Neamtu's speech was directly related to the similar school of thought from the interwar period, while condemning the abuse of the local fascist party[16]. Still, Neamtu states he is the adept of a Romania "armed with living faith and with actual means of armed resistance"[17]. While talking about tolerance, Cristian Preda, believes that it is a constructed value, since it is taught to children: „tolerance forces you to accept that different is normal. It is not natural. Quite the opposite, human nature forces one to despise your neighbor – this is the big lesson of Hobbes"[18].

Perhaps the most relevant example regarding the third dimension is provided by another vice-president of the former PD-L, Mr. G. Flutur. As president of the Suceava County Council, he approved in 2012 funding for a children's book written by an old legionar commissary, on the cover showing a picture of Corneliu Zelea-Codreanu, the founder of the far-right party. Also, in 2010, the same Suceava County Council funded the publication of another volume written by the same individual – George Ungureanu – called *Prin labirintul vieţii* (*Through the Labyrinth of Life*) where the author describes his career as a Romanization commissar during the short-lived Legionary National State in 1940.

4. Conclusions

After 2014, the National Liberal Party and the PD-L decided for a fusion, under the name of the national liberals. But they also decided that the newly formed party will change its European ideological allegiance, by leaving the ALDE and joining the Populars (of which the former PD-L was a member). That produced not only some confusion amongst the party members, but also affected the party programme in the most peculiar manner – central doctrinaire concepts and values appear to be fused in order to accommodate the recent political and ideological metamorphosis. Perhaps the best example is constituted by the recent change in regard to the party's vision on the human nature. Reading the text posted on the official site of the party (before it was removed during April 2016), one could found a rather interesting approach, which combines the classical liberal view and the christian-democrat one: man is an individual due to his economic interests, but also a person because he has spiritual aspirations. This ridiculous philosophical mixture must have attracted the attention of some intellectuals of the party, because was promptly removed from the site and replaced by a milder, social-liberal version[19]. In my opinion, this was not the product of an isolated individual acting without some connection to the party doctrine, but was inspired by the earlier work done by former party president Valeriu Stoica and Romanian-American economist Dragoş-Paul Aligică, *The Reconstruction of the Right* (Reconstrucţia dreptei), where similar contradictory positions were expressed regarding the same issue.

The connection with the far-right orthodoxist thought seems to have been passed on to the new party, as it nominated its candidate for the mayor of Bucharest a neo-legionar politician, Marian Munteanu[20]. He was the former leader of the Student League during the Piaţa Universităţii protests in 1990, leader of the neo-legionary party The Movement for Romania (Mişcarea pentru România) during the early 90's (1992-1995) and founder, at the beginning of 2016, of a civic initiative along with New Right's[21] leader Tudor Ionescu – "Our Alliance" (Alianţa Noastră)[22]. It is ironical that a neo-legionary gets to be nominated by PNL, due to the fact that, during the early 1930's, the liberal prime-minister I.G. Duca was assassinated by the legionnaires in Sinaia. The nominalization of Mr. Munteanu it's not a mere political mistake perpetrated by the liberal leadership, as it might

[15] http://www.hotnews.ro/stiri-esential-8395490-fundatia-crestin-democrata-condusa-teodor-baconschi-dupa-50-ani-ideologizare-atee-societatea-romaneasca-descopera-contributia-bisericii-binele-comun-prin-parteneriatul-stat-biserica.htm

[16] http://www.youtube.com/watch?v=c4chLIq4hlQ

[17] Ibid.

[18] C. Pătrăşconiu, op. cit., p. 71.

[19] http://pnl.ro/despre-noi/angajamentul-nostru/principii-si-valori-liberale

[20] Who was promply removed after a rather strong opposition and critique from both within the party and from the civil society.

[21] New Right, a nationalist non-govenmental association openly affirming its continuity with the interwar fascist Legionary Movement.

[22] http://www.aliantanoastra.ro/

seem[23], but it reflects a particular ideological stream within the party. The best example of this is represented by "I.C. Brătianu 1875 Liberal Club", an organization within the party which actually professes an… illiberal discourse[24]. During 2015 it proposed the reformation of the party's ideology in a document entitled "Appeal for Saving the National Liberal Party's Identity", in which strong nationalist-orthodoxist views were explicitly put forward (eg. Anti-abortion politics, revisionist politics towards Ukraine and the Republic of Moldavia, sustaining the "traditional" family and forbidding gay marriage, sustaining the presence of religious symbols in public schools and affirming Romania's status as the… protector of the Christians in the Middle East)[25]. Similarly, one of the members of the ICBLC, Ilfov M.P. Daniel Gheorghe held a political declaration in Parliament on the 21st of April 2016, where he openly and vehemently praised the virtues of orthodoxist nationalism[26].

What is the relationship between contemporary center-right conservative christian democrats and the xenophobic orthodoxist nationalism from the interwar period in the Romanian case? As I have tried to argue, there can be identified particular filiations between the two, resulting in a specific ideological framework that shapes the intellectual right discourse nowadays. The main dimensions of this discursive strand refer to the relationship between church and state, religion and the public sphere (eg. compulsory religion in school, anti-abortion, traditional patriarchal family, religious intolerance particularly towards Muslims, creating institutional partnerships between state and church, thus openly challenging the laicity principle, and so on) – both of them reflecting a (cvasi) fundamentalist ideological stance and, secondly, a xenophobic ethno-cultural conception of nation and national identity that is reminiscent of the far-right interwar nationalism.

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- http://www.cotidianul.ro/andrei-plesu-l-a-cadorisit-pe-gabriel-liiceanu-cu-tot-patrimoniul-editurii-politice-209751

[23] The usual argument being that the national-liberals were aiming to promote a candidate that had a particular form of legitimacy in relation to the recent mass protests in Bucharest and other parts of the country. Therefore Marian Munteanu was nominated due to his history as a leader of the Piaţa Universităţii protest in 1990 and not as a consequence of his particular ideological stance.

[24] http://www.clicb1875.ro/index.php/2016/02/

[25] http://www.activenews.ro/stiri-politic/Un-grup-de-liberali-propune-un-program-care-ar-infuria-UE-si-SUA-Economie-prin-noi-insine-.-Casatoriile-gay-considerate-toxice-.-Program-ANTI-avort-115043

[26] https://www.youtube.com/watch?v=7ZXW5TPMbK4&feature=share

A TOOL FOR A DYNAMIC ADAPTATION OF THE OBJECTIVES AT THE LEVELS OF EUROPEAN UNION, NATIONAL AND SECTORAL, UNDER SECTORAL AND ACROSS SECTORS[1]

Speranţa-Liliana NEAGU*

Motto:

''You can't understand climate changes in pieces, says scientist Gavin Schmidt. It is the all or it's nothing. In this illuminating talk, he explains how he studies the big picture of climate change with mesmerizing models that illustrate the endlessly complex interactions of small-scale environmental events.[2]

Gavin SCHMIDT

Abstract

Changing of paradigms and realities generated by the dynamism shaping of international relations and the reality, especially determines a necessity of rapid modernization objectives to adapt to new constructs strategies and rules (soft law, common law and customary law, on the other hand). Creating of the conditions to open a chapter of the EU accession, or preparation of the content of acts of delegation or implementation concomitant of provisions of the EU Commission, to achieve the interests of socio-political nations, integrated - must be based on targets set by decisions triangular (COM; PE; CONS[3]) and through the "six thinking hats"[4]" – Maltese psychologist Edward de Bono.[5] I created a simple tool for adaptation of the EU, national, sectoral, cross-sectoral objectives comparative for adaptation at dynamic reality. I created a simple tool for adaptation of the EU, national, sectoral, cross-sectoral objectives comparative for adaptation at dynamic reality.

Keywords: *agribusiness intelligence*[6]*, lateral thinking*[7, 8]*, sheet of analysis of negotiations for the adoption of a legal instrument incidence international / (EU/ regional), cross-sectoral measures, cross-sectoral objectives, plan of action, integrated strategy for sustainable development of legislation.*

1. Introduction

"Legislative world" is in a constant change as result of paradigms that need to be adapted to the new relationships and reconfigurations of human communities and the rules that lead the policies and actions. In order to fulfil the proposed goals, the strategies and policies may not have legal value even they are, in principle mandatory within the European Union, for example.

We can use some data in connection with the new information at global level. In this meaning, the agribusiness intelligence represents „a form of support for the business representatives to understand, to be prepared and to act in accordance with the volatile markets; from crop protection and seed, fertilizers and animal health to the production, manufacturing, trading and regulation of agricultural commodities and food products".[9]

The implementation of the legislation and diplomatic results need solutions at the expert's level and decision makers for benefit of the beneficiaries, *lateral thinking*[10,11] being a mode - "the solving of problems by an indirect and creative approach, typically through viewing the problem in a new and unusual light. Contrasted with vertical thinking"[12].

2. Improve the communication on the major negotiations results

After the participation to the working groups of EU institutions other organizations / national and international entities, it could be elaborated forms that could be adapted in accordance with deadlines,

* Counsellor for European affairs, Ministry of Agriculture and Rural Development (e-mail: **sperantaneagu@yahoo.com**).

[1] This material represents my research hypothesis, andit does not involve the institution I work at.

[2] *http://www.ted.com/talks/gavin_schmidt_the_emergent_patterns_of_climate_change*

[3] The EU Commission, the European Parliament, the EU Council.

[4] *prisms in a syncretic mode*

[5] http://en.wikipedia.org/wiki/Edward_de_Bono

[6] https://agribusinessintelligence.informa.com/about/

[7] http://www.debonogroup.com/lateral_thinking.php

[8] *http://www.curteaveche.ro/cursul-de-gandire-al-lui-edward-de-bono-instrumente-eficiente-pentru-a-va-transforma-modul-de-gandire.html*

[9] *https://agribusinessintelligence.informa.com/about/*

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[12] *http://www.oxforddictionaries.com/definition/english/lateral-thinking*

costs and other relevant issues requested by decision makers - GHG footprint etc. It can be used shades and colours for presentations having in view that visual contact is very useful for the better understanding.

It can be used for example a " 3D" or the "AutoCAD" program mainly the method "Pert"[13] to start, conduct and fulfil limits (honouring the obligations of contracts).

2.1. Improve the communication at the working groups level

Each meeting or consultation may be finished with a sheet, each representation being coloured with a specific colour, an area with a palette of nuances and the domain illustrated by shades.

The negotiations in the form of a sheet analysis as a stage for adoption a legal instrument with impact at the international level (EU / regional) represents in my opinion an important tool for more countries. It could be a sustainable base to elaborate the national laws with impact on all the actors, workers, employers and policymakers. To a better understanding and application of the future legislation should be consulted experts, politicians, citizens, non-governmental organizations and government authorities. Even if the example in other common market organization, there is the development of a proper legislation to set up trade policies in due time but protecting interests of the people, by setting up periods, quotas etc. and no restrictions to protect domestic jobs or industries, agriculture and so on.

The European Union has a common market/ internal market - *de jure.* Worksheets synthesize priorities and identify all the sensible areas with major impact for some communities could result in rapid changes in regulations and behaviours or even commercial production.

An IT program based on graphic representation with colours to systemic analysis could suggest measures/proposals of “de lege ferenda”, at local, national, regional level, European Union and international.

The Medicine Bruno Italian takes the idea launched by Maltese Edward De Bono, "the intelligence itself could even hold you in place in solving problems. [14]". As a result of this mode to think more of the trade barriers could be solved by horizontal and cross-sectorial approaches of the experts and lawyers, decision makers and politicians, business people (lobbying).

3. Improve the communication on the nation interest

The seminars, conferences on economics organised during the year will bring in attention topics of great importance from different sectors. The demand for major commodities should be part of detailed discussion during this kind of event. At this kind of events should be invited analysts, consultants from all over the world, including experts, economists, bankers and politicians. These seminars serve as a means to bring clients together for informative discussion and debate.

The transparency represents a basic principle for a good communication of the classification information according to national or regional interests. In my opinion, the main elements of each meeting with the aim to negotiate should consist of all the objectives as purpose of the meeting. The conclusions of each session will be in a form of a sheet minute, measures and actions on a small, medium and long term.

The conferences, fairs/exhibitions, seminars organised during the year could be a part of the development of the agricultural sector and food industries. The minute could be in a form of the colouring sheet could visualize the interconnections between sectors. To have a visible information not part of the analysed issues and not exhaustive ones and in the same time with the aim to support the policymakers to have good results. The comments and observations can add certain non-civilian’s views of the future decisions and thus may clarify certain cases of dissension.

The application of international law and plans and legal integrated and sustainable development strategies[15] can be achieved by measures cross-sectorial and targets sectors by setting goals and plan with indicators that lead to the development on a base approach of the both sides and also the entire / a holistic[16] method.

[13] *https://en.wikipedia.org/wiki/Program_evaluation_and_review_technique*

[14] ”*The Intelligence Trap*”, by Bruno Medicina.

[15] ”Integrated strategy for sustainable development - setting goals and plan with indicators that lead to development to resist and to have as a basic approach that takes into account both sides, and the entire / a holistic method”.

[16] „holism s. n . (Phil.) - conception interprets the phrase irreducibility entire sum of its parts , counting as " integrating factor " of the world and an immaterial principle unknowable . - In fr . holism”.

4. Case study - Ro position to topic x, document y [17]

A kind of sheet for the results of negotiations to adopt a legal document with international incidence – is the example with – **ILUC**[18] factor.

Because Romania wants to transition to a greener and more competitive, low-carbon, resource efficient use and resistant to climate change risks, we could put in the table the history and the generally speaking date about agriculture, some figures with a landmark stable like day, month and the year. Also, we will write the stage of negotiation for adopt a legislative act. Another point of view could be the SWOT[19] analysis[20] on a column with the strong and weak points and the line could continue with the Responsible institution, Tariff barriers Non-Tariff Barriers Animal health and phytosanitary standards / text and limits for negotiations /Possible alliances with sensibilities, risks, measures, observations etc. We put within the table the proposed legal text / text of the declaration / agreement international / bilateral, the accepted - "art. 3 is modified as follows (b)at alignment. (4), the second paragraph is modified as follows: (iv)it is added the following letters: (...) (d) to take into account the biofuels, the energy generated from vegetal and others crops in starch, crops of (...), as well as main crops (...) on arable land should not be more than x % from the final consume of energy in transport in member state in year...."

Position of the state member could be the following – "Romania in accordance with the politic declaration from the moment of agreement the project at the level of European Council will sustain or will not support this project in conditions of the decrease of the limit x% for the first generation of biofuel. "

The Arguments for the limits on negotiation are very important for the state and for the citizens - Ex. /A decrease percentage from x% will affect the interests of the Romanian farmers mainly of the producers, having in view, that Romania has a great potential and last year for example the production in comparison with the production obtained in the previous year[21]. In year ……. it was registered .....x tons in year y..... The risk is not sufficient to be quantified in a form of some compelling scientific studies and respectively, of some studies of impact in MS of applications of some concepts as factors "Z" to motivate the elaboration of a legislative document with obligations for economic agents that could affect the balance of the national markets and respectively, the national policies of promoting the different types of……

For conclusions we could put the temporary conclusion of the dossier - at the initiative of institution X at the date …….Graphic representation (if it is possible) results, figures/ ex. imports, exports, amounts resulted from indirect taxes and so on……. Date ……..

The graphics and schemes have the major impact for the politics especially, because they are not a lot of time and data for a rapid decision for a new law or government decision.

The final conclusion (if it is the case) at the initiative of institution "X" at the date .....Links, relevant publications and so on /Implications related to the gas emissions (costs) /Carbon footprint.

The footprint of greenhouse gases could be one especially in the new context after signing the agreement in Paris[22].

E.g. - social media like facebook would be manageable channel issuing general ideas or end bridge for meetings of experts in the field. The degree of transparency or opacity as established in the case of dissemination of data, given the importance of the subject or by speeding communication required or not.

The syncretism in the legislative field can be applied by optimal choice of formula conferences or workshops in which the debates preceded by the newsletter might be intertwined with the business and even direct sales (default pre-contracts or contracts opposable *erga omnes*) and proposals pragmatic of *lege ferenda* leading to simplification of the overall legal framework as well as the specific (eg. vocational education adapted conceptually upgraded curricula and proposals for honorary or monetary rewards for participation in public- private research) .

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[17] Revision to the Fuel Quality Directive and Renewable Energy Directive. "On 28 April 2015, the European Parliament voted to approve *new legislaton, the "ILUC Directive"*, which limits the way Member States can meet the target of 10% for renewables in transport fuels by 2020, bringing to an end many months of debate. There will be a cap of 7% on the contribution of biofuels produced from 'food' crops, and a greater emphasis on the production of advanced biofuels from waste feedstocks. Member States must then include the law in national legislation by 2017, and show how they are going to meet sub-targets for advanced biofuels.

Key elements of the draft EU Directive/ The contribution of biofuels produced from 'food' crops (to the 10 % renewables in transport target) is capped at 7%", *http://biofuelstp.eu/biofuels-legislation.html*

[18] „The indirect land use change", " *the estimated land use change emissions that are taking place globally as a result of the crops being used for biofuels in the EU, rather than for food and feed.",* http://europa.eu/rapid/press-release_MEMO-12-787_en.htm

[19] "Strengths and Weaknesses,Opportunities and Threats".

[20] https://www.mindtools.com/pages/article/newTMC_05.htm

[21] 221.000 tone rapeseeds (2014).

[22] https://unfccc.int/resource/docs/2015/cop21/eng/l09r01.pdf

5. De lege ferenda proposals

The results of data regarding the interim/ final negotiations could be subject of a law or the institutional regulation. Also, in order to ensure the dynamism is need a flexibility a by a special card dedicated to promote quality products recognized internally and/ or required in appreciable quantities/ impact social/ financial/ cultural and so on. The indicators will be set up at nationwide – for example, the duties / taxes for export / production increase with x tones / jobs secured etc.

6. Conclusion

The experts in charge with strategies and decisions should base the actions on data and studies. Also, in my opinion, strategies and policymakers could draw inspiration from what says Bunker Roy[23], to meet the needs of communities when they bring elements of reasoning in drafting new legislation.

Data from large projects such as those under the authorities lines with such prestigious consultant is "OPERA-CLIMA[24]" - gives new force argumnts for changes in the administration and legislation, synchronous with reliable results – from a joint program implemented by the World Bank and the Ministry of Environment, Waters and Forestsaims to allow Romania and Europe 2020 goals for preventing and combating climate change and reducing carbon emissions.

Agriculture can gather intelligence data useful for the farmers in the view to develop the farm, for example, market reports, political analysis, company presentation, data on imports and exports, prices, supply and demand.

Elegant and simple outlines, on Twitter, Narendra Modi[25] - Indian Prime Minister - "There are no winners and no losers at the end of the Paris Agreement . *Climate justice*[26] has won and we all work for a greener future ."

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[24] http://opera-clima.ro/en/

[25] https://twitter.com/narendramodi?ref_src=twsrc%5Egoogle%7Ctwcamp%5Eserp%7Ctwgr%5Eauthor

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- https://dexonline.ro/definitie/m%C4%83sur%C4%83

Annex 1 **/ Analysis sheet for the results of negotiations to adopt a legal document with international incidence – for example – ILUC factor**										
History / date	Stage	Elements of position	Responsible institution/ [1]	Possible alliances	Alliances with sensibilities	Tariff barriers Non-Tariff Barriers Animal health standards Phytosanitary standards	Intermediary results year x Final on decade/five years	Risks[2]	Actions measures[3]	Observations, comments /
Day/ month /year		Arguments	MMSC MARD	1. Economics 2.Diplomatics 3.Other categories / Business / finances / producer groups / social projects etc.	For analysis	Studies needed	Productions realised of biomass for next year 2016/.../2020/ maintenance of "n" jobs and so on	for analysis	For analysis	staff or required capital / training / amounts allocated / - scheduled monthly / annual / multi-annual / decade
		a. Strong points a1. High potential for soy crops /investments realised/national policies for promoting the using of the biofuels until the concluded of the negotiations a2. It was realised investments		Obs. a						
		b. Weak points The lack of scientific studies until the date of concluded the negotiations. Romania has no scientific research on: - Possibilities of technological development and of market… materials z, from the point of view of Y Ministry, being unforeseeable and insufficient contoured at the international level. - referring to the calculation of the gas emission in the vegetable and livestock sector, Romania sustains the idea that the farmers could be or not prepared to estimate the data (the data could not be estimated even at minimal level on the costs and the implications) b. Weaknesses Lack of scientific studies in Ro at the time of concluded the negotiations, - Possibilities for technological and market development ... z material, from the point of view of the Ministry Y, still insufficiently configured unforeseeable and international level.		Obs. b						

[1] coordonatoare/ competenta partajata.
[2] mitigate risk for ex. - https://agribusinessintelligence.informa.com/product-category/solutions/forecasting-and-research/
[3] masuri necesare/ institutia responsabila.

Day/ month /year									
The proposed legal text / text of the declaration / agreement international / bilateral etc.					Accepted text Art. 3 is modified as follows: (b)at alignment. (4), the second paragraph is modified as follows: (iv) it is added the following letters: (...) (d) to take into account the biofuels, the energy generated from vegetal and others crops in starch, crops of (...), as well as main crops (...) on arable land should not be more than x % from the final consume of energy in transport in member state in year....”		Limits accepted for negotiations /.min../max. **Position of SM[4]** **Romania in accordance with the politic declaration from the moment of agreement the project at the level of European Council will sustain or will not support this project in conditions of the decrease of the limit x% for the first generation of biofuel.**		
					Arguments for the limits on negotiation Ex. / A decrease percentage from x% will affect the interests of the Romanian farmers mainly of the producers, having in view, that Romania has a great potential and last year for example the production in comparison with the production obtained in the previous year[5]. In year ……. it was registered .....x tons in year y..... The risk is not sufficient to be quantified in a form of some compelling scientific studies and respectively, of some studies of impact in MS of applications of some concepts as factors “Z” to motivate the elaboration of a legislative document with obligations for economic agents that could affect the balance of the national markets and respectively, the national policies of promoting the different types of……				
The temporary conclusion of the dossier - at the initiative of institution X at the date …….		Graphic representation (if it is possible) results, figures/ ex. imports, exports, amounts resulted from indirect taxes and so on……. Date ……..	The final conclusion (if it is the case) at the initiative of institution “X” at the date	Links, relevant publications and so on	Implications related to the gas emissions (costs) **carbon footprint[6]**				

[4] Member state of UE or another international organization or entities.
[5] 221.000 tone rapeseeds (2014).
[6] „A carbon footprint is historically defined as "the total set of greenhouse gas emissions caused by an [individual, event, organisation, product] expressed as CO_2” https://en.wikipedia.org/wiki/Carbon_footprint.

Annex no. 2/ Key words

1. agribusiness intelligence;
2. analysis sheet of negotiations for the adoption of a legal instrument with international impact / (EU / regional);
3. lateral thinking;
4. cross-cutting measure;
5. objective for across sectors;
6. plan for legislative actions;
7. integrated strategy for sustainable development of legislation.

TO BE IS NOT-TO-BE: NIHILISM, IDEOLOGY AND THE QUESTION OF BEING IN HEIDEGGER'S POLITICAL PHILOSOPHY PART II: TRUTH, HUMANISM AND TECHNOLOGY

Mihai NOVAC[*]

Abstract

Allegedly, Heidegger never quite finished Being and Time: his initial intention had consisted in the determination of the meaning of Being as such, apart from Dasein's own existentiality. Afterwards, however, and despite the growing public excitement revolving around the published unfinished version of his project, his preoccupations, thematic conceptuality and very language, apparently started to shift away towards a strange and unfamiliar stance which he would never leave. Quite surely, his Nazi flirtation and subsequent withdrawal did not help in bringing clarity over this. On the other hand, this was not necessarily unexpected (although not necessarily to be expected, as well). What I mean to say is that for someone reading Being and time in spirit and not in law, the possibility of such a substantive rethought of his initial scheme is present throughout the work. One's changing one's mind with respect to oneself is, after all, one of the basic possibilities conveyed by Dasein's achieved resoluteness [Entschlossenheit]. Furthermore, despite his apparent reorientation, I think we can speak of some sort of attitudinal unity between Heidegger's initial and later work, conceptually mediated by the relationship between Dasein's Being-unto-death [Sein-zum-Tode] and the so called concealedness [Verborgenheit] of Being.. That is precisely what I aim to lay bare through this conceptual reconstruction of some of his later works: (i) On the Essence of Truth (1930) and (ii) Letter on Humanism (1946). Basically, I will try to show that if in Being and Time he tried to come to Being from Dasein, in his later work he tries to get to Da-sein from Being, fact which unsurprisingly brought along some reconsiderations but that, broadly speaking, essentially amounts to what he set out to do in his initial ontological project. Surprisingly, the most concrete instance of this pendulation between Dasein and Being is to be found, at least to my knowledge, in one of his more political works, i.e. (iii) The Question Concerning Technology (1953), around which our present endeavor will mostly revolve.

Keywords: *Being (Sein), entity (Seiende), Unconcealedness (Unverborgenheit), Stock (Bestand), Enframing (Ge-stell).*

Introduction

My main concern when teaching Heidegger is trying to translate his meanings into terms which are more agreeable to the *common sense* individual. One cannot, at first, teach Heidegger by speaking like Heidegger. His words and phrases are not so much technical (as with Husserl, for example), as so contorted and jumbled that they become almost unrecognizable in their *common sense* use. Why is that? Why would someone prefer a language which, apparently, is so abstruse that it threatens the acceptability of the message it tries to convey? Given that *usually people do it the hard way only when there is no easy way*, maybe because, in this case as well, he felt that there was no other way. More to the point, the basic motive behind the oddity of Heidegger's language is, I think, the fact that it is not so much *representational*, as *performative*: namely, its point is not so much to *describe* its objectual signification as clearly and distinctly as possible, as to *pro-duce/in-duce*[1] the proper *existential horizon* or *experiential context*[2] for his interlocutors to be able to come on their own *to the things being referred to in the way that it's done*.[3] And by *proper* I mean the *experiential context* belonging *to the things themselves* (as opposed to one which was predefined and imposed on them). In other words (and by this I also mean other than the ones he would use), Heidegger's faith in the empathic power of language is so great that he believes that it can (and must, if properly used) not merely describe and convey to the interlocutor the things and situations experienced by the *locutor*, but actually make him/her *be* in those situations; it is very similar to the way an actor or a poet would relate to language. Arguably, the need for this new, more life-laden and empathic philosophical language is rather transparent, from the very early stages of his thought:

„The intentional odd mix of street sights and sounds, a stop at the bookstore, chance social encounters, entering the classroom, recollections of the last class, and the like strung along this life-continuity, ultimately seeks to underscore the point that the whole of this motley continuity nevertheless possesses the self-contained unity of a situation.

[*] Lecturer, PdD, "Nicolae Titulescu" University – Bucharest (e-mail: **novmih@yahoo.co.uk**).

[1] *Hervorbringen* (ger.) – *poiesis* (gr.).

[2] Although Heidegger would, most probably, discharge both terms as unsatisfactory (i.e. already reifying).

[3] Existentially, I think this has to do with the distinction we have already discussed in the first part of the paper between Dasein's two kinds of *caring* for the Other: the one by which Dasein tries to *leap-in* (*einspringen*) for the Other and, consciously or not, dominate and reify him/her, and the one by which Dasein tries to *leap-ahead* (*vorausspringen*) of the Other and, consequently, let the Other be as he/she is/chooses (*Seinlassen*).

Even the most disparate things, say, what now lies on my desk, are held together in the ‚relative closure' of ‚my situation.' Whatever happens, we say, has its ‚context'. And the experiential context gives itself as a situation, a certain unity already in experience prior to all theorizing. What is the character and basis of this unified whole called a ‚situation'? (...) For it is *this* I which gives the situation *this* character; the walk would be different for another student. The I plays a role in defining the tendency of the situation, but in turn is defined by the underlying motivations driving the situation."[4]

In other words, *the I* and *the situation* are codeterminative: although the I fashions the situation in his/her own specific image (bestows upon it his/her own kind of specific unity), the situation itself has its *own*, autonomous semantic structure which codetermine both the I's self-interpretation and his/her interpretation of the situation itself. Better put, the I and the situation *flow into each other*. Where does the semantic structure of the situation itself come from? This is a very difficult question to which we will come back later. For the moment, as a formal indication, we can view it as a loosely interlocked set of meanings which *gloamingly presketch the what* of the elements partaking of a given situation, i.e. their approximate identity and array of possible connections. This array of meanings are, according to Heidegger, pre-linguistic and, more importantly, pre-theoretical – in fact they constitute the basis and define the parameters of any theoretical and sentential act. Consequently, they are out of the grasp of theoretical knowledge as, consciously or not, any form of theoretical knowledge is tributary to them. On the other hand, this doesn't mean that they are out of the grasp of any form of knowledge whatsoever and that is precisely where hermeneutics, especially etymological hermeneutics comes in. In other words, by looking at the etymology of the terms and concepts we usually deploy in a given situation, we can catch a glimpse of the pre-reflective, transculturally inherited meanings which define it (and, obviously, *our being in it*). As such, Heidegger's *linguistic coinage* is not at all arbitrary, it takes place within the boundaries of any given term's/concept's etymology and it is intended to bring forth the subjacent pre-reflective semantic structure unconsciously involved in our using it. We can view all of this as some sort of active etymological radiography. After all, that is exactly what *ana-lysis*, in its original etymological meaning amounts to: *loosening, unfastening* within a boundary (gr. *óros – horízōn).*

On the Essence of Truth

Hopefully, all this will become clearer after discussing Heidegger's notion of truth as presented in his 1930 lecture *On the Essence of Truth*. Now, if you remember from our discussion in *Part I*, in *Being and Time*, Heidegger had defined truth on the basis of Dasein's *Being-in-the-world* [in-der-Welt-Sein], i.e. as *truth of existence* achieved through Dasein's state of *resoluteness* [Entschlossenheit], brought about, in its turn, by Dasein's acknowledgement of *its own* finitude, that is of its *Being-onto-death* [Sein-zum-Tode]. This allowed Dasein to unbind itself from the spell of the impersonal self of everyday existence [das Man] and take matters, i.e. its own existential project [Entwurf] , into its own hands. As known, Heidegger wrapped al this up in the concept of *authenticity* [Eigentlichkeit], basically amounting to Dasein's acknowledgement of its own *uncanniness* [Unheimlichkeit] with respect to the standards of *common sense everyday life*. In this respect, truth was not so much some desirable feature of our inferences and ideas, but rather something to be lived:

„Resoluteness is a distinctive mode of Dasein's disclosedness. In an earlier passage, however, we have interpreted disclosedness existentially as the *primordial truth*. Such truth is primarily not a quality of ‚judgment' nor of any definite way of behaving, but something essentially constitutive for Being-in-the-world-as-such. Truth must be conceived as a fundamental *existentiale*. In our ontological clarification of the proposition that ‚Dasein is in the truth' we have called attention to the primordial disclosedness of this entity as the *truth of existence*; and for the delimitation of its character we have referred to the analysis of Dasein's authenticity."[5]

In *The Essence of Truth* the approach is complementary. Now, truth is not viewed from Dasein's perspective, but Dasein and its relation to Being are viewed, and somewhat reconsidered from the side of truth. At the same time, the ontological character of the approach is notably purer, i.e. less anthropocentric: it is not I that reveal Being through my presence, but rather Being itself reveals itself to itself through me. In other words, as we will see, the essence of truth is now the self-disclosedness of Being itself, of which man, or rather each Dasein, can partake, provided that he/she decides [entschließt sich] to *ex-ist*, that is to *let go of itself* and *expose* itself in the free interplay space provided by the self-disclosedness of Being. Now, allegedly, *truth of existence* is not so much Dasein's *state of authenticity* but rather its *standing in the open* [das Offene] provided by Being. On the other hand, as I

[4] Martin Heidegger, *Zur Bestimmung der Philosophie,* GA 56/57 (Frankfurt: Klostermann), 1987, pp.205/70f apud Theodore Kisiel, *The Genesis of Heidegger's Being and Time* (London: University of California Press), 1993, pp. 64-65.

[5] Martin Heidegger, *Being and Time*, trans. John Macquarrie & Edward Robinson (Oxford : Basil Blackwell), 1962, pp.343/par.297.

will attempt to show, Dasein's achieved state of authenticity, i.e. its coming to terms with its own Being-unto-death and uncanniness, is, in fact the only way Dasein can achieve the self-detachment necessary for the *exposedness to Being* of which Heidegger, in his later thought, speaks of as being the essence of truth.

Anyway, he starts with the traditional, supposedly *Aristotelian*, notion of truth as propositional correspondence: "A statement is true when what it means and says agrees with the thing of which it speaks."[6] On the other hand, he asks, *what precisely agrees to what in such a relation*? We must take into account the fact that we usually refer not only to statements as being true, but also to states of facts, beings and, ultimately, even things. In our daily use of the term it is not uncommon to refer, for example, to a friend or a lover as being true, or untrue (i.e. *false*), or to a certain object, or substance: *This is not true (i.e. genuine) gold!* is not at all a far-fetched use of the term. In such situations the relations are reversed with respect to the standard *Aristotelian* understanding: it is not that our representation/opinion must agree with the object in cause for them to be true, but, *au contraire*, the object being referred to must agree with our representation/opinion of it in order for it to be true. As such, contrary to the traditional understanding, *adequatio* can mean two things; in the first, shall we call it *ontological*, sense, *a thing must hold true* of its representation/opinion/idea, in the second, shall we call it *ontic*, *a representation/opinion/idea must hold true* of the object it refers to: „firstly, the correspondence of a thing with the idea of it as conceived in advance, and secondly, the correspondence of that which is intended by the statement with the thing itself."[7] At this point Heidegger sets about showing that and how the first meaning of *adequatio* is in fact primordial with respect to the second and he basically does this by pointing out that in order for any statement to be true of a thing, the one making it has to have a previous notion or conception of it. In other words, there is no neutral moment of perception in order to allow for an *objective* i.e. imponderable [*freischwebend*] judgmental standpoint: we always perceive and judge through an implicit preconception of any given thing. This is precisely the *subjacent semantic structure* I have referred to in the introduction.

With that being said, Heidegger continues by making a historical hermeneutics of the relation between intellect and thing with respect to the meaning of correspondence as *adequatio*: *Veritas est adequatio rei et intellectus.*

In this respect, he notes that if we look at the history of philosophy keeping in mind the afore-established alethic dichotomy, we can find two meanings of *intellectus*, one referring to the intellect of God, with Whose ideas any created object must agree (i.e. *agreement of the object to the Idea*) and the other, referring to the human intellect, which has to *adequate* its ideas to the objects (i.e. *agreement of the idea to the object*). As such, according to the implicit original meaning of *intellectus*, any object must first fit within the general order of the Creation and only as long as it does, can it become the point of reference to which any statement about it must correspond. In short, *coherence* (i.e. agreement with the Idea of general order of Creation – the ancient *Kosmos*) precedes *correspondence* (agreement of the idea to the object being referred to in the statement). The interesting thing is that in Heidegger's analysis, the *human intellect*, as a created thing, in order to fit with the general order of Creation, must correspond to its Idea, and it does so precisely by fitting its ideas (*representations*), to the things fitting the general order of Creation. *Coherent correspondence* is, I think, a proper name for this notion of truth.

Schematically, things would look more or less like this:

Intellectus divinus → *the general order of Creation* – Ideas (*Eidē*) → things of the world → human intellect → ideas

„The *intellectus humanus* is likewise an *ens creatum*. It must, as a faculty conferred by God on man, satisfy His Idea. But the intellect only conforms to the Idea in that it effects in its propositions that approximation of thought to thing, which, in its turn, must also conform to the Idea. The possibility of human knowledge being true (granted that all that ‚is' is created) has its basis in the fact that thing and proposition are to an equal extent in conformity with the Idea and thus find themselves conforming to one another in the unity of the divine plan.(...) *Veritas* always means in its essence: *convenientia*, the accord of ‚what-is' itself, as created, with the destiny of the creative order."[8]

Heidegger claims that, culturally, while the former meaning of *intellectus*, i.e. *intellectus divinus*, had its day back in the scholastic period, the latter, i.e. *intellectus humanus* gained more and more ground during the modern era until it completely absorbed the *intellectus divinus* and all of its tasks. As such, in the modern age, human reason progressively comes to consider itself capable, ready and willing to potentially calculate and predetermine the entire evolution of the world. Correspondingly, political modernity amounts to a *potentially universal administrative claim* on the world, of

[6] Martin Heideger, „On The Essence of Truth", trans. R.F.C. Hull and Alan Crick, *Existence and Being* (Chicago: Regnery), 1949, pp. 295.
[7] *Idem* p. 295.
[8] Martin Heideger, „On The Essence of Truth", trans. R.F.C. Hull and Alan Crick, *Existence and Being* (Chicago: Regnery), 1949, pp. 296-297.

which, as we will see later on, technology itself is the most concrete extension.

„The creative order as conceived by theology is supplanted by the possibility of planning everything with the aid of worldly reason [Weltvernunft], which is a law unto itself and can claim that its workings...are immediately intelligible."[9]

The most interesting thing however, Heidegger notes, is the fact that this interpretation of truth as (what I have called) *coherent correspondence* was maintained all along this transition from *intellectus divinus* to *intellectus humanus* (with the *coherent* part of it becoming, however, silent). All the more, this definition of truth gradually became so widely accepted that people started taking it for granted, as an axiom, thereby forgetting both its origins and the transition itself. In other words, positivism tends to forget that the very *positivistic* notion of truth actually got started in a cultural and philosophical context to which it thinks to oppose. Thereby the positivistic notion of truth is actually groundless [Grundlos] as, unknowingly, its very aim is to deny its grounds. In this interpretation, Heidegger comes very close to Nietzsche's warning to (post-)modernity regarding the risk of the secular truth crumbling along with the belief in the monotheistic God.[10]

On the next step, Heidegger supplements the hermeneutical aspect of his approach with some sort of phenomenology of correspondence. *What does it actually (i.e. as experience) mean for two things to agree with each other?* As a propaedeutic observation, he points to the fact that by correspondence, the corresponding things, beyond their coinciding aspects, do not become one and the same but, au contraire, have to remain different. In other words, *the distinction of the corresponding things is a precondition of the correspondence itself*. On the other hand, when speaking of the traditional, supposedly *Aristotelian*, notion of truth, what we have in mind is, usually, a certain kind of correspondence, i.e. the one between sentence and thing, that is *the agreement of the sentence to the intended thing*. At the same time, in keeping with the previous considerations, a corresponding sentence does not and cannot become its intended object if it is to say something about it. This *agreement of the sentence to the intended object* is a particular type of correspondence which Heidegger calls *re-presentative [vorsellende] relation* (keeping in mind that the *ad litteram* translation of the German term would be *setting-in-front-of*). As Heidegger sees it, in such a relation, the sentence is *pointed to* the intended thing (*as a target*) in a certain respect, thereby capturing and conveying the way the thing is in that respect. Along with this, the thing becomes an object.

„The thing so opposed must, such being its position, come across the open towards us and at the same time stand fast in itself as the thing and manifest itself as something constant."[11]

Given that Heidegger's thematization draws very much on a *German language game*, a few linguistic observations are in order: the German word for object, *Gegenstand*, has two components, namely *gegen – against* and *stand – stand*, thereby amounting to *standing-against*. However strange, this is actually a quite accurate apprehension of the Latin etymology of the term, *obiaceo – obiacere* (*inf.*) meaning (just as *Gegenstand* does) *standing-in-front-of* and *standing-against*. As such, we could say that in Heidegger's view, a thing becomes an object in the moment at which it becomes remarkable for Dasein in a certain respect as a separate entity. Furthermore, a thing becoming an object presents a certain interest for Dasein in the aforementioned respect and, as such, Dasein feels compelled to lay claim to it. *Logos* and its verbal derivate, sentential language is, in Heidegger;s view, Dasein's first and foremost means of apprehending the *objectualized thing in the respect presenting an interest.* At the same time, however, the thing becoming the object of Dasein's interest must awaken Dasein's interest and, as such, must reveal itself in the particular respect which makes the object of Dasein's interest. As such, in Heidegger's view, correspondence, as representative agreement between sentence and thing presupposes a mutually intended coincidence between Dasein and entity. However similar, this is not the old subject-object relation as, as always with Heidegger, Being is the one behind both.

Basically, I think Heidegger's claim in this respect can be stripped down to two things: first, that in order for someone to be able to apprehend something as an object [Gegenstand], the thing itself must reveal itself in a certain way, i.e. in such particular way and respect for Dasein to take notice of it and second, that in order for this thing to happen, Dasein itself must *make itself available*, must *sensitize itself*, if you will, to the given thing in that particular respect. To put it in a more Heideggerian language, truth as correspondence is a *meeting* [Begegnung] in which both Dasein and thing must partake by willingly *coming into the open* [das

[9] *Idem* p. 297.

[10] "2. The end of Christianity-at the hands of its own morality (which cannot be replaced), which turns against the Christian God (the sense of truthfulness, developed highly by Christianity, is nauseated by the falseness and mendaciousness of all Christian interpretations of the world and of history; rebound from "God is truth" to the fanatical faith "All is false"; Buddhism of action-). (…) 5 . The nihilistic consequences of contemporary natural science (together with its attempts to escape into some beyond). The industry of its pursuit eventually leads to self-disintegration, opposition, an antiscientific mentality. Since Copernicus man has been rolling from the center toward X." Friedrich Nietzsche, The Will to Power, trans. by Walter Kaufmann & R.J. Hollingdale, (New York: Vintage Books), 1968, pp. 7-8.

[11] Martin Heideger, „On The Essence of Truth", trans. R.F.C. Hull and Alan Crick, *Existence and Being* (Chicago: Regnery), 1949, pp. 300.

Offene], that is in the space of free interplay between Dasein and entity where they allow themselves and each other to become co-constitutive:

„All working and carrying out tasks, all transaction and calculation, sustains itself in the open, an overt region within which what-is can expressly place itself, as and how it is what it is, and thus become capable of expression."[12]

In other words, Heidegger tries to provide an alternative to the traditional dichotomy between transcendental philosophy and positivism, implicitly criticizing both for their reductionism and artificiality. As such, truth, in his view, primordially amounts to neither imposing a set of pre-given concepts to an inert raw material, nor to *secondhandly* conceptualizing some supposed *unbiasedly pure* initial peceptions, but to *uncovering that which belongs to the entity in the sense intended by Dasein*. To offer a somewhat Husserlian example, let us suppose that we are seeing the three facets of what we think it is a cube. Let us also suppose that when turning the cube we find that, quite surprisingly, we are not dealing with a cube at all, but with some other object. Of course, an empiricist would say that there is nothing mysterious here, that in fact all we have (and could have) done was to change our concepts in light of our perceptions. *Yes, but what determined me initially to intend the three facets I saw in the direction of a cube, as it quite clearly was not the only possibility?* Quite obviously it was a matter of subjectively deployed meaning, but the meaning itself, even if *put to use* by me, in a certain way, it was neither chosen, nor developed by me: I simply (and mistakenly) saw the thing as a cube. I think that the array of possible meanings which can be deployed with respect to a given thing in a particular situation defines in fact what Heidegger more or less metaphorically calls the open [das Offene] or the *clearing* [din Lichtung]; it is precisely what enables (and in fact constrains) me, in every given situation, to perceive something with meaning i.e. 'to see something (i.e. the three facets) *as something* (i.e. a cube)' [etwas *als etwas*], deriving from, what in *Being and Time* was called, *significance* [Bedeutsamkeit] of the world[13].

In lay terms, it would appear that for him, truth as correspondence means finding *the appropriate meaning of a given thing in a particular situation* – a *coming together* of the meaning suscitated by the thing in Dasein and the one bestowed by Dasein upon the thing.

Subsequently, the statement does nothing more than to capture and fasten this coincidence: „Directing itself in this way the statement is right (true). And what is thus stated is rightness (truth)."[14]

Of course that we adapt our concepts to our perceptions, as an empiricist would put it, but our perceptions as well are unwittingly predetermined by an array of meanings which, on the other hand, are not theoretical, i.e. conceptual in nature (as a neo-Kantian or some other transcendental philosopher would put it). In short, all of these meanings derive from Being in its *intercorrelative sense* as I have called it in *Part I*, i.e. from the general schema of the world into which we are, more or less, contingently borne and to whose ontology we are involuntarily delivered by our very ontogenetic becoming, i.e. *growing up*.

In nuce, at this point, Heidegger comes to the conclusion that the essence of truth consists in the mutual exposition of Dasein and entity within the open [das Offene]. On the side of Dasein, this would amount to saying that its adherence to truth depends on its *personal* decision to open itself to the thing revealing itself [Offenständigkeit]. In my opinion, the direct connection with *Being and Time* is that this *self-ex-positive* decision is truly, i.e. *authentically*, achievable only by means of Dasein's resoluteness [Entschlossenheit] attained through its realization and coming to terms with its Being-unto-death [Sein-zum-Tode].

In other words, in Heidegger's view, on the side of Dasein, attaining truth depends on a certain self-detachment in favor of the entity revealing itself out into the open. We can also understand all this by analogy to the relation between a picture and its viewer, or interpreter. What distinguishes a good, i.e. *truthful*, from a wrong, shall we say *artificial*, interpretation of a picture? Well, an answer would be that, an interpreter can err in two ways with respect to a picture, namely, he/she can put either *too much of him-/herself and too little of the picture* in the interpretation, or, *too little of him-/herself and too much of the picture (plus other interpretations) into it*. In other words, a *wrong interpretation* can either impose too much of the viewer's experience and lifeworld onto the picture, thereby being abusive, or it can concentrate too much on the picture itself, its *lifeworld* and other eventual interpretations that it becomes impersonal, i.e. it doesn't say anything about the viewer/interpreter's own relation to the picture. A good interpretation, on the other hand, aims at being *true* both to the viewer/interpreter (i.e. *personal*) and to the picture itself; in other words it *works with* the picture, namely it brings forth the array of meanings conveyed by the picture itself,

[12] Martin Heideger, „On The Essence of Truth", trans. R.F.C. Hull and Alan Crick, *Existence and Being* (Chicago: Regnery), 1949, pp. 310.

[13] „Not only is the world, *qua* world, disclosed as possible significance, but when that which is within-the-world is itself freed, this entity is freed for its *own* possibilities. That which is ready-to-hand is discovered as such in its serviceability, its *usability* and its detrminentality. The totality of involvements is revealed as the categorial whole of a possible interconnection of the ready-to-hand. But even the 'unity' of the manifold present-at-hand, of Nature, can be discovered only if a possibility of it has been disclosed." Martin Heidegger, *Being and Time*, trans. John Macquarrie & Edward Robinson (Oxford : Basil Blackwell), 1962, pp.184/par.144.

[14] Martin Heideger, „On The Essence of Truth", trans. R.F.C. Hull and Alan Crick, *Existence and Being* (Chicago: Regnery), 1949, pp. 301.

elaborates them in the context of the author's lifeworld, from there on establishing a connection with the viewer/interpreter's own lifeworld and, finally, *subjectively lived experience*[15].

As I have said earlier, I think Heidegger's *hermeneutical* notion of truth is best understood by this analogy. Anyway, the famous statement to which he arrives at this point can be interpreted as an indication in this respect: „Freedom is the essence of truth".[16] However, as we will elaborate later on, his notion of freedom is substantially different from the standard, that is *individualistic-anthropocentric*, understanding of it. *In nuce*, his notion of freedom is much more ontological in nature, that is he views freedom not as something that Dasein *has* as *quality* [Eigenschaft], or property [Eigentum], but as something that *it is*, namely a way of adhering to Being. In other words, for Heidegger freedom amounts to some sort of *ontological self-detachment* on the part of Dasein which enables its self-exposition to the entity revealing itself *as it is* out into the open; only through freedom, thus understood, can Dasein *sensitize* itself to the truth, and that is not because Dasein is *the cause of freedom*, but au contraire, because freedom (as self-detachment) is the basic manifestation of Being as truth[17]:

"(...) freedom is the basis of the inner possibility of rightness only because it receives its own essence from the more primordial essence of the uniquely essential truth."[18]

In other words, for Heidegger, freedom is not *with respect to the world* and *by virtue of Dasein's self*, but to the contrary, *with respect to itself* and *by virtue of the world*. More concretely, in Heidegger's view, Dasein doesn't become free by surpassing (or dominating) the world and thereby *being more like oneself* in its *immanent solitude*[19] but, quite the other way around, by surpassing itself onto the world (or onto the world as Being, to be more precise). Only by *existing*, in the original Latin meaning of the term *as standing out of and for itself*[20], can Dasein *expose* itself to the entity revealing itself *as it is*. In Walter Biemel's words: " Standing in the realm of the open, he (i.e. Dasein) is able to subject himself to what is manifest and shows itself in it, and to bind or commit himself to it."[21] Heidegger wraps all this up in the notion of *Letting-be* [Seinlassen], which means „to consent or yield [sich einlassen] to what-is. (...) Letting be (...) means participating in the open and its openness, within which every entity enters and stands."".[22] As previously noted, in such an interpretation, freedom doesn't mean *self-assertive isolation in spite of the world* but „an exposition into the revealed nature [Entborgenheit, unveiledness] of what is".[23]

In my opinion, as also pointed out earlier, we are not that far from Heidegger's position in *Being and Time* as some might (and do) think. First, because, as I have said, the freedom as self-detachment necessary for Dasein's self-exposition to Being is, arguably, attainable only by its realization of its being-onto-Death as its *ultimate and ownmost possibility*. Second, because in *Being and time* itself, Heidegger already discussed extensively on Dasein's *openness* [Erschlossenheit] to Being as its fundamental, i.e. *existential, truth*:

"Dasein, as constituted by disclosedness, is essentially in the truth. Disclosedness is a kind of Being which is essential to Dasein. *'There is' truth only in so far as Dasein is and so long as Dasein is.* Entities are uncovered only *when* Dasein is; and only as long as Dasein *is*, are they disclosed. (…) What does it mean to say 'there is truth'? 'We' pressupose truth because 'we', being in the kind of Being which Dasein possesses, are 'in the truth'. We do not presuppose it as something 'outside' us and 'above' us, towards which, along with other 'values', we comport ourselves. It is not we who presuppose 'truth',; but it is '*truth*' that makes it at all possible ontologically for us to be able to *be* such that we 'presuppose' anything at all. Truth is what first *makes possible* anything like presupposing." [24]

By *Letting-be* Dasein, i.e. man, becomes Da-sein, i.e. acknowledges itself as that being who is defined by its relation to the open. We are, in fact, I think, on *different versants of the same mountain*: as repeatedly pointed out, *existence* in its original Latin etymology means both *standing forth to oneself* and *standing outside of* oneself; if in *Being and time* Heidegger dealt with the *standing forth* side of existence, in *The Essence of Truth* and the subsequent works, with the *standing outside* side of it.

As such, in Heidegger's view, truth amounts to a mutual self-exposition of Dasein and entity or, differently put, *of Being as Dasein* and *Being as entity*. The exposition of Dasein to entity depends on its voluntary self-detachment which, in its turn, as I

[15] Ger. *Erlebnis*.
[16] Martin Heideger, „On The Essence of Truth", trans. R.F.C. Hull and Alan Crick, *Existence and Being* (Chicago: Regnery), 1949, pp. 303.
[17] *I.e.* the most basic and essential possibility of being bestowed by Being upon Dasein.
[18] *Idem* p. 305.
[19] As in a Cartesian understanding of freedom, for example, would, arguably, be the case.
[20] See Mihai Novac, „To Be Is Not-To-Be: Nihilism, Ideology and the Question of Being in Heidegger's Political Philosophy. Part I: Being and Time" in *CKS 2015* (Bucharest: UNT), 2015, pp.834-844.
[21] Walter Biemel, *Martin Heidegger. An Illustrated Study*, trans. J. L. Mehta (New York: Harvest Book), 1976, pp.84.
[22] Martin Heideger, „On The Essence of Truth", trans. R.F.C. Hull and Alan Crick, *Existence and Being* (Chicago: Regnery), 1949, pp. 306.
[23] *Idem* pp.307.
[24] *Idem* pp. 269-270/par.227.

have tried to show, depends on Dasein's coming to terms with its own finitude (authenticity). However intricately conceptualized, this is actually not so hard to grasp. On the other hand, the self-exposition of the entity to Dasein is not easy to understand. *How could an entity, i.e. an inanimate object, expose itself to anything?* Well, *in nuce*, Heidegger's answer to this, is, as far as I can understand it: we don't know, but it happens, at least as long as truth is what we originally and primordially experience it to be: *aletheia* i.e. *uncoveredness/unconcealment* [Entborgenheit] 'of something *as something'*. On the other hand, the very fact that we don't know what self-discloses itself to Dasein as Being is mysterious – and that mistery, i.e. the *mistery of the source*, actually belongs to our original way of experiencing truth. After all, *Aletheia* is the negation of *Lethe* (etym. gr. *oblivion, concealment*) – truth as *unconcealment* or *disclosedness* [Entborgenheit] is grounded on and derives from *concealment* or *hiddenness* [Verborgenheit] and our *definition of truth* should take that firmly into account (fact which, according to Heidegger, neither positivism, nor transcendental philosophy does[25]):

„From the point of view of truth conceived as revealedness...hiddenness is un-revealedness [Un-entborgenheit] and thus untruth proper which is intrinsic to the nature of truth."[26]

As such, just as in *Being and Time*, for Heidegger truth still amounts to the ‚undisclosedness of Something *as something*'. As a quick reminder, in *Being and time*, 'something as something' [etwas *als etwas*] is the basic semantic structure defining and modulating our perception of the world. Concretely, it is what, for example, would allow one, depending on context, to spontaneously perceive a spherical object (something) '*as a football ball*', or '*as a bowling ball*', or a metal T-shaped object '*as a hammer*' and so on. To put it in a very non-Heideggerian language, for the sake of approximation we could say that the first 'something' would more or less correspond to the *sensory data*, whereas the *'as something'* to the meaning one ascribes to it depending on context (keeping in mind that, in Heidegger's view, our spontaneous and original perception is not that of the sensory data, but that of the meaning). As pointed out earlier, the so called *open* [das Offene] in which things reveal themselves to Dasein is, at least how I see it, precisely the array of potential meanings, i.e. of "*as somethings*", which can be ascribed to a thing in a certain context.[27]

Now, what I think Heidegger claims in this last respect is that this *open* can and does change from one time period to another – in other words, the array of potential '*as somethings*' which can be ascribed to a certain something varies historically. *In nuce*, one and the same thing can (and does) *mean* different things according to the historical age in which we contextualize it. Being reveals itself differently from one historical period to another. In fact, in Heidegger's view, this is precisely what history primordially amounts to: the changing of the *open*, of the array of meanings by which Dasein *exists*, i.e. relates to and *exposes itself to* Being. From this perspective, the empirical-chronological history, that is what people do at one historical date or another, is just secondary.

As such, every historical age has its own specific *open* and consequently its *truth*. This does not mean, however, that according to Heidegger, in the bigger picture, all *opens* are the same and therefore valid in their own right. *Au contraire*, some are better than others depending, first, on the fullness of the unconcealment [Entborgenheit] of Being they allow for, and, second, on the authenticity they suscite in Dasein. Generally, one could say that a given *open* is more or less accomplished depending on the degree to which it explicitly takes into account and integrates into its *truth, the mistery*, i.e. the hiddenness [Verborgenheit] of Being as part of the disclosedness [Entborgenheit] of Being. In this regard, neither post-archaic[28] *European epochs* fare particularly well, while our present one, as already shown in *Part I*, fares particularly badly.[29] The

[25] Although some would argue that Kant's *thing-in-itself* [Ding and sich], as an unknowable precondition of all phenomenal knowledge did just that.

[26] Martin Heideger, „On The Essence of Truth", trans. R.F.C. Hull and Alan Crick, *Existence and Being* (Chicago: Regnery), 1949, pp.313.

[27] „The circumspective question as to what this particular thing that is ready-to-hand may be, receives the circumspectively interpretative answer that it is for such and such a purpose [es ist zum...]. If we tell what it is for [des Wozu], we are not simply designating something; but that which is designated is understood *as* that *as* which we are to take the thing in question. That which is disclosed in understanding – that which is uderstood – is already accessible in such a way that its ‚as which' can be made to stand out explicitly. The ‚as' makes up the structure of the explicitness of something that is understood. It constitutes the interpretation. In dealing with what is environmentally ready-to-hand by interpreting it circumspectively, we ‚see' it *as* a table, a door, a carriage, or a bridge; (...)" Martin Heidegger, *Being and Time*, trans. John Macquarrie & Edward Robinson (Oxford : Basil Blackwell), 1962, pp.184/par.144.pp.189/par. 149.

[28] As in ancient archaic Greece.

[29] As stated there "(…) according to Heidegger, the founding fathers of the European Lifeworld, i.e. those thinkers that grounded the framework of our existence as Europeans have articulated and passed down a distorted and restrictive understanding of Being, i.e. one that didn't allow for the reiteration of the question of Being (which normally should be reenacted with every new cultural configuration, or individual destiny). The very categories and language of our thought and human interaction are, according to Heidegger, tributary to this traditional misinterpretation of Being which followed an ever degenerative path up to the (post)modern age – therefrom, our alienation from our lives and Being, namely nihilism. That is why Heidegger states that the history of European thought and culture is in fact the history of the *withdrawal of Being* (form the world).

reasons therefor, though clearer now than at the time I wrote this, are not yet sufficiently clear; however they will be further fathomed later on. For the time being, suffice it to say that, in Heidegger's view, it is not necessarily our fault that things turned out that way: both disclosedness [Entborgenheit] and hiddenness [Verborgenheit] are *of Being* also in the sense that they belong to it; in other words it might well be that the oblivion [Seinsvergessenheit] of Being is part of the hiddenness [Verborgenheit] of Being which is the ground of the disclosedness [Entborgenheit] of Being. This has to do with the ontological reasons for the oblivion of being I have mentioned in *Part I*. More on this, later on.

Letter on Humanism

Supposedly, Heidegger wrote his *Letter on Humanism* as an answer to Jean Beaufret's questions, but in response to Sartre's *Existentialism is a Humanism*. Allegedly, this marks the moment of his explicit dissociation from the French existentialism. *Grosso modo*, I think that his attitude in this regard could be summed up as follows: *if the existentialism is a humanism, then my philosophy is not existentialism*.

As repeatedly pointed out, after his *Being and Time* era, Heidegger came to see the entire Western tradition of philosophy (at least since Plato) as the byproduct of some sort of *ego inflation*, or, to put it in a more Heideggerian language, as *anthropocentric*. Basically, this means that, irrespective of the doctrinaire particularities, the general trend in Western philosophical thought was to conceive Being through some or other feature of Dasein: ideas, experience, consciousness, reason, will and so on. As such, says Heidegger, humanism, along with subjectivism and idealism, constitute a triad which progressively came to define the generic and specific attitude of Western thought with respect to Being. Essentially, this is what anthropocentrism, at least in its standard sense, amounts to. The so called *oblivion of Being* [Seinsvergessenheit] extensively discussed by him in *Being and time* (and by us in *Part I*) is, probably, the major symptom thereof.

On the other hand, as we have seen, his considerations in *The Essence of Truth* had led him to believe that Dasein's, i.e. man's, existence is to be understood by way of its *self-exposedness* to Being. This would amount to saying that *what man is, depends on, and is defined by the way it relates to (aprox. understands and comports itself with respect to) Being at one (historical) time, or another*. *In nuce*, what Dasein, or rather *Da-sein* amounts to is defined by its *open* [das Offene], or *clearing* [Lichtung]:

"The standing in the clearing of Being I call the ex-sistence of man. Only man has this way to be. Ex-sistence, so understood, is not only the basis of the possibility of reason, *ratio*, but ex-sistence is that, wherein the essence of man preserves the source that determines him."[30]

As we also have seen, in Heidegger's view, (i) the *opens* change historically and, all the more, (ii) their change is indeterminate, i.e. Dasein has no control over the way they change. Concretely, in a less Heideggerian language, this is to say that what a thing *is*, depends on the array of meanings in which it is embedded and this, in its turn, depends on the general semantic structure of the world at the time (the so called *significance* [Bedeutsamkeit] of the world). Consequently, the significance of the world, the open [das Offene] or the clearing [Lichtung] change historically in an uncontrollable way. This does not necessarily mean that their change is chaotic, quite the opposite, but it does mean that Dasein, Da-sein or man has no control over it. However, *having no control over it*, does not mean that Dasein cannot grasp or fathom it. *Au contraire*, this is actually man's most fundamental calling, according to HeIdegger: that of *laying bare*, that is of *bringing forth and articulating*, the open or the clearing in which it happens to be situated (or, maybe better said, *thrown*). This is precisely where the *task of thinking* comes in:

"Thought brings to fulfillment [Erfüllung] the relation of Being to the essence of man."[31] - where fulfilling meant "to unfold something in the fullness of its essence."[32]

„Thought...lets itself be called into service by Being in order to speak the truth of Being. It is thought which accomplishes this letting [Lassen]. (...) Thought acts in that it thinks. This is presumably the simplest and, at the same time, the highest form of action: it concerns man's relation to what is." [33]

As such, by thinking, Da-sein can *lay bare* its more or less specific clearing and the way it came about – i.e. the general historical succession of *clearings*. Essentially, this is to say that ancient Greek culture, classical Greco-Roman culture, Christian Middle Ages, modernity and postmodernity are just successive ways of, implicitly

To Heidegger, the sources of this historic distortion are to be found with the very origins of our thought, namely the ancient Greek thought and more particularly Plato. In short, the *oblivion of Being* conducive to nihilism is the gradually sublimated product of the Platonic definition of Being as *immutable presence*, i.e. as perpetually identical and unchanging." Mihai Novac, „To Be Is Not-To-Be: Nihilism, Ideology and the Question of Being in Heidegger's Political Philosophy. Part I: Being and Time" in *CKS 2015* (Bucharest: UNT), 2015, pp.834-844.

[30] Martin Heidegger, "Letter on Humanism", trans. Edgar Lohner in *Philosophy in the Twentieth Century*, vol. 3, ed. William Barrett and H.D. Aiken (New York: Random House,), 1962, pp. 277.

[31] *Idem* p. 271.

[32] *Idem* p. 270.

[33] *Idem* p. 271.

or explicitly, understanding Being or, better said, of Being self-disclosing itself to man. Articulating each of these clearings, i.e. cultural moments, in its specificity with respect to one's own existence constitutes the task of thinking, which Heidegger will try to fulfill in his later works.

Question Concerning Technology

According to the standard tradition of the myth, Hephaestus, the Greek god of craftsmanship, was so deformed at birth that his mother, Hera, didn't want him at her side and literally threw him out of Mount Olympus, fact which, at least in some versions, further crippled him. He later got back at Hera by way of one of his *skillful contrivances* and, though unwillingly, also got back on Mount Olympus. I think this story also conveys the basic claim of the Heideggerian standpoint on modern technology, i.e. that it is the product of some sort of *resentful domination* – it emerges as an attempt at compensating and overcoming man's *ontological precariousness*, i.e. its *finitude*[34] by imposing on Being its own laws and principles, by *making Being in its own* (i.e. man's) *image*, if you will. More concretely, in Heidegger's view, modern technology is the supreme product of the world-reification process which started with Plato's metaphysics. The definitive process of the corresponding post-modern worldview is what we could call *subjective-ideal presentisation*, namely that of (i) shrinking reality to what is *now, at the present moment*, perceived by *mind* and (ii) of making the thing(s) so perceived dependent on the mind's ideas. *To be is to be perceived* and *to be perceived is to be reasoned, i.e. conceptually determined* are, I think, in Heidegger's view, the two basic principles of today's, i.e. post-modern, life-world. In the next section, we will explore Heidegger's arguments for the dominative nature of technology, his account of the historical emergence and development of technology in this particular sense and the political consequences thereof.

As we have previously seen, Heidegger came to believe that Dasein, i.e. *man*, is its existence and existence is the way it *opens itself*, that is relates to and comports itself [Verhält sich] with respect to Being. This goes to saying that what *any-thing*, including Dasein itself, is, is determined by the particular meaning Dasein, in that particular situation, chooses to ascribe to it and that this meaning, in its turn, derives from a more comprehensive array of meanings contained, in their turn, in the *general semantic structure of the world* as conceived by the culture in cause. As also seen earlier, Heidegger wraps all this up in the concepts of *open* [Offene] or *clearing* [Lichtung] of which he came to the conclusions that (i) it changes historically and that (ii) this change is not under Dasein's control. However, even if Dasein cannot intervene in the historical change of the clearings, it can *think* it, that is analyze it and determine its own position both with respect to the general historical transformation of the clearings, and with respect to the particular clearing in which it happened to be thrown. By doing so, Dasein can, allegedly, codetermine, that is *take part in*, its own destiny, or provide its own personal answer to the question of Being, if you will.

Given that the original name of the lecture was *Das Ge-stell* and that, even after its re-elaboration, this is still the most central concept of the work, a few preparatory observations in its regard I think are entitled. The most common English translation of *Ge-stell* was *enframing* and that, I think, is a good translation given that it more or less explicitly covers the last two of the three original meanings of the term, while at the same time alluding to the first. Concretely, in German *Ge-stell* means (i) *something put together*, i.e. generated by composition, by inter-joining different parts, (ii) *framework* and (iii) *standing frame* or *rack*[35]. In addition, *Ge-stell* may also refer to (iv) a *hearth* or to (v) *the well of a blasting furnace*. Quite obviously, the semantic sphere of the term is rather ample but, at the same time, these meanings are visibly correlated. By a mere superficial overview of the list of denotations one may conclude that *Ge-stell* refers to something which belongs in a workshop or a building yard.

Anyway, the *Ge-stell* or *enframing* is, according to Heidegger, the essence of modern technology and, consequently, of (post-)modern age itself. More explicitly, it constitutes the distinguishing ontological attitude of modern man, basically amounting to something we could call *complete calculatory predeterminative securization of the world*. Essentially, according to Heidegger, (post-)modern man tries to overcompensate its own finitude by attempting to control every, apparently, contingent aspect of its world. As we have already seen at the end of *Part I*, however, this, is not the right way given that, according to Heidegger, it is precisely our *own* finitude[36] which makes us *Da-seinly human*, if you will. Without limitations and their realization, Da-sein can grasp neither of its existential preconditions: (i) *authenticity* [Eigentlichkeit] as resolute integration of its Being-onto-death and (ii) the *hiddenness* or *concealedness* of Being as the inaccessible ground of its truth as disclosedness [aletheia – Entborgenheit].

[34] Made manifest in its *throwness* [Geworfenheit], it's *Being-onto-death* [Sein zum Tode] and in the hiddenness or concealedness [Verborgenheit] of Being.

[35] Michael Inwood, *A Heidegger Dictionary*, (Oxford: Blackwell), 1999, pp. 210.

[36] Manifested especially as *Being-onto-death* in *Being and time* and as the *hiddenness* or *concealedness* [Verborgenheit] of Being in his later thought.

Existentially speaking, we could say that without the former, Dasein cannot *stand forth to itself*, without the latter, it cannot stand *outside of itself*.

Anyway, Heidegger starts by stating that he is not interested in technology as such, but *in its essence*, i.e. in something lying beneath it, announcing itself *through and as it* and definitive of its greater finality (its *For-which* [Wozu] as he would have called it in *Being and time*).

"Technology is not equivalent to the essence of technology. When we are seeking the essence of a tree, we have to become aware that That which pervades every tree, as tree, is not itself a tree that can be encountered among all the other trees. Likewise, the essence of technology is by no means anything technological. Thus we shall never experience our relationship to the essence of technology so long as we merely conceive and push forward the technological, put up with it, or evade it."[37]

To make this distinction clearer he addresses the common notion of technology as instrument. Quite strangely, he states that even though this instrumental interpretation of technology is surprisingly *accurate* [Richtig] for a common interpretation, it is not also *true* [Wahr]. In saying this he alludes to a point he will try to make explicit later in this lecture according to which the main *ontological flaw* of modern technology is that it covers *the truth behind it*, i.e. the clearing [Lichtung] and, ultimately, the *concealedness* [Verborgenheit] of Being as the ground of the disclosedness [Entborgehneit] of Being. I have also tried to anticipate this point in *Part I*, when I was writing that in Heidegger's view man as Dasein/Da-sein is made possible by its *pervasiveness to nothingness* (mainly instantiated in *Being and time* by Dasein's Being-onto-death and in his later work by the concealedness or hiddenness of Being). As such, what I have called here the (i) *subjective-ideal presentisation* and the (ii) *complete calculatory predeterminative securization of the world* prevent, i.e. *cover*, precisely that, thereby precluding Dasein from realizing its existentiality. What I have then called the reification of the world is also an interrelated aspect thereof. More on this later.

Anyway, in its common interpretation, technology is essentially instrumental. Therefore its point consists in its intended effect, in what can be achieved through it. In other - i.e. mine, not Heidegger's - words, technology amounts to some sort of *intentionally enacted causality*. As such, we should take a look at the original meaning of causality, respect in which, Aristotle's account is still the most influential, even if in a misinterpreted sense according to Heidegger. Allegedly, both in his *Physics* (II, 3) and in his *Metaphysics* (V, 2), Aristotle distinguishes among four so called *causes* of a thing or state of affairs: 1) *causa materialis* (*hyle*) – the material, or substance a thing is made of; 2) *causa formalis* (*eidos*) – its shape, or aspect; 3) *causa efficiens* – that which brings it about and also determines it to change and move; 4) *causa finalis* (*telos*) – the finality of its movement, purpose of its action and, eventually, goal of its intention. Formally, these are the four causes of anything and, consequently, any account of something must consider all four of them in order to be complete. On the other hand, Heidegger notes, the Greek word for cause is *aitia/aition* which, originally was not used in such an abstract and specialized way but simply meant *bearing the responsibility for*, or *by virtue of*. This implies a *personal connection with*, or to put it in a more Heideggerian language, *Dasein's involvement* in the respective thing or state of affairs. In other words, *the bringing about of something*, for example, presupposes a modification of Dasein's own existential stance, mood [Befindlichkeit] and, in the end, Being-in-the-world [in-der-Welt-Sein] itself. This is something that the abstract-specialized use of the notion of causality tends to overlook and not by accident, as this abstract and detached use of the notion of causality is precisely the byproduct of the subject-object dichotomy specific to the reificatory ontology culminating in the modern worldview.

Heidegger famously exemplifies the four types of causes and the difference between the original and the abstract(-*modern*) meaning of *causality* by referring to an *offering cup* or *chalice*. The material, formal and final causes of the offering cup are simple enough, I think, not to require any special analysis: (1) the material cause is the silver the cup is made of, its (2) formal cause is its actual shape, *the way it looks*, if you will and its (4) final cause is, quite expectedly, the procession or rite in which it is used. The actual difference between the original and the common-abstract notion of cause appears with respect to (3) *causa efficiens* supposedly, the silversmith as he is the one bringing the cup into existence. On the other hand, simply labeling the silversmith as the *causa efficiens* of the cup disregards his very personal involvement in the making of the cup, his mastery (or lack of it), decisions, intuitions, feelings while and after making it. More concretely, such an approach disregards the cup itself as the creation of that particular silversmith – another silversmith would have made a different cup.

"Finally there is a fourth participant in the responsibility for the finished sacrificial vessel's lying before us ready for use, i.e., the silversmith-but not at all because he, in working, brings about the finished sacrificial chalice as if it were the effect of a making; the silversmith is not a causa efficiens.

[37] Martin Heidegger, "The Question Concerning Technology" trans. by William Lovitt in *The Question Concerning Technology and Other Essays*, (New York: Garland Publishing), 1977, pp.4.

The Aristotelian doctrine neither knows the cause that is named by this term nor uses a Greek word that would correspond to it. The silversmith considers carefully and gathers together the three aforementioned ways of being responsible and indebted. (...) The silversmith is co-responsible as that from whence the sacrificial vessel's bringing forth and resting-in-self take and

retain their first departure. The three previously mentioned ways of being responsible owe thanks to the pondering of the silversmith for the ‚that' and the ‚how' of their coming into appearance and into play for the production of the sacrificial vessel."[38]

The silversmith does not just *generate* the cup, he/she *makes it* and in making it he/she brings forth, just in the way it stands forth, something that previously *was not there* – in this act of creation *the standing forth to itself* (existence) and the *standing forth and against* (object) come together in a unique way: a new entity takes its place in the *there/here* [Da] of Being [Sein]. This is why Heidegger calls this way of creating *bringing-forth* [hervorbringen] as he traces it back, through the Latin *pro-ducere* to the Greek word *poiesis*.

"It is of utmost importance that we think bringing-forth in its full scope and at the same time in the sense in which the Greeks thought it. Not only handcraft manufacture, not only artistic and poetical bringing into appearance and concrete imagery, is a bringing-forth, poiesis. Physis also, the arising of something from out of itself, is a bringing-forth, poiesis. Physis is indeed poiesis in the highest sense. (…)What is the bringing-forth in which the fourfold way of occasioning plays? Occasioning has to do with the presencing [Anwesen] of that which at any given time comes to appearance in bringing-forth. Bringing-forth brings hither out of concealment forth into unconcealment. Bringing-forth comes to pass only insofar as something concealed comes into unconcealment. This coming rests and moves freely within what we call revealing [das Entbergen]."[39] The silversmith is the *aitio* of the sacrificial cup, i.e. the ground responsible for its occasioning and being just the way it happens to be - by no mere accident, therefore, also *techne* referred to both what we would call *technical*, and *artistic* creation: any such act of creation is not just objectification of the *inner* representations in some inert products, but a modulation of Dasein's own ontological stance.

Nature, on the other hand, says Heidegger, is different in this regard, in that it needs no *aitio*, at least not in this latter sense – nature is able to bring by itself, that is without anyone's personal involvement, things into existence and subsequently to their fulfillment:

"For what presences by means of physis has the bursting open belonging to bringing-forth, e.g., the bursting of a blossom into bloom, in itself (en heautoi)."[40]

Among such beings, at least initially, governed by nature was also Dasein. On the other hand, Dasein, besides following nature's cycle of emergence-fruition-dissolution was also what we (but not Heidegger) could call *aware* thereof. Consequently, Dasein grew more and more dissatisfied with this cycle as it, most obviously, imposed on its existence an imminent finitude. As such, Dasein tried to both copy and overcome nature. It tried to copy nature by its creative power, it tried to overcome it by attempting to impose on it, given its aforementioned creative power, its own laws and principles. Basically, Heidegger claims that the entire history of the European culture and civilization, at least since Plato, constitutes just Dasein's attempt at making nature into a controllable object. The contemporary product thereof is what I have previously called *complete calculatory predeterminative securization of the world*, or what Heidegger calls, in a single word, *enframing* [Ge-stell]. Enframing is modern man's way of creating not by joining in the cycles and forces of nature, but by *ensnaring*, storing and directing them for its purposes. Basically nature, just as the world as such, is viewed by the Ge-stell-man as simply a provider of raw materials to be used in this historical crusade against its own finitude.

"The revealing that rules in modern technology is a challenging [Herausfordern], which puts to nature the unreasonable demand that it supply energy that can be extracted and stored as such. But does this not hold true for the old windmill as well? No. Its sails do indeed turn in the wind; they are left entirely to the wind's blowing. But the windmill does not unlock energy from the air currents in order to store it. (…)The hydroelectric plant is set into the current of the Rhine. It sets the Rhine to supplying its hydraulic pressure, which then sets the turbines turning. This turning sets those machines in motion whose thrust sets going the electric current for which the long-distance power station and its network of cables are set up to dispatch electricity. In the context of the interlocking processes pertaining to the orderly disposition of electrical energy, even the Rhine itself appears as something at our command. The hydroelectric plant is not built into the Rhine River as was the old wooden bridge that joined bank with bank for hundreds of years. Rather the river is dammed up into the power plant. What the river is

[38] Martin Heidegger, "The Question Concerning Technology" trans. by William Lovitt in *The Question Concerning Technology and Other Essays*, (New York: Garland Publishing), 1977, pp.8.
[39] *Idem* pp.10-11.
[40] *Idem ibidem*.

now, namely, a water power supplier, derives from out of the essence of the power station."[41]

Heidegger calls the *way things are* within the Ge-stell, *Bestand*, i.e. *standing reserve* or, more commonly, *stock*. Everything is instrumental within the Ge-stell, i.e. matters only as a means to an end which, in its turn, is also a means to another end and so on. What about Da-sein? Well, theoretically, the entire Ge-stell is centered around Da-sein which consequently would be the only end in itself. However, precisely thereby, if Da-sein were to *lose itself* the Ge-stell and everything within it would become pointless, i.e. just a means to an end which is itself instrumental. And, according to Heidegger, it just happens that in order not to lose itself Da-sein needs the angst caused by the confrontation with its *own* finitude (manifested as thrownness [Geworfenheit], Guilt [Schuld], Being-onto-Death [Sein zum Tode] and, later, Hiddenness [Verborgenheit]). As we have already discussed in *Part I* these are the preconditions for its authenticity and, as argued here, for its existentiality. As such, precisely by overcoming nature and its own ontological precariousness Da-sein loses itself within the Ge-stell: nothing has any meaning given that any meaning is, now, instrumental. Da-sein itself has become Bestand, i.e. a mere *standing reserve* to be used in the mass production of its alleged illimitation. Materialist scientific positivism constitutes the metaphysical model of the Ge-stell, while industrial ideologies such as Capitalism, Marxism and Nazism its socio-political avatars. The question of Being has become completely forgotten and, paradoxically, just at the apex of its age, man is no longer to be found:

" (…) man in the midst of objectlessness is nothing but the orderer of the standing-reserve, then he comes to the very brink of a precipitous fall; that is, he comes to the point where he himself will have to be taken as standing-reserve. Meanwhile man, precisely as the one so threatened, exalts himself to the posture of lord of the earth. In this way the impression comes to prevail that everything man encounters exists only insofar as it is his construct. This illusion gives rise in turn to one final delusion: It seems as though man everywhere and always encounters only himself. (…) In truth, however, precisely nowhere does man today any longer encounter himself, i.e., his essence. Man stands so decisively in attendance on the challenging-forth of Enframing that he does not apprehend Enframing as a claim, that he fails to see himself as the one spoken to, and hence also fails in every way to hear in what respect he ek-sists, from out of his essence, in the realm of an exhortation or address, and thus can never encounter only himself."[42]

Of course, the Enframing [Ge-stell] provides man with plentiful of immediately accessible and utilizable things, but they are in fact devoid of any true meaning: the Ge-stell just *generates objects for subjects* if you will, but although utilizable, they are not really useful – they do not existentially engage Da-sein in any way. Contrary to the aforementioned sacrificial chalice, a plastic mug, for example, does not involve Da-sein's personal creativity – ultimately, it is the very same plastic mug irrespective of who pushes the buttons of the production line. In making it Da-sein doesn't really create anything and in using doesn't partake in anything (except, maybe, for the daily routines of the They/One-self [Man]).

Given his defeatist view on technology, many judge Heidegger as a traditionalist or, at least, as a *rural passeist*. However, Heidegger does not promote the kind of *back to the stone-age* anti-technologism he was accused of. He was very aware of the fact that technology and the Being of the future man are inextricably linked. At the same time, on the bigger, i.e. *ontological* scale, we should take note of the fact that the Enframing, for what it's worth, is, in the end, the Clearing [Lichtung] of the (post-)modern man and that the changing of the Clearing is not something over which Dasein has control. As such, I do not think Heidegger ever recommends the renunciation on part of (post-)modern man to technology, despite of its *alienating and nihilating effects*. Modern man should not and could not renounce technology but what it could do would be to relate and comport itself [Verhalten] differently with respect to it, namely more *mindfully*.

"But when we consider the essence of technology, then we experience Enframing as a destining of revealing. In this way we are already sojourning within the open space of destining, a destining that in no way confines us to a stultified compulsion to push on blindly with technology or, what comes to the same thing, to rebel helplessly against it and curse it as the work of the devil. Quite to the contrary, when we once open ourselves expressly to the essence of technology, we find ourselves unexpectedly taken into a freeing claim."[43]

Just as I said at the end of *Part I* the problem is in Heidegger's view, not so much technology as such, but what we could call technologism, i.e. the belief that technology necessarily should and could be relied upon in solving any humanly conceivable problem, the problem of Being in particular. Although Heidegger does not explicitly put it like this, I think we could understand technologism as the

[41] *Idem* pp.14-16.
[42] *Idem* pp.27.
[43] Martin Heidegger, "The Question Concerning Technology" trans. by William Lovitt in *The Question Concerning Technology and Other Essays*, (New York: Garland Publishing), 1977, pp. 26.

joint product of technology and the impersonal One or They [Man] aiming at the complete securization of man within its world through their interlocked reification. As noted at the end of *Part I*, the main gain of this would be the alleged *dis-limitation* of (post-)modern man, both in the sense of immortality and in that of complete and perpetual Unconcealedness (*non-Heideggerianly speaking*, some sort of omniscience). However, as previously pointed out, the price therefor is maybe too high, as this *dis-limitation* of man would most probably also bring about its depersonalization. Trading an *owned mortality* for a *disowned immortality* would not be the most gainful exchange for (post-)modern man although, at least according to Heidegger, this was the tacit finality of the entire European culture from at least since Plato. One of the main symptoms thereof is the very *anthropomorphization of Being* we have discussed at the beginning, i.e. the fact that the entire post-Platonic philosophical tradition sought to conceive Being through one of the particular aspects of Dasein. The main danger of this process is that of Da-sein's losing its own existentiality, both in the sense of *standing forth* to itself and of *standing outside* of itself.

In considering that, we should take into account the incessant preoccupation of all traditional philosophy with *defining human nature*, i.e. ascribing a set of *primordially definitive and unchanging* set of characteristics to *any-thing human*. So the *anthropomorphization of Being* errs in fact in two ways: first by making man the measure of all things, i.e. the *Lord of Being* and second by imposing on Dasein(s), each with *its own uncanny* [unheimlich] way of being, a *generic human nature*. In doing so anthropomorphization brings about the forgetfulness of Being and, in the end, of man itself as Da-sein.

On the other hand, as previously noted, this is not, so to say, *Dasein's fault*, as the *unfolding and retraction* of Being is not something within Dasein's control, but something pertaining to Being as such. Consequently, there is no general socio-cultural solution to the oblivion of Being. However, this doesn't preclude a personal or, shall we say, individual solution. In this sense, each Da-sein is *indebted* to provide *on its own* an answer to the question of Being by *thinking through* [durchdenken] its Clearing and resolutely coming to terms with its Being-onto-Death within it. In doing so Dasein has the possibility of *rejoining in its own being* the two primordial aspects of *techne*: art and instrumental craftsmanship in some sort of personal reinstatement of *poiesis* through one's *own* life. Ultimately, the answer to the question of Being is strictly personal - there is no community capable of inducing to its members either Being, or its question and it is sad that Heidegger forgot that for a few years during his life.

Conclusions

What did I try to do here and where did I get in doing it, at least so far? Mainly, I think, I have tried to disprove one of the standard trends in Heidegger's exegesis consisting in the exaggeration of the difference between his *Being and time* period, and its subsequent thought. I have repeatedly spoken of an *attitudinal unity* between these two alleged periods in Heidegger's philosophy, attempting to show, in this respect, that they can be subsumed under his primordial understanding of the concept of *existentia*, respectively viewed as a complementary transition from the *standing forth to oneself* (the former period), to the *standing outside of oneself* (the latter period). More concretely, I have tried to show that the realization of Dasein's Being-unto-death which is conducive to authenticity and, ultimately, to Dasein's fulfillment of *its own* existence, in the former sense, is the pre-condition of achieving the kind of *self-detachment* and *exposedness to Being* which Heidegger defines as existence, in his later period.

In nuce, the three main steps of this endeavor were:

I The determination of the attitudinal precondition of truth as freedom from oneself and self-exposedness to Being;

II The understanding of the self-exposedness to Being as *taking place* within an *ontological revelatory space* Heidegger calls the open [Offene] or the Clearing [Lichtung]. In non-Heideggerian terms, the Clearing can be understood as *the general semantic structure of the world* at a given historical moment. As such, what Da-sein is depends, every time, first on the particular Clearing in which it happens to be thrown, second, on the way it reacts existentially to it, that is, choose to live within it. Irrespective of the particular content of its choice, first Da-sein has to think through its Clearing the general historical succession of the Clearings (the so called *Fate* [Schicksal]) and then resolutely decide *on its own* its standing within it.

III The *through-thinking* of the present Clearing and of Da-sein's situation within it, or, in other words, Heidegger's radical critique of technology. Basically, by technologism Da-sein apparently comes to overcome both nature and its ontological precariousness (Being-unto-death and the Hiddenness of Being); however it might well be that such so called limitations are, in fact, precisely the preconditions for Dasein's existentiality which, in its turn, is what differentiates Da-sein from the other, shall we say, inert entities. As such, just when apparently overcoming its ontological precariousness through technology Da-sein comes on the verge of losing itself in the form of *Bestand*, i.e. of becoming just one of the resources involved in the technological process. However, Heidegger is aware of the fact that Da-sein cannot renounce

technology altogether and so he does by no means recommend such a solution. What he does say, at least how I understand it, is that each Da-sein should overcome the *technological impersonal One/They-self* and creatively put technology to use for the shaping of its own existence as self-exposedness to Being's self-revelation.

Man is a frail being and only by acknowledging such frailty can it find the strength to help it bear the burden of its own existence and, eventually, even the allies therefor: Being as Nature and Nature as art. In living so, Dasein rejoins *techne* and *poiesis* in its own being.

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ENERGY RELATIONS BETWEEN RUSSIA AND UKRAINE AFTER THE EUROMAIDAN: TRAPPED BETWEEN THE CONTRACTUAL SPACE AND THE SPACE OF SPACES

Eric PARDO SAUVAGEOT*

Abstract

Russia-Ukraine energy relations have been mired in constant tension and contract renegotiations since the fall of the Soviet Union. Major examples of the conflict ridden character of mutual energy relations are the big disputes of January 2006 and January 2009 which translated into grave disruptions of energy flows to other European countries further west. The new period opening with the contract signed in January 2009 and later with Viktor Yanukovich´s presidency seemed to have ushered Ukraine and Russia into a period of relative stability. That situation floundered with the onset of the Euromaidan, the ousting of Ukraine´s President Viktor Yanukovich and the arrival in Kiev of new authorities which Moscow perceived as hostile. Energy relations were necessarily affected by a new context where both countries entered a period of armed confrontation. In this presentation, I will analyze energy relations between Russia and Ukraine since the Euromaidan using as analytical tools the characterization made by Katja Yafimava of four different spaces to understand how energy relations unfold in the post-Soviet space: regulatory space, space of flows, contractual space and space of places. This seems particularly warranted as in our case we find that particular changes (or lack thereof) in both the contractual space and the space of spaces determined to which degree energy relations between our two countries moved towards a pattern of conflict. This way, we may extract valuable lessons as for the way mutual relations are constructed and either politicized or de-politicized depending on the circumstances. This may provide a guide to consider how energy relations may evolve in the coming future, especially if diplomatic relations stay in their current stage since Russia decided to annex the Peninsula of Crimea and support separatist militias in the Donbass region.

Keywords: *Russia, Ukraine, Energy, Natural Gas, Contractual Space, Space of Places.*

1. Introduction

This paper endeavors to analyze the situation of crisis in mutual energy relations between Russia and Ukraine since the phenomenon known as Euromaidan took place from December 2013 and February 2014 in Ukraine, leading to Viktor Yanukovich´s ouster as President as the final outcome. This political phenomenon led to a similar deterioration in relations between Russia and Ukraine as when the "Orange Revolution" averted Yanukovich´s election in rigged presidential elections and allowed the election of the pro-Western Viktor Yushchenko.

As it happened then, this worsening of relations between the two neighbours led to deterioration in energy relations: the popularly known as "energy wars" of January 2006 and January 2009 were the manifest example of this state of affairs. It was expected that similar phenomena would happen after the Euromaidan. As we will see, energy disputes and sustained natural gas cut-offs happened indeed, but the outcomes were not quite as extreme as expected from the fact that Russia-Ukraine relations rapidly reached their nadir since the fall of the USSR: Russia swiftly annexed the Peninsula of Crimea and the City of Sebastopol and has been active supporting separatists in the Eastern region of Donbass, with the self-proclaimed Republics of Donetsk and Lugansk sustaining themselves in part of the homonymous provinces.

As we will have the chance to explain in more detail below, geopolitical changes mentioned above did impact in a series of energy disputes that have been happening since 2014. This has happened in a more subtle way than through the crude use of the "energy weapon", as Russia´s politization and energy cut-offs have come to be popularly known. The general process of deterioration of mutual Russia-Ukraine relations enabled at a certain degree the appearance of energy disputes between both countries shortly after the fall of Yanukovich. However, at the same time, it limited the margin available to actors involved to escalate their disputes. Energy has not been used as a surrogate for war unfolding in parallel. Analyzing these episodes in energy disputes between our two actors will enable us to use this case-study as to determine as exactly as possible the level of politicization in their energy relations and its particular characteristics.

The importance of this study lies in the necessity of separating facts from propagandistic discourses that identify politicization in the post-Soviet Space and Russia´s role therein under the category of energy weapon leaving aside due nuances that bring a clearer picture of how actors behave.

* Eric Pardo is Phd by the Universidad Complutense de Madrid and lecturer at Deusto University, Faculty of International Relations and Social Sciences, Bilbao, Vizcaya, Spain.

In order to provide a suitable answer as for the degree of politicization which occurred during the period of our case study (2014-15), we will use the theoretical framework devised by the researcher at the Oxford Institute for Energy Studies (OIES) Katja Yafimava. Yafimava distinguishes a set of four spaces that determine energy relations in a context of interdependence between energy producers, transit countries and consumers. These four spaces are: *space of flows*, *contractual space*, *regulatory space* and *space of places*.

Focusing on the *contractual space* and on *the space of places*, this article will make a positive contribution to the existing literature, both to that devoted to the complex reality of energy interdependence and energy disputes,[1] and to the issue of politization and the use of energy as a weapon.[2]

2. The background

Russia-Ukraine relations have been fraught since the both countries reached independence, after the Soviet Union´s fall. Marring mutual relations were geopolitical issues such as the status of Crimea and mainly, the status of the former Soviet Black Sea Fleet, based at the City of Sebastopol in the Peninsula.

However, the Administration by the second President of the Ukraine, Leonid Kuchma managed to find a modicum of stability with its neighbor: if rapprochement with the West remained an objective, it was subordinated to immediate interests, such as internal stability and to the maintaining good relations with Russia. This country as recognized as a necessary economic and political partner. Whenever relations with the US, the European Union or with financial institutions as the IMF soared, the awkward equidistance sought turned into a pro-Russian, even if cautious turn. This was particularly manifest at the last years of Kuchma´s administration, under the premiership of Viktor Yanukovich.[3]

This situation floundered as a result of the Orange Revolution, which, as already mentioned above, led to the failure of Yanukovich´s attempt to become the new president; instead, his rival Viktor Yushchenko was elected when elections were repeated.[4] With a new administration starting, Ukraine took a decidedly pro-Western turn in favor of EU and NATO membership. The Russian Federation could only react negatively to this political orientation. As we will mention below, this was the time of the "energy wars" of 2006 and 2009. However, the political challenge to Russia was mostly mitigated by the ineffectiveness of the new authorities, with President Yushchenko and his Prime Minister Yulia Timoshenko feuding and with political instability ensuing and putting a brake to their reformist zeal.[5] The May 2008 NATO Summit in Bucharest, where Ukraine and Georgia were offered the perspective of membership, arguably played a significant role in the so called "Five Days War" of August 2008 between Russia and Georgia and was the farthest that Ukraine would get in its new pro-Western orientation. Then financial crisis hit Ukraine hard and the Presidential elections of 2009-2010 brought Viktor Yanukovich to power.

Yanukovich´s Administration has come closer to the balance that was sought after during Kuchma´s Administration. However, certain tension remained in relations with Russia. Integration within the EU-promoted Association Agreement (AA) elaborated in the frame of the Eastern Partnership,[6] competed with Russia´s project of Eurasian Union, for which Ukraine was an essential potential partner. Kiev, while cooperating with the IMF, longed for the

[1] See, among others: Katja Yafimava, *The Transit Dimension of EU Energy Security* (Oxford, New York: Oxford University Press, 2011); Simon Pirani, Jonathan Stern, Katja Yafimava, "The April 2010 Russo-Ukrainian gas agreement and its implications for Europe", *Oxford Institute for Energy Studies* (2010), at http://www.oxfordenergy.org/pdfs/NG42.pdf; Simon Pirani, Jonathan Stern and Katja Yafimava, "The Russo-Ukrainian gas dispute of January 2009: a comprehensive assessment", *Oxford Institute for Energy Studies* (2009), www.oxfordenergy.org/wpcms/wp-content/uploads/2010/11/NG27; Jonathan Stern, "The Russian-Ukrainian gas crisis of January 2006", *Oxford Institute for Energy Studies* (2006), http://www.avim.org.tr/icerik/energy-gas.pdf

[2] Zeyno Baran, "EU energy security: time to end Russian leverage", *Washington Quarterly* 30 (2007): 131-144; Karen Smith Stegen, "Deconstructing the "energy weapon": Russia's threat to Europe as case study", *Energy Policy* 39 (2011): 6505-6513; Stacy Closson, "A comparative analysis on energy subsidies in Soviet and Russian policy", *Communist and Post-Communist Studies* 44 (2011): 343-356; Nina Poussenkova, "The global expansion of Russia´s energy giants", *Journal of international Affairs* 63 (2010): 103-124; Adam Stulberg, "Out of Gas?: Russia, Ukraine, Europe, and the Changing Geopolitics of Natural Gas", *Problems of Post-Communism* 62 (2015): 112-130.

[3] The revelation that Ukraine had sold air-defense radars to Iraq, as revealed in 2002, in violation of UN resolutions, necessarily cooled relations with the US (See: Fred Weir, "Ukraine may have sold air-defense radar to Iraq", *The CS Monitor*, October 17, 2002, http://www.csmonitor.com/2002/1017/p01s03-woeu.html

[4] See: Andrew Wilson, *Ukraine´s Orange Revolution* (London: Yale University Press, 2005); Paul J D'Anieri and Taras Kuzio, *Aspects of the Orange Revolution. Democratization and election in post-Communist Ukraine* (Stuttgart: ibidem-Verlag, 2014); Taras Kuzio, Democratic revolution in Ukraine: from Kuchmagate to Orange Revolution (London; New York : Routledge, 2009).

[5] There was even an "interregnum" where Viktor Yanukovich was elected as Prime Minister as a result of the Orange coalition´s inability to agree on a new government after the March 2006 parliamentary elections: Prime Minister Timoshenko had been sacked in October 2005 by the President and the Socialist Party decided to switch sides, so Yanukovich would be elected in October 2006; as a result of new elections in November 2007, Timoshenko came back to power.

[6] The Eastern Partnership seeks to deepen relations with a set of post-Soviet countries: Armenia, Azerbaijan, Belarus, Georgia, Moldova and Ukraine. See: http://www.eeas.europa.eu/eastern/index_en.htm

benefits of Free-Trade that the AA offered.[7] The signature of the AA was foreseen for the Eastern Partnership Summit in Vilnius to take place on the 28th and 29th of November 2013. However, either exclusively because of pressure from the Russian side or due to inducements later offered by Moscow, the decision was taken on the 21st to postpone the signature. This fateful decision sealed Yanukovich´s destiny, as it triggered a new revolution, the Euromaidan,[8] meant to topple him.

The Euromaidan pushed at least half of the country[9] in clear confrontation with an Administration whose authoritarian and corrupt leanings had become unbearable to large swaths of the population; the poor economic performance during the last two years did not help to endear the Ukrainian population with its rulers. The first citizens to show up at the demonstrations in Kiev´s Central Square, the Maidan, where mostly pro-European youths disappointed at the President´s U-turn; however, the more repressive the government´s response turned, the more people grew indignant and took to the streets to protest against Yanukovich. The civil movement increasingly came to be structured around a vanguard of ultra-nationalist and extreme-right paramilitary militias that managed to both face and provoke the dreaded Berkut until the final and bloody stage from the 18th to the 20th of February, an episode still nowadays shrouded in mystery as for its ultimate responsibility.[10] The pressure from paramilitary sectors from the opposition in the street, probably in combination with a loss of support from certain parts of the Administration´s business interests (aka oligarchs) led to Yanukovich´s flight and a new parliamentary alinement of forces, so the former opposition came to rule; Petro Poroshenko was elected President in May 2014 in the first round.

As had happened with the Orange Revolution, this led again to a staunchly pro-EU orientation, so the AA was finally signed. However, Russia´s reaction was this time much harsher, in parallel with the more violent character of the revolution this time: few days after Yanukovich had fled the Russian Federation led an undercover operation to swiftly occupy the Peninsula of Crimea and to secure control of the Base of Sebastopol, where the Russian Federation´s Black Sea Fleet is based.[11] By the 21st of March, the Peninsula of Crimea had been annexed to the Russian Federation. Then during April, pro-Russian militias mushroomed in the Eastern region of the Donbass, again with undercover Russian support. As a result, the conflict in Eastern Ukraine gas evolved into a classical post-Soviet frozen conflict, with the self-proclaimed Donetsk and Lugansk People´s Republics (DPR and LPR) ruling parts of the homonymous provinces.

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The energy relations between Russia and Ukraine have in great part followed political events. Whenever Ukraine has come to be ruled by politicians antagonistic to, or deemed to be so by, the Russian Federation, energy relations have clearly worsened. This was the case during Yushchenko´s Administration and is equally the case now under Poroshenko. However, energy relations have also followed their own dynamics due to intrinsic elements that have tended to draw both countries apart from each other. In general, energy relations have been clearly more contentious that other aspects in their mutual relations.

At the center of this reality lies the protracted, and during long time failed, energy transition from the subsidized model of the Soviet Union towards a market based energy market upon independence. Far from moving into this direction, as most countries in the former Eastern Bloc did, many post-Soviet countries tried to keep subsidies in order to maintain competitiveness of their obsolete industrial sector and to guarantee cheap energy supply to an impoverished population. This was clearly the case with Ukraine. The problem lay in the fact that subsidies would either translate into either excessive state debt for Ukraine (usually monetized and thus feeding inflation) or would force producers such as Turkmenistan and the Russian Federation to assume the costs themselves. This latest option, for obvious reasons, was the one preferred by Kiev.

Unfortunately, this usually gave way to constant fights between Ukraine and its suppliers to maintain under-market prices. A transition towards market prices was performed for oil. However, natural gas was a different story: with the metallurgical industry and district heating for the population dependent on this source, Ukraine could

[7] One of the main obstacles for signing the AA was the fact that former Prime Minister Yulia Timoshenko was jailed for abuse of power when signing energy agreements with Russia in January 2009. This clearly appeared as a politically induced trial to get rid of one dangerous opponent. However, after lengthy negotiations, the road towards signature seemed open by late 2013.

[8] See: Richard Sakwa, *Frontline Ukraine: crisis in the borderlands* (London; New York: I.B. Tauris, 2015); Andrew Wilson, *Ukraine crisis: what it means for the West* (New Haven: Yale University Press, 2014); Rajan Menon and Eugene B. Rumer, *Conflict in Ukraine : the unwinding of the post-cold war order* (Cambridge, MA: The MIT Press, 2015).

[9] This division is geographical, with the Western half more Ukrainian-speaking, nationalistic and pro-European than the Eastern half of Ukraine, mainly Russian speaking and more supporting of Yanukovich´s Party of Regions.

[10] While many believe the responsibility lies in government hired snipers, there are several accounts that point to Maidan related militants. For arguably the most elaborate account in this direction to date, see: Ivan Katchanovski, "The "Snipers' Massacre" on the Maidan in Ukraine", unpublished paper, http://www.academia.edu/8776021/The_Snipers_Massacre_on_the_Maidan_in_Ukraine.

[11] After several years of negotiations, it was decided in 1997 that the former Soviet Black Sea Fleet would be divided, with Russia retaining the largest part and leasing the port of Sebastopol, under Ukrainian sovereignty.

hardly afford to pay market prices. This translated into accumulated debts and subsequent gas cut-offs from Russia and Turkmenistan. Ukraine often responded with unsanctioned offtakes of natural gas that transited its territory; in this respect, Ukraine took advantage of its position: besides being a consumer of natural gas, it was transit country for supplies sold further West in Europe. This made an escape of gas cut-offs possible, whenever this happened. Thus "energy wars" involving natural gas were recurrent during the decade of the 90s. With the onset of Yushchenko´s government from 1999 to 2001,[12] the perverse spiral of indebtedness, cutoffs and unsanctioned offtakes came to an end. There was even agreement in 2003 for a project to build a natural gas consortium between the Russian and Ukrainian monopolies, Gazprom and Naftogaz and which would enable Moscow to better control the flow of natural gas through Ukraine.

All this period of "peace" came to an end with the onset of the Orange Revolution. During the last administration of Kuchma, prices agreed for Ukraine had not ceased to fall in relative terms: usual market formulae to determine natural gas prices are based on international oil prices. With these skyrocketing since the start of the decade, the cost of opportunity of not revising energy prices grew; Ukraine was again enjoying subsidies. The fact is that whereas that might have been relatively acceptable under Kuchma and under promises of establishing an energy consortium, it was not the case anymore under Yushchenko. It was the Ukrainian side who started to demand revision of the transit tariffs[13] and Gazprom responded in kind concerning supply prices; during the same time, Turkmenistan also supplied natural gas to Ukraine and started to demand higher prices too. This led to a fatal cocktail as disagreements led to Gazprom cutting off supplies on the 1st January. An agreement was reached on the 4th January by which Ukraine accepted higher prices; prices would be subsequently revised in 2007 and 2008. However, a new dispute erupted in January 2009 due to new price disagreements and to debts that Naftogaz had started to accumulate again under the pressure of higher prices. The energy dispute of January 2009 led to a sustained cut-off or nearly three weeks which translated into flows through Ukraine being cut off too. This time, the new agreements signed forced Ukraine to accept energy prices linked to international oil prices, under a formula which was particularly burdensome for Naftogaz.

Fortunately for Ukraine, as seen above, the political tide changed with the arrival of Yanukovich at the Presidency. This enabled Ukraine to strike a new agreement in April 2010 with Russia which introduced a price discount in the formula agreed one year earlier: in exchange for extending the lease contract for its Black Sea Fleet in Sebastopol, Russia offered a discount of 30% in natural gas prices. Politicization of energy relations came again to favor Ukraine in the midst of the Euromaidan: in "reward" for having postponed the signature of the AA with the EU, Putin offered his Ukrainian counterpart a 33% reduction in prices of natural gas; Russia was choosing again to subsidize Ukraine´s natural gas in exchange for political benefits. These two discounts would become significant in the next months to understand the new deterioration of energy relations between Russia and Ukraine after the Euromaidan.

3. Theoretical framework and hypothesis

As we have had the chance to see in the section above, the Euromaidan ushered Russia-Ukraine relations into a new period of political deterioration. The short background reviewed in this article has highlighted that there is a close link between the political situation and the state of energy relations. It is fair to assume that a high degree of politicization takes place between Russia and Ukraine when it comes to energy issues. However, to establish this fact does not in itself provides us with a clear picture of what characteristics this politicization has and what degree it reaches within the different categories it assumes. Unfortunately, as already mentioned in our introduction, this state of lack of definition either in the public debate or even worse, in the academic realm, has become a source of deficiency as for what respects the needed rigor regarding energy issues in the post-Soviet space.

When it comes to politicization, it must be considered that this phenomenon has several dimensions within the realm of energy relations. In itself, the term might be simply understood as the introduction of non-economic factors into a set of relations, in this case, energy, which cease henceforth to be based strictly on economic terms. In our particular object of study, politicization has usually assumed a clear form, which is that of subsidization through the producer´s acceptance of lower than market prices. This may have happened in exchange for political favors or as a concession in order to avoid undue unrest. The most contentious form of politicization is that which derives in energy disputes where problems of either supply or transit happen. It is this form of politicization that has spawned the term "energy weapon", a term that has arguably become the catch-all word to subsume the

[12] The same who would challenge Kuchma´s anointed heir, Viktor Yanukovich, and eventually become his successor, had been in fact his Prime Minister during this period. The most likely reasons for his being sacked were that.

[13] Besides payment for supplies from Russia, Russia had to pay Ukraine for all the volumes of gas that used its transportation system; in compensation for subsidized prices for natural gas, Russia faced low transit tariffs.

most conflictive dimensions of energy relations in the post-Soviet space in general and between Russia in particular. [14] The usual idea conveyed by the idea of energy weapon is that Russia uses energy cutoffs as a way to blackmail opponents into submission, whatever the exact political goal may be. As energy disputes, such as that of January 2006 and especially, January 2009 translated into energy cutoffs for Central and Western European countries, it has been usual to identify these countries as Russia´s target.[15]However, for obvious reasons, it is Ukraine that is most often characterized as the "victim" of Russia.

The complex interplay into the "tap weapon" and "transit weapon" that each of the countries enjoy will not be analyzed here, but it is undeniable that Russia has gone as far as to use cutoffs in energy disputes, be it for strictly economic reasons or under influence of political factors too. To clarify the impact of politicization and to see whether anything such as an energy weapon happens to exist, it is useful to focus as a case study on the period immediately after the Euromaidan. The reason for this is simple: as Russia-Ukraine relations have reached a stage of military confrontation, it would be reasonable to assume that energy will be used as a weapon if such motivation exists; the inhibition to recur to the so-called "tap weapon" should have reached its minimum when the inhibition to recur to war has disappeared, which has clearly been the case since Russia supported and intervened in Crimea and the Donbass.

Contrary to this obvious conclusion, we will here apply the categories developed by Katja Yafimava to identify relevant *spaces* to understand in which measure the level of energy-related conflicts which happened after the Euromaidan and which will be studied below was related to the political context. Yafimava identifies four spaces that determine the state of energy relations between a set of producers, transit countries and consumers: the *space of flows*, the *contractual space*, which can be seen as those two directly relating to the actors´ energy relations exist alongside two other important spaces, the *space of places* and the *legal/regulatory space*.[16] The *space of flows* does not require much explanation: it is the physical reality of energy and its related cash flowing from the point of production to the last supply point, transiting quite often through third countries. As for the *contractual space*, it is equally intuitive and is the legal expression of the space of flows: bilateral contracts between producers and consumers or transit countries make possible the space of flows; its breakdown, as happened twice between 2006 and 2009 necessarily came to affect the health of the space of flows. The *legal* or *regulatory* space in our case refers to the set of institutions that determine governance of energy relations, depending on the membership of the countries involved. Finally, we find the *space of places*. Here we find the countries that compose the space within which a determined energy relation unfolds. This space is of particular importance as relations between state actors may affect the integrity of both the contractual space and the space of flows.

We intend to find out in what measure manifest changes in the *space of places* between Russia and Ukraine as a result of the Euromaidan combined with the existing *contractual space* and how their interplay influenced in how the space of flows was interrupted during the months after the fall of Yanukovich. The *legal* or *regulatory space* will not be considered here as no changes happened that may make it the object of our study as probable cause for certain changes taking place during this period. Our hypothesis is that tensions in energy relations between Russia and Ukraine were determined by the room left by the *contractual space* and by elements within the *space of places* that had a direct impact on aspects related to energy. We do not expect to see the use of the "energy weapon" in total linkage with developments in the *space of spaces* unless these bore directly on energy issues. Namely, we do not expect to see energy turned into an instrument of Russia´s foreign and security policy during the said period independently of the intrinsic relevance that changes in the space of spaces may have had with energy.

4. Analysis of energy relations since the euromaidan

As we already mentioned, changes happening as a consequence of the Euromaidan set Ukraine into a course similar as that under the Orange Revolution. However, the parallels stop there. Whereas the protests during the Orange Revolution represented a clearly civic movement opposed to an unabashed

[14] Karen Smith Stegen has devoted an article to analyze the term and has come to the conclusion that the term can hardly be used in a rigorous way (See: Smith Stegen, "Deconstructing the "energy weapon""). It is interesting to read the following comment by Tim Boersma considering this same term (Tim Boersma, "The end of the Russian energy weapon (that arguably was never there)", *Brookings*, March 5, 2015, accessed March 16, 2016): as he highlights, the price differential between different Gazprom´s costumers has been usually included into this category, dismissing the fact that this may be explained by strictly economic factors of market availability or lack thereof.

[15] A recent example is the following article in the Washington Post: *For years, Russia's ability to choke off energy shipments any time tensions spiked with the West was a potent threat, one that could force much of Europe to shiver during the wintertime* (Michael Birnbaum, "Russia used to have a powerful weapon in its energy sector. Not anymore", *The Washington Post*, August 18, 201, accessed March 16, 2016, https://www.washingtonpost.com/world/russia-used-to-have-a-powerful-weapon-in-its-energy-sector-not-anymore/2015/08/17/b58f314c-4043-11e5-b2c4-af4c6183b8b4_story.html

[16] Yafimava, *The Transit Dimension*, 35.

attempt to rig elections, this time the process was murkier: the Euromaidan had a clearly violent dimension, which was in great part related to the government´s own violence. Still, this time Yanukovich could clearly pose himself as the legitimate ruler of Ukraine after he had won clean elections three years earlier in 2010. Besides this, while the responsibility for the bulk of the victims in the fateful period from the 18th to the 20th February has not been clarified, the process of impeachment of Yanukovich after he fled did not adjust to the procedure prescribed by the Constitution; most importantly, the vote did not reach the minimum required by the Constitution, even if it represented a large number of the Rada´s representatives. We may say that as a compensation of the illegality of the process, the next Prime Minister, Arsenii´ Yatseniuk was voted with an even larger majority few days later. Whatever the vices of origin that may have existed, the fact is that the dissolution of the former Party of Regions (Yanukovich´s party) and the election in the first round of Petro Poroshenko as president in May established a firm ground for a new course in Ukraine´s politics. That was bad news for Russia and it did not anticipate good news either for energy relations.

The framework of energy relations was determined by three major elements that constitute the existing *contractual space* between Russia and Ukraine at the time when our analysis starts:

1) The contract between Russia and Ukraine for delivery of natural gas and for the payment of the transit tariff had been agreed on the 19th January 2009 and was valid for 10 years. There was therefore no contractual void at the time.

2) In addition to the contract, there had been agreement in April 2010 in the co-called "Kharkov Agreements" to establish a discount equivalent at the time to 30% of the current price of 100US$; this discount substituted the discount of 20% that had been approved for 2009 in order to alleviate the impact of market prices. It was a clear "intervention" of the *space of places* as it was the direct consequence of Yanukovich´s arrival. The political linkage was manifest: the discount was approved in exchange for the extension of the lease-contract for Russia´s Black Sea Fleet in Sebastopol, Crimea that was to expire in 2017.[17] Henceforth, the contract was extended into 2042, with the possibility to further extend it into 2047. It must be highlighted that this political discount compensated a previous arguable intervention of the *space of places* into the contract of 2009: the complex formula to calculate how prices were determined for each quarter of the year yielded abnormally high prices for Ukraine (in occasions higher than those for Germany) in what a political retaliation may be seen after the dispute of January 2009.

3) Finally, changes in the *space of places* had become manifest again on the 17th December 2013 in the midst of frantic negotiations between the EU and Russia to attract Ukraine into their respective projects of integration. Energy relations were the object of a new episode of politicization in the form of energy subsidies granted by Russia after Ukraine had postponed the signature of the AA with the EU: instead of US$385tcm as Ukraine was supposed to pay for the first quarter of 2014, it would pay a much more reduced price of US$268.5tcm. Although there was no explicit political linkage, the circumstances made clear the reasons for Russian largesse.

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The *contractual space* provides us with information about the contractual nature of energy relations between Russia and Ukraine and therefore helps us understand in which moment changes in the *space of places* which had happened with the Euromaidan could intervene: according to the contract of 2009, prices are pegged to international oil prices and are revised each quarter of the year. When the discount had been offered in December 2013, prices had been calculated according to the first quarter of 2014, so they would be functioning for that period as a minimum. Thus, when April was approaching, Russia announced that the discount would cease to be applied, so the influence of those radical changes in the *space of places* happened during that time: prices would go back to the status quo ex ante with natural gas back to US$385tcm; in this case, the *space of places* cancelled the advantage it had generated before.

However, as we already know changes much more significant than just a cooling down of mutual relations between Russia and Ukraine and the refusal of subsidies granted before when these were good enough were happening:

1) In the first place, Russia swiftly occupied and annexed the Peninsula of Crimea. This was the biggest change in the space of places that had ever taken place since independence, as it was the first time that Russia used force (even if restrain from the Ukrainian side made the whole process a mostly bloodless one) against Ukraine. This aggressive movement from the side of Russia was consequential indeed: it brought a radical change in the borders between both countries reducing Ukraine´s access to the Black Sea as well as depriving it of future exploitation of mineral resources located offshore.

However, despite the fact that Russia was using military force, this does not seem to have pushed Russia to use the "energy weapon" as an additional pressure in order to succeed in its military

[17] In 2008, coinciding with the war that Russia waged against Georgia and that led to the former´s occupation and recognition of the already de-facto independent republics of Abkhasia and Southern Ossetia, Yushchenko had threatened to hamper Russia´s Fleet freedom of movement; ensuring that the agreement did not expire after 2017 was therefore of capital importance for Russia.

objectives; the inhibition to use energy this way remained while Crimea was being occupied.

2) Few weeks after the occupation and annexation of Crimea had succeeded, a new military front opened in Eastern Ukraine, in the region of the Donbass. In a similar pattern as when Russia intervened, everything started with armed militants subverting the legal order and occupying key administrative buildings, under cover of demonstrations which made police and military interventions the more difficult. First attempts in April were eventually smothered without much effort. However, the tide did not subside and new attempts happened in May which led to the establishment of a permanent basis for the Russia supported militants and to the proclamation of the Donetsk and Lugansk People´s Republics of (DPR and LPR). Even if consequences were not as a radical as in the case of Crimea in what respects borders, due to the fact that Russia has refused the annexation of the two self-proclaimed republics, initially united in the Republic of Novorossiya (it was dissolved in October 2015), it has been much worse given the state of war and the loss of lives that has been taking place there since the beginning of the insurrection with the full-scale intervention of the Ukrainian army and voluntary battalions.[18]

The violence of this part of the conflict would easily lead to think that this time Russia would have used energy as a complement in the war it was carrying out. Russia has always shied away from acknowledging its direct intervention, even if it has not remained silent in its critics of the Ukrainian side and its moral support of the militants, while making clear it would not stop the flow of voluntaries coming from Russia to help fellow militants. It is true that Russia was avert to expose itself, something that the use of the "energy weapon" might have made explicit, but it could nevertheless have exerted pressure as a way to demand restraint from the Ukrainian side, as its support of the militants in the Donbass has always been manifest. As we will see below, the fact is that while war has been happening to date since shortly after the Euromaidan succeeded, natural gas supplies have been suspended several times and for extended periods. Still, it is hard to see any explicit linkage between the war and energy disputes. The inner dynamics of these events will be analyzed shortly below to see how, instead of influenced by the *space of places*, it is rather the *contractual space* that bore a most significant influence.

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That said, there is a particular aspect, which far from being irrelevant, shows a linkage between the *space of places* and the development of energy disputes. This relates to the annexation of the Peninsula of Crimea which we already mentioned: as we may remember, the *space of places* had already influenced in favor of Ukraine with the concession of a discount linked to the extension of the lease-contract of Russia´s Black Sea Fleet. It becomes manifest in what respect the annexation of Crimea radically changed the basis for the "Kharkov Agreements": even if Russia´s actions clearly ran counter to the very spirit of International Law, Moscow could justify on the basis of a "de facto" situation that it no longer had to pay for using a territory that now belonged to the Russian Federation. This had an immediate translation and represents the most direct influence of the new space of places that unfolded during this period:

On the first April, as Gazprom had previously announced, the discount granted in December was cancelled, so prices bounced back to US$385tcm. However, on the 4th April, Gazprom came back with a new announcement: real prices to be charged henceforth would be US$485tcm; this was the consequence of cancelling the US$100tcm from 2010 and the Russian side clearly linked it to the new status of Crimea. If the *space of places* had led in 2010 to a political discount, politicization of energy relations as a result of war in this same space meant that the ruling *contractual space* would be that from the January 2009 contract without any further influence of any additional factors. Here, war in the *space of places* had had a clear influence in the realm of energy relations.

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The energy disputes that resulted as an outcome of the process shortly reviewed above yielded the longest natural gas cutoffs registered to date. Intuitively, it seems warranted to believe that the presence of war explains this reality. However, from the interplay of contractual space and space of places seen above, we can conclude that the genesis of the dispute was only partly related to the deterioration in the *space of places* and war within it was only one aspect among others. Once that politicization of energy relations in favor of Ukraine had been wiped out by a process of counteracting re-politicization, the problem we will find is that of seeing how Ukraine is confronted to detrimental aspects of the *contractual space*. In the first place, the price of US$485 was not determined arbitrarily by Gazprom. Instead, it derived from the spirit of the contract, once it had been "de/re-politicized".

During the months from April to June 2014, an odd situation developed, as Ukraine continued to receive supplies of natural gas from Gazprom but refused to pay for it as long as an acceptable price had not been agreed. The result of accumulated

[18] According to the UN, by late 2015, there had been more than 9000 victims (See: "Despite less fighting, eastern Ukraine still 'highly flammable,' UN reports, as death toll tops 9,000", *UN News Center*, December 9, 2015, accessed March 17, 2016, http://www.un.org/apps/news/story.asp?NewsID=52771#.VuqdbOLhDIU).

changes based on the *space of places* had led to a divergence as for the correct price to be supplied: Russia demanded US$485tcm whereas Ukraine wanted to keep US$268.5tcm. It may seem quite opportunistic from the part of Ukraine to demand a price that had been granted to the current political establishment´s chief enemy, Yanukovich; the justification put forward from the Ukrainian side was that this would be the real price Ukraine would pay if distortions in the original contract were annulated.[19] As we see, the shadow of the *space of places* when the *contractual space* was agreed in 2009 did not fade unless this would be modified.

Finally, on the 16th June Gazprom decided to stop supplies to Naftogaz due to the debt accumulated during the past months: Gazprom had been supplying natural gas since April without receiving payments and the final debt which had accumulated reached US$4,4bill.[20] The gas cutoff that happened did not happen in a void, as we have seen previously, as Gazprom could rely on several aspects of the *contractual space* to justify its move: according to article 5.1 of the contract payments had to be made by the 7th of each month for deliveries applying to the previous month.[21] Failing this, Gazprom could ask Naftogaz to move to a pre-payment system (article 5.8).[22] Finally, if none of the previous payment modalities were fulfilled, again following the contract, Gazprom could unilaterally decide to cease supplies (article 5.3).[23] Gazprom´s decision was therefore in full accordance with the *contractual space* and it cannot be considered this broke down as a result of the outcome.[24]

The period when deliveries were suspended coincided with summer. During this period, as opposed to high consumption during winter, supplies are naturally lesser, so tense situations of undersupply as those happening back in January 2006 and January 2009 could be avoided. In addition, it must be highlighted that Ukraine consumed much less natural gas during this time as compared to previous years and its reserves were full at the time when gas was cut off as it had imported large volumes of Russian gas during the spring. Two other important elements that must be highlighted are the following: 1) since the construction of Nord Stream pipeline through the Baltic Sea, Gazprom´s supply to Europe through Ukraine had been reduced, so instead of 80% as it had been in the past, only around 42% of Gazprom´s gas to Europe should have transited this country; 2) In 2014 Ukraine resumed imports of natural gas from Central Europe that had started in 2013 (around 2.1bcm) but which had been suspended after Ukraine had been granted December´s discount: Ukraine would eventually import as much as 5bcm of natural gas from this region in 2014.[25]

The cutoff happening from June 16th to December the 2nd was the longest cutoff since gas problems started in the decade of the 90s. However, for the reasons explained in the paragraph above, it was the most uneventful gas dispute, with Ukraine suffering no supply problems and with the rest of Gazprom´s European costumers being delivered contracted volumes without disruptions, it barely reached the headlines. A solution was found on the 26th September when a trilateral agreement was reached between Gazprom, Naftogaz and the European Commission. Thus, an agenda was established to repay debts and to resume supplies under an agreed price formula: although this was not made explicit, the formula was based on the status quo ante December 2013. This means that the suppression of December´s discount would be accepted from the Ukrainian side whereas Russia would still consider as if conditions had not changed in order to apply the discount of 2010 in exchange for the lease-contract´s extension in Crimea. Momentous changes in the *space of places* had to be made flexible in order to reach an agreement. As Ukraine did not want to accept these prices yet, it was necessary to confirm the agreement with slight changes on the 31st October. Supplies did not start until the 2nd December under agreed prices of

[19] For an explanation in this direction, see: Volodimir Omel´chenko, "Основний план Путіна зірвався, ціна на газ є помстою", Tsentr Razumkov, March 4, 2014, accessed March 18, 2016, http://www.razumkov.org.ua/ukr/article.php?news_id=1104. Boris Nemtsov, former energy minister from Russia deemed that the real price should be US$300tcm (See: "Украине нашли новый долг и дешевый газ", *Nezavisimaia Gazeta* June 16, 2014, accessed March 18, 2016, http://www.ng.ru/economics/2014-06-17/100_obzor170614.html), while other analysts as Mikhail Korchemkin (See: Alexei´ Topalov and Anatolii´ Azarenko, "Киев копит долги", *Gazeta*, July 9, 2014, accessed March 18, 2016, http://www.gazeta.ru/business/2014/07/08/6106457.shtml and Simon Pirani (See: Evan Ostryzniuk, "Living without Russian gas: Hard, but possible", *Kyiv Post*, June 26, 2014, accessed March 18, 2016, http://www.kyivpost.com/article/content/business/living-without-russian-gas-hard-but-possible-353515.html) considered US$330tcm as the most likely.

[20] "Russia and Ukraine achieve progress in gas talks", *Euractiv*, June 3, 2014, accessed March 18, 2016, http://www.euractiv.com/section/europe-s-east/news/russia-and-ukraine-achieve-progress-in-gas-talks/

[21] See: "Газовое соглашение Тимошенко-Путина. Полный текст", *Ukrainska Pravda*, January 22, 2009, accessed March 18, 2016, http://www.pravda.com.ua/rus/articles/2009/01/22/4462671/

[22] "Газовое соглашение".

[23] "Газовое соглашение".

[24] In fact, it cannot be considered to be a coincidence that the cutoff happened on the 16th June: the 16th of each month is when Gazprom should present the bill for the next month´s payment in case it was decided to move to point 5.8 of the contract. Gazprom felt legitimized to proceed this way as point 5.1 had been repeatedly unfulfilled. As Ukraine manifested it would not accept the bill under the current conditions, then we may understand that Gazprom chose that day as the day to cut deliveries.

[25] See: "Ukraine purchased 63% of its imported gas in Europe in 2015", Naftogaz, accessed March 18, 2016, http://www.naftogaz.com/www/3/nakweben.nsf/0/8FD7A9A348A0844DC2257F4C005802FD?OpenDocument

US$378tcm for the last quarter of 2014 and US$365tcm for the first quarter of 2015; owing to variations in the international oil market, these were lower than former prices of US$385tcm by late 2013.

The so-called winter package was to be substituted by March 2015 by another agreement. Even if this package had reestablished energy relations on the *contractual space* functioning between April 2010 and December 2013, it was subjected to a more arbitrary situation since the *space of places* had been shattered as a result of the Euromaidan and the annexation of Crimea; the *contractual space* in this period was therefore much more unstable. As a result of this situation, Russia-Ukraine relations eventually moved towards a new situation of suspension as a new dispute in prices became unavoidable: the winter package was renewed for the second quarter of 2015 but troubles appeared when it came to agree prices for the third quarter: Ukraine refused to pay the same price as in the second quarter, US247.18tcm as it reasonably expected to see natural gas prices below that former price following oil prices which had been crumbling since late 2014. Gazprom, on the contrary, wanted to compensate these lower prices unilaterally reducing the discount to only US$40tcm.[26] This margin of unilaterality was the consequence of the weakening of the *contractual space* due to the process seen above. Supplies were resumed in October, but shortly thereafter, supplies ceased again, due to Ukraine´s not needing Gazprom´s natural gas due to an extraordinary increase in supplies from Central Europe: if these amounted to 5bcm in 2014, they would jump to 10,3bcm one year after, dwarfing Gazprom´s supplies which reached a nadir of 6,1bcm.[27] As Naftogaz´s own website proudly announces at the time of writing (18 March 2016), the company has not been importing Gazprom´s natural gas since 112 days.[28]

5. Conclusions

The appearance of the Euromaidan ushered Russia-Ukraine energy relations into a new period of instability. As it might have been expected, the radical worsening of political relations and the military aggressions from the Russian Federation into Ukrainian territory affected energy relations. Discussions regarding pricing and debt accumulation led to supply cutoffs as it had already happened in the past, especially during the period of Viktor Yushchenko´s presidency, after the Orange Revolution. The coincidence with a period of intense political tension might arguably serve as a basis for discussing the possibility of a use of energy for political purposes and test the hypothesis of the "energy weapon".

However, a careful analysis of the details of that period throw a much more nuanced picture. Using as a theoretical framework the different categories established by Katja Yafimava and focusing on two of them, the *contractual space* and the *space of places*, has helped us to understand the extent of politicization and to know whether energy was used as a political weapon.

We may confirm that political effects of radical changes in the *space of places* impinged on energy relations. However, this did not happen as the "energy weapon" discourse would have us think; namely, energy was not used as a surrogate of aggression. This reasoning is somehow intuitive bearing in mind that inhibition for using armed force against Ukraine had disappeared during this period. On the contrary, changes in the *space of places* had an effect only whenever these changes involved intrinsic features related to aspects of the *contractual space* built in the past years. These changes led to the suppression of a set of political discounts that had modified the contractual space; once these disappeared, the point of reference remained the contractual space, so whatever attempt to politicize could hardly move beyond it.

As a general conclusion, we may state that a crude use of the "energy weapon" was absent, whereas politicization of energy relations happened in a limited way depending of the aspects that changed during a period where political relations were reaching their nadir.

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THE ROLE OF THE PUBLIC ADMINISTRATOR - MAIN TENDENCIES IN MANAGEMENT AND LEADERSHIP SKILLS OF PUBLIC ADMINISTRATOR IN ROMANIA

Constantin BRĂGARU[*]

"The difference between a good administrator and a bad one is about five heartbeats. Good administrators make immediate choices. […] They usually can be made to work. A bad administrator, on the other hand, hesitates, diddles around, asks for committees, for research and reports. Eventually, he acts in ways which create serious problems. […] "A bad administrator is more concerned with reports than with decisions. He wants the hard record which he can display as an excuse for his errors.

Frank Herbert, God Emperor of Dune

Abstract

The public administrator (city manager) has to be a professional in mastering the science of planning, organizing, directing, coordinating, reporting, and budgeting. He must be equipped to research issues and offer solutions, draft proposals for legislation and regulations, prepare statements and presentations for testimony, conduct negotiations, build coalitions, and advocate client positions to legislators, other elected/appointed officials, and their staffs. Public administrator must provide representation at the state and other levels of government for businesses, associations, individuals, and non-profit organizations.Having as a role model the good politics from the other european union member states,the institution of public administrator has proven it's utillty in Romania due to full initiative of several mayors and presidents of county councils.

Keywords: *Public Administrator, city manager,capabilities, planning, organizing, directing, coordinating, reporting, budgeting, research issues, solutions.*

1. Introduction

There are various roles that are played by the Public Administrator. It must be important that the role of the administrator is not to be confused with his or her job, although, the role of the administrator may be defined by his or her job. For example, an administrator may have a job where he or she compiles data gathered from subordinates and analyzes the data to develop effective solutions to a problem in the form of policies. This may be his or her job, and the job may be titled Assistant Administrative Analyst, but this may not necessarily be his or her role. Given the description of duties, one may infer that the role of this administrator may be that of a problem Solver. This study distinguishes between various roles of the public administrator.

2.A brief review about public administrator terms of evolution,various roles and bureaucracy.

In a study of democracy and Public Administration, John P. Burke focused on the tension between democracy and bureaucracy. It is here that the role of the Administrator is defined as a guide that is responsible for taking the efficient bureaucratic organization through the moral aspects of a responsive democracy. Burke does not go into detail on how the administrator guides the organization but his next depiction shows how the organization may have an affect on the role of the administrator. Burke addresses the dilemmas faced by officials on a daily basis. Officials have their morals tested and are expected to follow organizational protocols impartial to what their personal beliefs may entail. Burke gives administrators the role of actors because they have their personal beliefs and agendas in their private lives, but once they come into the work place, they are expected to act accordingly to the demands of an efficient and effective organization. Some may feel sorry for administrators but as Burke points out, "Administrators, in choosing careers in public service, are often well aware of the moral pitfalls"[1] . They are analogous to the stunt persons who are aware of the dangers the stunt may do to their bodies in an attempt to perform a spectacular act for the enjoyment of the moviegoers (clients/citizens) in exchange for the appropriate pay. They have come undercontract and have agreed to perform such duties even at the possibilities of such risks.

In another study conducted by Pamela B. Teaster , the term Guardian was used to describe the

[*] PhD Associate Professor at "Nicolae Titulescu" University of Bucharest, Calea Vacaresti 185, sector 4, Bucharest. (e-mail: **costin_bragaru@yahoo.com**).

[1] John P. Burcke ,*"Reconciling public administration and Democracy:The role of the responsible administrator"*, Public Administration Review, pp 181, 1989.

role of the Public Administrator. This study focuses on care given to the indigent, the senior citizens, the people with diseases, and the children who are neglected and have insufficient care. The term "Parens Patriae" is used and is defined as "the duty of the sovereign to care for its citizens who cannot care for themselves"[2] .

This has vast implications in that it means that the role of Public Administrators come with the responsibility of providing medicine, shelter, clothing, and food to those in need. Being that there may be an enormous population of people who need these services, developing methods for effectively and efficiently distributing these services may become intricately burdensome. After all, how is one to define and measure the criteria for who should get what services, when, where, how much, and for how long? In addition, because resources may be scarcely limited and not everyone may be able to receive services, where should the lines of priority be drawn? It may fall into the jurisdiction of the Public Administrator to make such decision, which is another problem in its own: discretion. This discretion is the administrator's ability to make decisions when it may not be clearly defined or described in their agencies contract or manual or when there may be multiple options on various steps that may be taken concerning a certain situation.

Teaster, when describing the responsibility given to administrators concerning wards of the state, labels administrators as Surrogate Decision Makers. Some of these decisions, according to Teaster, "included medication and other medical decisions, habilitation decisions, financial decisions, and care and quality-of-life decisions"[3] . These decisions are not necessarily made according to a schedule or some seasonal activity but may spontaneously arise in the event of new wards entering into the system, wards becoming ill, or other factors that may submerge. The administrators must be aware of what procedures they may take, where available resources are located, and have the proper funding and planning available in the event of contingencies. If the administrators are not prepared in the event of catastrophes, the affected parties may file litigation against the agencies responsible for rendering these services.

Another author focuses on the actor role of Public Administrators the Theatre Metaphor used by many to portray officials and administrators in different lights. Larry D. Terry has discussed how in the Reagan era, administrators were portrayed as villains and in defense of that categorization, supporters of Public Administrators attempted to cast the role of hero on these officials. Sometimes it is not necessarily the administrator that attempts to assume these roles, but most of the time they are type cast for these roles. For example, when a person attempts to get a straight answer from a bureaucratic organization and is transferred from one administrator to another without completely having his or her concern addressed, the administrators may have the role of villain attributed to them. When the disaster resulting from Hurricane Katrina struck New Orleans, Louisiana, and FEMA was slow to respond to the needs of the people, their administrators also received the role of playing the villain. On the other hand, when administrators develop effective programs that address the concerns of a specific population, the role of Hero is attributed to them. Even though the overall role may be that of an actor, the individual roles are given favorable or detestable attention depending on the outcomes resulting from the actions or inaction of various administrators. Terry points out that both of these roles may be problematic because when administrators are depicted as villains, government is given less credibility and is seen as "an evil force that must be conquered and destroyed" [4]. In addition, the depiction of the administrator as a hero may be problematic because this gives the officials an unrealistic level of expectations to which that may not be able to meet. Some problems may be wicked and unsolvable, and deeming administrators as heroes may be setting them up for failure.

For the purpose of this discussion, one final role will be included. Not that there are not more than the roles listed here, but it would serve to keep the attention of the viewer focused on the issue at hand b listing more than one role so that he or she may know that there are various roles taken on by Public Administrators. The final role discussed here was described with due recognition by Charles T. Goodsell ; Goodsell described the role of the Public Administrator as that of an Artisan. In his own words, Goodsell states,*"It is, rather, to argue that the carrying out of common professional duties by public administrators can, with considerable payoff for both administrator and citizen, be viewed as the execution of an applied or practical art… it embodies a specialized skill that is capable of creating results that are both usable and pleasing to behold. Specific objects are created and tasks performed, yet in ways and with consequences that establish in the minds of both creator and audience a sense of intrinsic satisfaction, above and beyond the utilitarian purpose at hand."*[5] .

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[2] Pamela B. Teaster ,*"When the State Takes Over a Life: The Public Guardian as Public Administrator",* ,Public Administration Review, pp 397, 2003.

[3] Ibidem, pp 399.

[4] Larry D. Terry, "*Legitimacy,history and logic:public administration and the constitution",* Public Administration Review, pp 58,1997.

[5] Charles T. Goodsell, *"The Case for Bureaucracy: A Public Administration Polemic",* 4th Edition, CQ Press, pp 247, 2003.

The specialized skill here may be analyzing data, evaluating data, conducting research using various methods of polling and surveying constituents. These tasks performed may bring about plans, policies, and legislation which may be the objects referred to by Goodsell. When these "objects" bring about social services that provide shelter to the homeless, food stamps to those in hunger, clothing to those without, and even jobs for the disenfranchised, the intrinsic satisfactions becomes salient. Using the term science alone to describe what administrators do seems to take away the human creativity that is put into the tasks performed by administrators. The depiction of the administrators as artisans denotes that the work done by them is a work of beauty in its most precious form.

There may be hundreds of roles fulfilled by Public Administrators. This discussion has presented a few of the roles that are most often seen among people who come into contact with various agencies and their officials. These roles include guides that lead the organization on a path that serves the people, actors who are to put personal issues aside for the sake of performance, guardians who care for and act on behalf of the helpless, surrogate decision makers who utilize discretion concerning issues that affect the lives of the disenfranchised, villains when things go wrong, heroes when things go right, and artisans who utilize artistic talents and craft objects that bring forth satisfaction. These roles give the field of Public Policy and Administration romanticized features that most would not recognize when thinking about bureaucracy. Administrators can be seen as daring, compassionate individuals who take on the difficult task of being the problem solvers in society. Some may see it as a dirty job, but someone has to do it.

3. The European experience in practicing public administrator (city manager)[6] position

The quality of public administration is important for Europe's competitiveness. Modern, innovative and efficient public administrations is essential to sustaining the recovery and unlocking Europe's growth potential.The growth-friendly public administration scoreboard was published as part of the Member States' Competitiveness Report in September 2014.

The scoreboard is the first EU-wide exercise to analyse how "fit for purpose" the Member States' public administrations are, as regards promoting growth and competitiveness. It analyses a number of features important for competitiveness, so as to encourage improvements in government and public administrations.

The scoreboard delivers mixed results:

- Overall, government effectiveness has not improved for the EU over the past five years;
- Member States' budgetary, regulatory and implementation capacities vary;
- Red tape and high compliance burdens are negatively impacting on those wishing start a company and obtaining licences, pay taxes, participate in public procurement, export goods and services, or settle legal disputes.

Political and administrative organizations of local authorities in European Union countries have a number of basic characteristics in common.First, the political bodies in each municipality representative,is the result of democratic elections. In almost all municipal entities there is a political leader, recognized as such, whether the function of such person is mentioned or not. This leader can be elected directly by citizens or by the governing board members or appointed by the central government. Political and executive powers of the people can vary greatly.

Also, in most municipalities have at least one person whose role is to:

- manage, coordinate and supervise the organization of government;
- to provide advice to politicians;
- to ensure rational use of public resources, efficiently and in accordance with law.

These three features reflect the principles governing the organization of local government. Two decades ago, City Manager was usually a senior civil servant (age than in the organization), with a basic training in financial and legal. Experience in local government was seen as the most important requirement to fill such a post. This experience was gained through specialized training programs in public administration training institutes in their respective countries.

As regards public administration, legislation in European countries has not institutionalized a stable space professionalized management that can be separated from politics. The legislature has often opted for a president of local government, leaving the option of delegation of management tasks. The political dimension as prevail in the executive or management functions, the administrative expense of the organization[7].

Therefore, in recent years, European governments have chosen to modify some parameters bureaucratic organization for flexible management methods, with emphasis on the economic side and individual performance. Attitude

[6] City Manager – *institution which has it's origins in anglo-saxon administrative system that has inspired also the establishment of romanian public administrator*.

[7] J.I. Soto, *„Los secretarios de administración local entre la gestión y el control. Un rol en evolución"*, în *Revista de Estudios Locales*, iulie 2003, p. 163.

in the City Manager has changed as a result of awareness that managerial skills are more important than specialized training. Effective management of public institutions realizes that an organization requires management skills and specific knowledge on effective use of human resources. Currently, among the decisive factors for the appointment of a City Manager holds the largest share of the management skills, combined with experience in local government.

"Professionalization" management has its sources in the need to differentiate the role of elected officials from that of technical professionals in other words; policy must be distinguished from the implementation [8].

Among European countries now applying a model of coordination of local public services by a person other than the Mayor, City Manager shall include: Belgium, Denmark, Germany, Ireland, Latvia, United Kingdom, Netherlands and Sweden. Given the strategic position they occupy City Manager, it is preferable to have higher education.

Expertise is less important because the management team, City Manager working with department heads, who have specialized training. Implementation of effective management in public administration has its origins in the United States and Western European countries (especially Anglo Saxon), where community services are organized based on specific mechanisms of the private sector, in coordination with City Manager / Executive Director.

Such notice the existence of the following items from the U.S. literature the role of City Manager is defined and explained so well (Journal of Public Administration Research and Theory): "Many times the city manager faces an important issue that influences political existence. According to this article, which has as its main subject study investigating the mechanisms that lead officials elected to postpone work to develop policy manager, city manager faces a number of factors such as experience, professionalism, relationship with Council members, which is the main reason of failure. Data from this study show that city managers leading image detrimental earn their administrative authority through their ability to manage and develop policies to achieve objectives. Thus, managers must reconcile the inherent tension between responsibility and respect. "In other words the content of this journal of public administration refers to the City Managers ability to impose its political influence in their activities, to achieving the targets. Such notice, the influence of a City Manager gets stronger at the expense of their administrative authority.

The definition of the City Manager in foreign literature we find in Elgie McFayden Jr.'s conception, in his "City Managers: Impact on Citizen Participation in Local Government", that the objective side of this concept: "A city manager is a administrative officer, who is usually appointed to serve as chief administrative officer within the Board. A city manager is clearly responsible for the City Council, but is much less likely that the image of responsible dethrone a strong mayor. To be held accountable for their decisions often unpopular fiscal policy they should respond to voters. Another fact to consider is that it is difficult for voters to hold board members responsible for inadequate social and fiscal policies, because power is decentralized; city manager is appointed and usually has a contract with well established tasks legal point showing their performance in some time. This paper analyzes the impact of the Government Board on the relationship between citizens and local Administrative. The objective of this paper is to determine whether a current city manager has a negative peace on the level of interaction between citizens and local government and if it decreases the influence of citizens in social and fiscal policies

On the other hand as "The International Conference on Business and Commerce" on the topic "The city manager: from the U.S. experience to Romanian reality" city manager is seen as an entrepreneur, a bureaucratic set in contrast with the political entrepreneur is relatively more prudent in the proposed policy and more likely to support new ideas that have been "verified" their associated professionals. The literature offers another perspective on the city manager. This route to success is their move to larger cities and better paid, but there are still a few city managers who enjoy office in small towns, poorly developed.

4. The actual stage of public administrator evolution in Romania

Having as a role model the other E.U. states know-how and good politics,the institution of public administrator has begun to prove it's utility also in Romania,through the initiatives of certain mayours and county councils presidents. The main tendencies in developing public administrstor's function are aiming for implementation and also research and evaluation above the influence of those measures in reforming local public administration system. All these eforts were synthetized in the project called "*Public administrator – a key for a succesfull local management",* financed from Social European Funds and having as a purpose developing public administrator institution by increasing the level of

[8] C. Ramió, „Desenvolupament organitzatiu de l'ajuntament gerencial", in *Diputació de Barcelona: L'ajuntament gerencial: reflexions i propostes per gerencialitzar*, Barcelona: Diputació de Barcelona, 1999, p. 53.

informations regarding the employment of public administrators and supporting the creation of a functional operational network in this case.

In Romania, public administrator function was regulated by Law no.286/2006 amending and supplementing Law no. 215/2001 local government. One of the innovations introduced by Law no.286/2006 is the introduction of public administrator, creating the legal framework for delegating certain tasks to the mayor / chairman of the county public administrator.

The legislative framework provided by this law allows mayors / presidents of county councils to engage, under a management contract, a public administrator responsible for coordinating specialized device or public service at local / county. By delegation, he may exercise the chief quality officer. Public administrator may be employed on a proposal Mayor / Chairperson of the county, with approval of the local / county as a result of competition, the maximum number of posts approved. Appointment and dismissal of public administrator are made by the mayor / chairman of the county on the basis of procedures and specific tasks approved by the local / county.

Also, intercommunity development associations may decide to appoint a public administrator for management services of general interest subject association.

Recruitment, appointment and dismissal of public administrator intercommunity development associations are made according by Law.286/2006 amending and supplementing Law no.215/2001 on local public administration, republished, based on specific procedures by their boards of directors and approved by decisions of local and county councils concerned. (Law no.215/2001 on local public administration republished, Chapter VIII, Art.114).

Institution as a public administrator is bottom up initiative of local government in an attempt mayors and presidents of county councils to delegate a multitude of their duties. Romanian public administrator has increasingly become a reality in communities inspired model City Manager. Its presence has emerged as a viable solution for local officials in the separation of attributes specific management representative and current activities. Public administrator function comes as an alternative local Romanian, was introduced into law in mid 2006.Local realities require a change in system performance by redistributing tasks locally by primary and / or presidents of county councils, to streamline administrative act.

Although the institutions of public administrator work in some administrative units, it was not yet introduced a bill. No local government law.215/2001 does not restrict the adoption of local development policies, but does not specify the nature of these initiatives, which required an amendment.

The main duties of public administrators in Romania are: exercise main credit quality, coordination of various publicservices (Service Management and Community Public Service and Fire Emergency, Community Police Service, security and order of services for social assistance, Department of Population, education, health service, sports, culture, public service for local public finance, local taxes), direct relations with the public (audience, addressing petitions), media relations, relationship with non governmental organizations, writing extra budgetary funded projects. Note that these duties are not distributed uniformly in terms of public administrator job description, at the county councils and / or municipalities (of city, town or village). Not all public administrators have the same powers, but they differ from one political subdivision to another. For example, not all public administrators have been delegated the task of authorizing officer. Others were delegated this authority, limited to a certain level or not.

Justifying its delegation to the mayor, it may concern different aspects, some referring to the trust and loyalty capabilities.

On the status of public administrator, it is not a public official in the mayor's specialized unit, but has the quality of contract staff, as reflected in the law which states a contract of management between primary and under which the administrator will accomplished latter duties. Moreover, this is strengthened because the not specifying text Law 188/19994 or within Law 286/2006 of any references that we could conclude that the public administrator would be considered a public official.

Quality staff and not official contract implies a lower wage regulating public administrator, which increases the primary instruments available to motivate his subordinate, or to reward their merits. Thus, according to O.G. 10/2007, salary of a public administrator will fall within certain "limits, with the minimum basic salary of secretary

administrative unit and the maximum salary of the mayor, president of the county or the mayor of Bucharest, as appropriate" (Government Ordinance no.10/2007).

Conclusions

With national policy-making gaining in complexity and becoming increasingly exposed to international and European coordination, as is the case in all EU Member States, there is an even greater need for public administrators to have a broad perspective and the ability to coordinate their work with national, European and international institutions. In this regard, the EU context and development of multi-cultural skills should be emphasised and included more in the competency frameworks and the training and development

activities for top public managers. New ways of developing public administrators in a more structured way have to be found, taking into account their responsibilities and time restrictions. Given the importance of the European environment of public administration, more emphasis should be placed on this dimension in the future. The development of leadership skills is still important in many Member States in order to add long-term strategic thinking and team and people management to the management competencies. To lead permanent change, public administrators have to develop into top public leaders.Long working hours are still the norm for top management positions, whilst telework or flexible working Latest trends in Top Public Management in the European UnionTop public managers (TPM) should perform as leaders instead of only as managers, while being able to bring movement and change to the organisation in a way that encourages most of the employees to want to be part of the movement.time arrangements are still rare. Consequently, establishing flexible working arrangements that help reconcile professional and private life should be allowed also in higher and top management positions so as to enable more women to take up top positions. Another valuable stimulus is a well-designed parental leave system. In the countries with a long-established leave system, it is generally not part of the organisational culture to allow public managers to benefit from these working conditions. The main problem continues to exist, because women or men who are taking care of a child or family often thereby limit their chances of promotion or career development. This is one of the elements that will have to be considered throughout the EU. Political support for changes in this area is essential.

Regarding the presence of a public administrator in administrative units in Romania, the benefits are undeniable. Such advantages are to improve the efficiency of the administrative record, following the introduction of this feature. Streamline flow of documents and information are other arguments in support of the model adopted by other local government units, as a guarantee of professionalization of Romanian modern public management. In these circumstances, an administrator could then support duties Mayor / Chairperson of the county and could secure a more efficient administrative system.

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THE EVOLUTION OR INVOLUTION OF POLICIES TO COMBAT YOUTH UNEMPLOYMENT?

Ştefania Cristina GHIOCANU[*]

Abstract

A current problem that Romania is facing is high unemployment among young people. Despite the implementation of policies to fight it and improve some of them, this problem is still present on the agenda of the public institutions at the national level and those of the European Union. In Romania, companies that hire inexperienced youngs in force receive from the Romanian state, through European funds between 200-300 euros / month per employee.A boost for companies to increase employability among youth.

A first question that arises here is: this policy does not discriminate, directly employability among adults, creating consciously or not, unemployment among them?

By the present research I wanted to provide an overview of public policies implemented in this area, showing both the negative aspects which could lead to a deeper issues that are behind it: discrimination of adults in employment and those positive could lead to a clear evolution in this area. The aim is to demonstrate whether the policies implemented in Romania to fight youth unemployment represented an evolution or involution more in this regard? Reported for purpose, targets are those that require to define the concept of young and category directly concerned by these policies, according to Union legislation, to present a concrete statistical data on youth unemployment since 2002 until now,because in 2002 was taken the first private assumption of companies, as simulation of modules for youth employment and analysis of public policies implemented in this field.

A final proposed target It is to follow the results of the policies implemented in these years and demonstrate that led to an evolution or involution, including the negative aspects that stood in the way of fulfilling expectations and the proposed actions. To achieve these objectives, the method proposed for research is the analysis of legislation and documents.

Keywords: *unemployment, discrimination, public policies to combat unemployment, employability of young, development of policy.*

Introduction

This article aims to evaluate the impact of social policies for youth employability . It has as its starting point a common problem not only at national but also at European level and at the EU level; namely aggressive growth in unemployment among young people.

The main purpose of this article is to show whether legislation on combating youth unemployment was an evolution or involution in this regard. As targets proposed in this article are: to identify the weaknesses of legislation in the field of fighting youth unemployment, analyzing their discriminatory effects and to identify the important elements that Romania has not taken into account after its adoption.

As a way of responding to these goals we chose to document and analyze the legislation. Article does not intend to make a comprehensive analysis in this area , but to identify weaknesses in the legislation that would be improved by a new public policy in the field.

I think that is one issue under research : real , actual , present both in Romania and at European level and affects a category big enough and important for the future of any country and any society. Youth unemployment, respectively, reducing their level of employability is a real problem and concrete, because , as I said earlier, the youth unemployment rate is 25, 7% in Romania and 23.4% the European Union; It presents a problem because even the European Union considered it a major problem.

Public policies on youth integration in the labor market have undergone many changes, with a significant dynamic and an end that would have to be found to reduce unemployment among this target group. I would not say that this goal was achieved or that the problems in this area have seen an improvement, at least in the short term. Thus, in 2002 youth unemployment stood at 23, 9% in 2006, youth unemployment was 23.3% . In 2007, 23.6% in 2008 youth unemployment was 18.7% knowing the biggest decrease in adult of 34.65%. Four years later, in 2012 youth unemployment was 22.5% and 43.1% among adults and youth unemployment is currently around 25.7% and 41.69% among adults according to the National Institute of Statistics and the National Association of Employment.

In this case Romania is ranked 7 on youth unemployment in the European Union, higher percentages recorded in Greece, Spain, Italy, Slovakia, Portugal. We chose 2002 as the reference point because this year was adopted, the Law no.76 / 2002 on the unemployment insurance system and stimulation of employment. Before presenting a brief analysis of these data, I consider it necessary to clarify the concept of "young", according to

* PhD, first year, The University of Bucharest, Faculty of Social Work and Sociology, Specialization: Sociology.

European regulations and legislation of our country to combat unemployment among this category.

In this respect the European Union considers "young" person aged 18-30 years, specifying that by 2012 "young" was considered a person aged 16-25 years. Based on these data I will try to answer several questions arising from such percentages, quite large and worrying.

The first question that I believe arrives in anyone's mind when he has to face such data that speak of a subject quite important in human life: work and able to support themselves financially, at least at the stage of subsistence to a stage environment - it is natural: What is the cause of rising unemployment among young people and not only at a rate so high in the last 3 years, given the legislation adopted and improved to fight it? Another question that arises from these data would be: Why Romania improved legislation on fighting youth unemployment if it led to an improvement in its only until 2008?

According to legislation to fight youth unemployment, an important place Law 76/2002, updated in 2015. According to Article 80 (1), "employers who employ, for an indefinite period, graduates of institutions education are exempt for a period of 12 months of paid contributions to the unemployment insurance budget, the related graduates employed, and receive monthly, per period, for each of the graduates: one of the minimum gross salary guaranteed payment in force at the date of employment for graduates of lower secondary schools or schools of arts and crafts;

 1.2 minimum gross salary per country guaranteed payment in force at the date of employment for graduates of upper secondary or post-secondary education;

 1.5 minimum gross salary per country guaranteed payment in force at the date of employment for university graduates.

According to Article 80 (2) employers who employ, indefinite, graduates of disabled people receive monthly for each graduate, amounts in par. (1) for a period of 18 months. Employers who retain graduates employed on the job more than three years, receive, for each year of continued labor relations or service in the next two years, financial aid equal to the amount of social contributions paid by employers for these people (art. 84 (1.2)). "

Also, another law in this area, Law no. 116/2002 updated on preventing and combating social exclusion states in Article 8 (1): "employers who hire young people aged between 16 and 25 years, under a contract of solidarity, will receive a monthly basic salary for the date youth employment, but not more than 75% of the net average wage economy, announced by the National Statistics Institute. Art. 8 (2) states that "if the termination date of solidarity employers will conclude with youth an individual contract of indefinite duration, they benefit, for a maximum of two years, the monthly repayment of a sum in the amount of 50 % of unemployment benefits due.

Here, therefore, that there is a strong legislation to combat youth unemployment, but this does not mean that cancels the first question that has arisen since the early submission of data What is the cause of rising unemployment, especially among young people and why it exists, or at least is not reduced after some drastic measures both in financial terms for a national budget and quite motivating for any private enterprise.?! Seen from the data presented above, that despite legislation adopted in favor of reducing youth unemployment and submit a phenomenon

that persists even higher percentage than in 2008. This also applies to unemployment among adults. Why?

First there is current legislation discriminates on the public to solve this problem. Unemployment has existed among both youth and adult. Why legislation that solves or just wants to solve the youth unemployment problem and not the adult? Even if young people represent the future of this country and would society, adults who currently maintain this society through work, values and training they give to young people and society further, in a way, of course, indirectly.

On the other hand the law is observed clearly presented solution: offering money (CAS cuts, money given to every employee, etc.) for private companies employing young people with certain conditions set out in law. This solution clearly unfavorable for the second time adult. A company that would be able and could hire both a young conforming to the requirements of the legislation, but equally an adult would choose for which aobţine certain financial benefits which are provided by law.

Also in the legislation and solutions adopted have not considered social values, social relations of the two groups: adults and youth. It is a good chance that an adult to take care of a family, be resposabil and growth of children, which means that the discrimination that prevents employment, legislation that disregards the problem may be born other social problems, the indirect effect of unemployment among adults dropout, drug, alcohol, high growth of divorces, increased suicide rate, high rate of abandoned children, etc.

Conclusions

Just fault that an adult (in most cases) is not only responsible for the life and well-being but also that of children and the family he has, and unemployment problems among the public may arise other subcategories of social problems. But it would be very serious if all this would be directly responsible adult,

but when there is legislation that discriminates clearly a certain category of people (adults), which has the same problem as another category (youth) and policies public implemented only in solving the problem of the two categories, I think to blame unemployment among adults do not directly damaging impact adults only.

Now to look less and situation of young people. There is a clear legislation passed that favor employment. However there is a percentage of unemployment increasingly grew. Also, based on the subjective side of youth unemployment was not taken into account but only s + emphasized on motivating private companies to hire young people.

There is unemployment among young people, they have taken steps to combat them, measures which discriminate against another group of people, but there is still in force, and yet the problem worsens with larger steps. Underlying measures was not taken into account the willingness of young people to engage in the labor market - even if it's harder to test their desire for personal and professional development, involvement and motivation in the social, professional, social links real solid and other aspects of their lives - family, college, school, liability level of their level of adaptability to new requirements and the new economy. If all these things would have been analyzed, tested and checked before the adoption of this legislation the outcome would have been motivating companies to hire more young people but a solution could come in motivating young people to engage in socio-professional change higher education system, reducing the number of university places commensurate with market requirements, development of schools of arts and crafts at a high level, stronger adoption of legislation on longstanding practice during university studies and programs.

Absenteeism courses in higher education, from high school even, their results within educational institutions, social relationships they create with people they offer education and training I think there are elements that should be considered in implementing any policies to combat unemployment and not just offer money and tax exemption for private companies would be a real solution, as long as these issues were not analyzed, tested and matched. Public policies to combat youth unemployment, but not only, should have been taken bearing in mind a few things: to have a real unemployment (and yes there); will be tested, values the target group; do not discriminate against another group of people who face the same problem; after its results to improve from year to year, otherwise recourse to new regulation.

It is apparent therefore that what it lacks Romania to adapt existing legislation to combat youth unemployment are very real impact studies and analysis of data recorded in this area. Can not improve legislation had no visible results and which gave rise to another problem: discrimination in employment of adults. From this point of view Romania has not fared in combating youth unemployment and more receded since created another major public issue and has not managed to reduce the original version.

Any public issue born even after an economic crisis can not improve or resolve or partially if: the solution adopted infringing certain social values affect other rights of other persons does not take into account the values of the individual and if not tested social relations between individuals - and social policies have focused more on financial development than on social issues, which can not exist without the latter.

Public policies should be regarded by citizens as an aid, as a boost, as a "holding hands when they go to higher ground," not as a solution supreme defining and to become addicted, and they should create the necessary framework for implementing a solution and then move to direct implementation of it, and if results are what you want from it is necessary replenishment and reinventing action mode and not just improving those who still failed to achieve the intended purpose initial.

In conclusion, I think we can say that the good thing Romanian Government did to increase employability among youth is that it has taken some measures to stimulate the private sector and to support their insertion in the labor market. But what has not been taken into account periodic analysis of results and assess the impact of policy interventions, at least after the first 2-3 years after implementation.

The impact assessment should have been the connecting link between the desired results and those obtained in reality. Another negative aspect that has not been noticed, as I presented above, is the fact that the private sector has taken advantage of this opportunity (the benefits of economic-financial items arranging inexperienced young) and neglected category adulthood, increasing unemployment among them.

On the other hand, private companies have regarded this policy, more like a financial benefit because the tax exemption for a certain category of employees (young inexperienced) and receiving a minimum wage for them. Which favor a much more privately than young unemployed. Why? For an issue to consider for the new assessment of these policies already implemented would be that the private sector has created far fewer jobs than would be needed for all young people with higher education and without experience, at least, which not solve youth unemployment but also creates unemployment and higher among adults.

Therefore, I can say that unemployment among young people and policies against it is the point that would require new impact studies, new evaluation methods and a new strategy for dealing with meaning applicability of policies in this sense.

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NEW POLITICAL, ECONOMIC AND SOCIAL CHALLENGES IN A COMPLICATED INTERNATIONAL CONTEXT

Liviu RADU[*]
Carmen RADU[**]

Abstract

The present paper is intended as a natural continuation to the study "Public policies and electoral cycles" – a paper presented at Challenges of the Knowledge Society – CKS – 2015.

The evolution and reform of public policies meet new challenges under the social-economic and political conditions of the 2016 electoral year. The year 2016 is electoral in Romania, Austria, the Czech Republic, Ireland, the People's Republic of China, the Russian Federation as well as in the United States of America – presidential elections. We propose to analyze this year's probable evolution of public policies. Aside from elections, the governments of several states, as well as the European Union's structures of leadership, are called to offer viable solutions with which the international arena is confronting: the migrations wave from the Middle East and the refugees' seemingly impossible integration, the probable economic crisis in China, urgent reforms which must be adopted for an European cohesion.

Keywords: *economic crisis, electoral cycle, public policies, economic sustainability, refugees' crisis.*

1. Introduction

The evolution and reform of public policies face new challenges in the social-economic and political conditions of the 2016 electoral year. The world economy as a whole is confronting with new and dramatic trials at the beginning of the century. One of the most severe global problems, which we have repeatedly emphasized, is the increasing population on planetary level.

In the common sense, the term policies is usually considered to apply to something "above" particular decisions, but to something "smaller" than general social movements. Thus, policies, in terms of analysis level, is a concept placed in the middle. A second and essential element is that for most authors the term refers to a certain kind of purpose[1]. In Romanian language (as well as in all Romance languages) using the expression "public policies" implies a difficulty. Since the term "policy" immediately relates to what we usually call policies[2]: respectively, the activity of political parties and political people, parliament, government, presidency; in the context of electoral campaig**ns, political declarations etc.**

Should we wish to take into consideration the European public policies, which mainly address to the European citizen[3], perhaps it would be useful to mainly initiate the study of this article with detailed analysis of the phenomena and influences on public policies in the European Union.

The year 2016 presents numerous aspects which cause our memory to access the 1912-1914 interval. Major social-economic, political and military tensions manifest on a global scale which are much harder managed by the international community. We thus mention the armed conflict in Eastern Ukraine, the annexation of Crimea by the Russian Federation, the civil wars in Middle East (Syria and Yemen), the evolutions of raw materials markets which lead to the productions economies' crisis (petroleum market), the negative evolutions within Asian exchange markets, policies regarding emigration promoted in the European Union, challenges related to international terrorism and, just as important, managing an electoral context in numerous countries. The year 2016 is, simultaneously, the year in which Great Britain will have to decide its European path.

The end of World War I was marked and influenced by the "14 points" stated by the American president Woodrow Wilson in January 1918 which stipulated at the XIV clause the creation of "a state association" envisioned to insure "reciprocal guarantees of security for small and large states[4]"

The purpose was to create a new world, a world of laws and principles. "The world Wilson envisioned was based on principles, not on power, on law instead of interests, and this matter was

[*] University Lecturer, PhD, Faculty of Social and Administrative Sciences, "Nicolae Titulescu" University of Bucharest (e-mail: **lgradu2005@yahoo.co.uk**).

[**] University Lecturer, PhD, Faculty of Social and Administrative Sciences, "Nicolae Titulescu" University of Bucharest (e-mail: **ceradu2005@gmail.com**).

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equally applied for the winner and loser. […] The remedy identified by Wilson in collective safety implied the world's nations uniting against aggression, injustice and – perhaps – selfishness excesses. […] Wilson proposed a world in which resisting in the face of aggression would be based on moral arguments rather than geopolitical[5]". How far have we truly evolved from this moment?

2. Content

The main question of our study is the following: can public policies still save the united European Union's situation through means of their economic, social, agrarian and monetary components? Surely the answer is affirmative at first sight because repeatable history teaches us that Europe has suffered before such catastrophic situations from which not only did it reborn but also managed to develop by inviting new states to adhere to forming a common unit. In the past as well as nowadays, after World War I, Count Richard Nikolaus von Coudenhove-Kalergi, an Austrian publicist and political thinker, foresaw the end of Europe's domination: "the global European hegemony is irredeemably lost". However, Coudenhove-Kalergi was a unique figure, who fought for the European idea from 1992 until his death in 1972, being in the inter-war period in the middle of all initiatives regarding the creation of a united Europe. In 1923, Coudenhove-Kalergi proposes Europe's first project of confederation, a project exposed in the volume *Pan-Europe.* Also in 1923 he creates the *Pan-European Union* – the first non-governmental "europeista" organization of the continent.

For Coudenhove-Kalergi, Europe always was a human brotherhood which shares common visions. The inheritor of a rich culture and grandiose history, Europe, in his vision, will only be able to survive the vicissitude of time if it manages to harmoniously meet the particularities and interests of every nation on the continent. He considered that rejecting any nationalist prejudices, defending freedom and consolidating peace are, along with the reconciliation between France and Germany, the foundation stones for European unity[6].

A political vision which excluded Russia and Turkey included Island instead. The relation with Great Britain would be a special one, England not being part of Europe unless the improbable situation in which the British Empire falls.

Russia represented, as well as today, a danger for Europe, because a revanchist Russia is defined as an irreconcilable enemy. It was considered that as soon as Russia recovered from its internal catastrophe, neither Poland, Romania or The Czech Republic would manage to put an end to Russia's advance towards West[7].

We mention evolution possibilities for an Europe which was developing in 1923, the year in which the Pan European Union was created and followed by a period of 90 years, in which another world war emerged and many other regional wars.

In the period which immediately followed World War I, the Western-European states concentrated their efforts of surpassing the critical situation post-war by applying some Keynesian economic policies, attempting to a larger or smaller extent disturbances which might have intervened as a result of the external environment's influence on their economies which regarded the usage of their own resources or product release on international markets. When the critical economic situation was surpassed and the step towards relaunching economic growth was made, the economic policies applied domestically as well as in relations with the foreign countries, experienced a relative transformation from moderate management towards modern liberalism in the Western area of the continent and from the moderate management towards the extreme one in Central and Eastern Europe.

Based on the structure created in the inter-war period and aiming at eliminating the damages caused by World War II, the economic policies applied in the Western European space were differentiated, continuing the line started in the inter-war period. The European Union's Economy is an economy progressively unified in a natural way as well as through the intense commercial changes developing along the centuries between member states, as well as through the process of formal integration starting in the '50s of the 20th century. The essential characteristic is represented by the cultural diversity which places its mark on the demand's high flexibility as well as on the supply's dimensions and specializations. To this extent even the European Union's economic policies reflect this unity in diversity.

Thus, the European Union's economic policies present the following features[8]:

- Unequal level of development: some common policies, the Common Agricultural Policy or the commercial Policy for example, are complex whether others, such as the regional development Policy or social Policy, developed along three decades, while the cultural Policy or that of

[5] Henry Kissinger, Diplomacy, translation by Mircea Ştefancu, Radu Paraschivescu, BIC ALL Publishing House, Bucharest, 2002, page 195.
[6] Mihai Sebe, European Institute in Romania, The idea of Europe in inter-war Romania, IER studies collection, no. 29, Bucharest, 2010.
[7] Mihai Sebe, quoted paper.
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consumer's safety are recent and insufficiently developed.

- The different type of approaching common policies within the European Union's treaties: thus some policies existed which were not even mentioned in Treaties, but which developed and evolved progressively, for example the policy regarding environment, while others were never applied in spite of being established thoroughly;
- Diversity in establishing and applying common policies: for example, Great Britain, with a prosperous economy, a constant economic growth and an unemployment rate beneath the community average, was interested at the moment of entering the EU, in developing common commercial policies. This fact was able to offer it the possibility of recultivating the productive potential with increased efficiency. Other member states, placed in the phase of reconstruction after the war were interested in developing the productive device;
- The model of integrating on an EU level: some policies are "common to all countries" (such as the Common Agricultural Policy, Commercial Policy or Transportation Policy) meaning that they have completely replaced national policies, whilst others are just complementary to them.

In this context, in March 2010, the European Commission launched the Europe 2020 strategy, for emerging from crisis, thus preparing the EU economy for the following decade's challenges. Europe 2020 takes into consideration the new century's challenges and shapes a perspective that encloses the accomplishment of a high degree of occupying the labor force, creating an economy with low carbon emissions, social productivity and cohesion, objectives which will be reached through concrete actions on an EU level. However, in order to defeat these challenges we either must work harder, better or more intelligently[9]. This task falls on the already fragile shoulders of the young generation, since Europe's future prosperity depends on its younger members. They sum up to approximately 100 million in the EU, or one fifth[10] of Europe's total population. In spite of the opportunities offered by a modern Europe, the young people are presently confronted with high challenges related to educational systems, professional development, access to the labor market etc. Unemployment among young people is unacceptably high, being placed at 21%[11]. In order to reach the objective of occupying 75% of the labor force for the population situated between the ages of 20 and 64, the young population's transition towards the labor force market must be radically improved. It is estimated that until the year 2020 the working places will require high level qualifications, combined with the capacity to adapt and inovate[12]. However, as we presented in previous papers, the entire Europe lacks highly qualified specialists in the ICT domain (information and communications technology). In the EU, less than a person out of three has a higher education degree (31, 1%)[13], in comparison with over 40% in the USA and over 50% in Japan.

Europe does not lack potential. We have researchers, entrepreneurs and enterprises meeting the global standards, as well as unique qualities which regard values, traditions, creativity and diversity. We have made important progress in creating the largest internal market in the world. European enterprises and civil society are actively engaged in both emerging and developing economies from the entire world. The European Union has approved the objective of occupying the labor force for people of both genders of 75% for the age group of 20-64 until 2020: an ambitious engagement considering the long-lasting European social model and its social security systems. The crisis has reduced the employment levels to 69% and has increased unemployment up to 10%, assuming that the labor force market can stabilize in the near future. The decrease of fertility, on the other hand, determines the active age population in the EU (15-64) to start decreasing in spite of the continuous immigration wave.

The most vulnerable people in our societies have generally been struck by the economic crisis. The situation of those with the smallest wages has continued to deteriorate. Young people, emigrants and those with a low level of qualification, which often depend on temporary and poorly-paid jobs, have been confronting with the largest increase in unemployment. Especially, a young person out of five on the labor market does not have a job; unemployment for citizens outside the EU is 11 percentage points larger than citizens of the EU, and people with a low level of qualification are confronting with a double increase in unemployment.

As it has been possible to observe in recent decades, the intensive usage of global resources has inflicted pressure on our planet and has threatened the security of provision. Keeping our current models of resource usage is out of the question. In the context of these changes, a more efficient usage

[9] European Commision – communication on behalf of the Commision for the European Parliament, Economical and social european comitee and regions Comittee, a digital agenda for Europe, Bruxelles, 26.08.2010.
[10] Eurostat, 2009, ages between 15 – 30 de ani.
[11] Eurostat, June 2010, < 25 years old.
[12] According to Cedefop projections.
[13] Eurostat, 2008, age group 30 - 34 years old.

of resources will be essential for insuring growth and employment level in Europe. This increase in efficiency will create important economic opportunities, will lead to improving productivity and reducing costs, stimulating competition. New products and services must be developed and new methods of reducing the used resources must be identified.

The Common Agricultural Policy (CAP) is one of the first community policies, created with the objective of ensuring the food provisions within the community. CAP represents a set of rules and mechanisms that regulate the production, processing and commercialization of agricultural products in the European Union and that presents an increasing concern towards the rural development.

CAP comprises two pillars[14]: a) *common market organizations* (common measures of regulating the functionality of agricultural products markets) and b) *rural development* – structural measures which aim at balanced development of rural areas. CAP has developed starting from the principles for a unique market (agricultural products circulating without restrictions within the EU), community preference (favoring the consumption of original products in the European Union) and financial solidarity (common measures are financed from a common budget). The European Commission presented on October the 12th 2011 a set of regulations which established the legislative frame of CAP for the 2014-2020 period, as well as an evaluation of the impact of certain alternative scenarios regarding political evolution. The legislative package from October 2011 consisted of four proposals of basic regulations for the common agricultural policy regarding: direct payments, an unique common organization of markets (COM), rural development and a horizontal regulation regarding financing, managing and monitoring CAP.

The reform proposals were based on the Communication regarding CAP in the perspective of the year 2020 from October 12th 2011, which emphasized the general policy options meant to respond to the future challenges with which agriculture and rural areas will be confronting and to fulfill the objectives established for CAP, namely:

- Reliable food production;
- Lasting management of natural resources and environmental policies;
- Balanced territorial development.

The legislative package for the cohesion policy, published on October, 6th 2011, included a general regulation for establishing common norms for all funds which are part of the Common Strategic Framework: the European Fund for regional development, the European social Fund, the Cohesion Fund, the European agricultural Fund for rural development (EAFRD) and the European Fund for maritime and fishing business. This regulation would allow a better combination of funds regarding a more powerful impact of action.

As well as in the case of other funds, in order to introduce a clearer connection with performance, specific objectives will be required for all programs regarding rural development. One part of the funds (approximately 5%) will be retained in a so-called "performance reserve" and will become available only when it is possible to demonstrate that progress is being made in fulfilling those specific objectives. The rates of co-financing from the EU will amount to 85% in the less developed regions, in outermost regions and in the small islands in the Aegean Sea and to 50% in other regions. For the next financial period (2014 – 2020), the European Commission proposes to allocate 281.8 billion Euros for Pillar I (direct payments) of CAP and 89.9 billion Euros for rural development. The total sum allocated to agriculture reaches 386.9 billion Euros.

In order to define the necessary actions for applying the Europe 2020 Strategy, the European Commission has proposed to reach until 2020, within the EU, the following objectives:

- The employment rate for the population aged between 20 and 64 – 75%;
- The level of investments in research and development – 3% of the EU GDP.
- Reaching the objective "20/20/20" (or 30/20/20, in case of respecting certain conditions) in the field of environmental changes and energy;
- The rate of early school drop-outs – 10%, and the population with a higher education degree, aged between 30 and 34 – minimum 40%;
- Reducing by 20 million the number of European citizens threatened by poverty (which would correspond with a 25% decrease of the number of people that risk poverty).

All these European policies are under close scrutiny at present, due to evolutions at international level:

1. Great Britain's Brexit.

From the moment Great Britain joined the European space (January 1st 1973), it has had a more pragmatic vision regarding its long-term interest, an interest which aimed at a much more fragile integration than it was wished for in Bruxelles. Great Britain had a different perspective on the monetary policy (rejecting the unique currency proposal, although the economic performances made this matter possible), the agricultural and commercial policies, as well as on people's free travelling. The degree of British europesimism has always been one of the largest within the member countries. Due to

[14] External affairs ministry, EU politics, common agricultural politics.

last year's evolutions, political forces and significant percentages of the British electorate pressured the British government into organizing a referendum regarding the country's integration in the E.U.

This detachment would have a major economic impact on Great Britain (the loss of approximately 85 billion Euros annually until 2030) and a period of economic slough. If Great Britain maintains its European Union membership, it could reach an economic growth of approximately 1.5% annually in the following years[15].

For or against maintaining the E.U. membership, the British Prime Minister, David Cameron, has placed in front of the Union partners four conditions regarding his support for the referendum which will be organized on June 23rd 2016[16].

- The first condition is related to sovereignty, meaning that increased forces are imposed for national parliaments, which can block the European legislation. Great Britain requires a censorship system, which will permit the member states to modify or reject European directives considered inappropriate. Theoretically, this mechanism should be approved by all member states and not imposed by Great Britain.
- The second condition is related to the Euro Zone and it imposes explicit recollection of the fact that the euro is not the only currency in the EU. This step would insure the states which are not members of the monetary union that they are not disadvantaged. Great Britain wants the states which are not part of the Euro Zone to not be exposed to the effects of a possible fiscal union and to be guaranteed that no contribute will be made to future bailouts.
- The third condition envisions integration. Great Britain wishes it were not obliged to participate in the efforts of constructing a closer Union (The United States of Europe), which in the future could lead to constituting a political Union.
- Finally, the forth condition is represented by the evolution of social benefits, i.e. restraining the migrants' access to social benefits. Basically, Great Britain wished the requests formulated by those who recently entered the Kingdom could be limited or even blocked, so that they could have access to social benefits 4 years after obtaining residency.

These requirements have been debated during many summits held by the E.U. The leaders of the member-countries reached an agreement, during the meeting in Bruxelles held between February 19th and 20th, 2016 regarding terms of maintaining Great Britain in the European Union. The debates were difficult since these requirements struck the interests of some of the union's members (especially Eastern countries, with a large number of emigrants towards western areas, including Great Britain). The referendum's result will be vital for the European Union's existence.

2. The evolution of Asian capital markets.

Ever since the beginning of last year (2015), Asian exchange has shown signs of panic regarding the evolution of China's economy and major variations on the petroleum market. Clearly the growth rhythm of Chinese economy has been recording a decreasing trend in recent years. Taking into account the market's dimension and the global influence it manifests, China's economic evolution can generate a new economic crisis on a global scale. The year 2016 has brought in Asia's stock exchanges significant decreases and harsh perspectives regarding the future[17]. China's decreasing economy has also accelerated the decreasing price for petroleum, since the Chinese industry's demand has dropped, which were responsible for 15% of the global GDP. To this extent everything is reflected in stock exchange in spite of a relative improvement in the West[18].

3. The refugees' crisis in Europe.

Europe, alongside with the United States, has always represented an El Dorado for populations of poor countries or for refugees in conflict areas. The phenomenon has always been present but in different proportions, depending on the social-economic and political events. The conflict in Syria has emphasized this emigrational tendency without limiting only to people in Syria. The western space mirage has caused inhabitants of the entire Middle East to wish to benefit from the European Union's prosperity.

Europe has always prided itself with its humanitarian tradition of receiving refugees and offering shelter to foreigners that are running from the face of danger and persecutions in their native countries. Today, the governments of European Union states must confront with an increasing number of immigrants, with legal as well as illegal statute in a space which lacks internal frontiers. The governments of the E.U. member states have decided to balance regulations in this matter to the extent of

[15] http://www.ziare.com/economie/produsul-intern-brut/daca-iese-din-ue-marea-britanie-ar-pierde-o-suma-cat-jumatate-din-pib-ul-romaniei-1354612
[16] http://cursdeguvernare.ro/reforma-ue-cele-4-conditii-impuse-de-marea-britanie-pentru-raminerea-in-uniune.html
[17] http://www.capital.ro/bursele-asiatice-distruse-dupa-prabusirea-de-ieri-a-pietelor-financiare-internationale-ultimele-evolutii.html
[18] http://stiri.tvr.ro/incertitudine-la-burse--criza-de-china-trimite-unde-de-soc-in-toata-lumea_64371.html#sthash.4RDSEF0J.dpuf

examining shelter demands according to some basic principles recognized in the entire Union. Thus, minimum common standards have been adopted for accepting those who ask for shelter and for obtaining a statute. A European Office of Shelter Support has been created, with headquarters in Malta, in order to facilitate cooperation between the EU's member states in this domain. Combating a massive flux of illegal seaway immigrants in recent years has become one the EU's main priorities. The governments of member states are cooperating for bringing human trafficking to an end to and for reaching common agreements for repatriating illegal immigrants. Simultaneously, legal immigration is better coordinated through EU regulations regarding family reintegration, long-term residential statute[15]. The last UN[19] numbers, not yet published (The Economist), show that Syria's population has reduced to only 16,6 million, from the approximately 22 million levels previous to the war. The opening shown by Germany towards refugees has created a true migration wave in 2015 (over 1.3 million people from Syria and the Middle East have reached Germany or other European states). This situation has challenged the European legislation regarding the Schengen space and the coherency of policies regarding free circulations on European level. Basically, every state placed on the path to Germany has encountered great problems regarding measures of limiting the crisis. The European states start to increase the number of divergent visions regarding the situation and the way to manage it. Eastern and Western Europe regard more and more differently the policies regarding this domain, and the potential quotes of repatriate refugees are rejected by an increasing number of states (Hungary, the Czech Republic, Slovakia, Poland, Romania – up to a certain point also France, are opposing the quota under the form proposed by Germany). Turkey has been suffering the hardest part of the refugees' crisis up until the present, by sheltering over 2 million Syrians and 200,000 Iraqi which had left from the path of violence, more than any other neighbor country of Syria.

The main effects of the refugees' crisis[20]:

- Modifying policies and regulations in some member states. Each of the member states has a different shelter system, which contributes to the actual border chaos and to 40 warnings launched by the European Commission for the member states regarding the urgent transposing of shelter directives in internal law;
- The crisis' impact on the Schengen space. The European Commission's president accepted Germany's request to reintroduce temporary controls on the borders with other states members of the EU, particularly at the border with Austria. The possibility of suspending free circulation between the EU's member states and Schengen would be applied for the crisis situations in article 16. The EU has the obligation to insure the proportionality principle for such measures so that the open borders and free circulation will reach normality;
- The crisis impact on the European law regarding shelter and migration. Europe is unable to receive millions of refugees and indeterminately. A common strategy and policy are absolutely imperative. The recently launched European agenda for migration[21] attempts to systematize an approach leading to the creation of a European law, as well as finding some new measures of preventing and combating illegal migration, which represent a threat on European security. The Dublin Agreement will be revised for the fourth time since it lacks functionatility in crisis situations. The commission takes into consideration a unique mechanism of shelter agreement also;
- The crisis' impact on European security. The refugees arriving in Europe are a potential target for being allured by extremist and jihadists networks which act in many European states;
- The crisis' impact on European identity. Many analysts consider that Europe will change radically and will become a Muslim continent if the current European leaders lose control of the immigrants number which arrive from a closed culture, radically different than the European culture. The number of Muslims in Europe in rapport with the total European population was of 7.6% in 2014. The failure of European immigrant's policies so far, from a radicalization perspective, of violent extremism and terrorist attacks within European borders raises serious signs of concern regarding public opinion.
- Economic impact. Economicly speaking, the costs for the refugee's wave, their journey to countries which offer shelter followed by costs of integrating them on European labor markets, will probably reach tens of billions of Euros. Only the aid Turkey has already received surpasses 14 billion Euros. On the long term, any European benefit resulted from this afflux is highly unlikely. The experience France has in integrating maghrebian immigrants (started in the '50s last century) at both social and economic levels stimulates a pessimistic view on integration.

In conclusion, the refugees' exodus phenomenon is an aspect which challenges European cohesion and unity.

[19] http://www.euic.mk/content/Brochures-pdf-NEW/EN/12_Lessons_EN.pdf
[20] http://www.contributors.ro/wp-content/uploads/2015/10/Pol-Brief-39.pdf
[21] http://ec.europa.eu/dgs/home-affairs/what-wedo/policies/european-agendamigration/backgroundinformation/docs/summary_european_agenda_on_migration_e n.pdf

4. The electoral year 2016.

The year 2016 is electoral in Romania (local and legislative elections), Austria (presidential elections), in the Czech Republic (legislative elections), Ireland (legislative elections), The People's Republic of China (legislative elections), Russian Federation legislative elections) as well as in the United States of America (presidential campaign). What these electoral events have in common is exactly the fact that they are influenced by the above mentioned phenomenon (the refugees' crisis, a possible global crisis and the probable European crisis which might follow the British referendum in June, 23, 2016). Each of these countries' politicians has their own current interests – winning the elections. Populist policies during a crisis have an increased popularity which can lead to wrong long-term solutions. Some of the elections in countries with large global influence (presidential elections in USA, legislative evolutions in Federal Russia, and the Great Britain referendum regarding the country's membership n the European Union) will determine mutations in public policies on a global scale. Political reactions should also be observed within countries from Visegrad (the Czech Republic, Hungary, Slovakia and Poland), countries which refuse to accept quotas as well as pro-immigration policies. Just as important, a possible new attack following the one which took place in Paris in October 2015, would represent a political and social disaster, with major influences on short term evolutions.

Last year we made the following observation regarding the European Union: as long as states such as Germany exist, well established from economic and political points of view, populism cannot extend.

Unfortunately, today, Germany's policy of open doors, without taking into consideration economic, social, political and religious implications, can lead to phenomena which will endanger the very European Union. Germany is confronting with the government's dramatic decrease in popularity and there are voices asking for additional measures of security for the European Union's external borders in order to maintain the free-circulation within the Schengen space.

5. Conclusions

The elections for both the European Parliament as well as the National Parliament in 2014, in several countries members of the European Union showed that citizens of the EU's member did not fully trust the future of the European construction[22]. In the more developed countries, the optimism resists, while in less developed countries affected by crisis, the number of skeptics is significant. Turning a significant part of electorate towards euro-skeptical or nationalist political parties could be interpreted as an answer to the unpopular austerity measures. As surveys of the most recent Eurobarometre[23] show, a large majority of Europeans consider that the European Union is responsible for imposing policies of economic austerity. Fueled by the politicians' populist or radical messages, which are increasingly more popular in a period marked by the economic crisis' effects, the anti-austerity reaction is gradually changing in one or many new ideological movements that nevertheless seem to have a different vision of the European Union's project opposed to the one currently assumed. In the context in which voices, usually singular within the European social model, become increasingly more powerful and with larger echoes within masses, and projects emerged out of radical citizen movements such as Syriza in Greece and Podemos in Spain, together with nationalist parties such as the National Front in France and UKIP in England, have access to governing or will most likely accede to it in the following elections, according to opinion surveys. We should ask ourselves what we can expectt from the dynamic European integration, what it will bring us and where it is heading.

Recent surveys made in member countries of the EU suggest that the Europeans have their trust divided as far as European construction and its leadership are concerned. More than half the Italian citizens are dissatisfied by the EU's leadership performances, according to the Gallup[20] survey which has recently been conducted. Some surveys reveal a slight increase in the EU's leadership trust; however it was particularly noticed in countries in which optimism has slowly grown, including the three countries that successfully finalized the salvation program for the sovereign debts crisis, Spain, Portugal and Italy. In 2014 approximately 49% of the EU citizens appreciated the government, a significant increase opposed to 2013, when trust decreased and reached 40%. Trust in leadership remains the lowest in countries under the salvation program, Greece and Cyprus. In 2014, only 23% of Greeks and 28% of Cyprians appreciated the EU's leaders'' performances. Thus, the year 2016 of

[22] Drd. Cristian Moisoiu "Cetățenii UE sunt divizați în ceea ce privește încrederea în viitorul comunității europene", Institutul de Economie Mondială di cadrul Academiei Române, 2015.

[23] European Commission – Eurobarometer No. 82/2014. Eurobarometru este raportul de anchetă socială al Comisiei Europene, ajuns la numărul 82 şi este realizat bianual în 35 de ţări sau teritorii, dintre care cele 28 de state membre, 6 ţări candidate şi comunitatea turcă din Cipru. Eurobarometru 82 a fost efectuat în perioada 8 – 17 noiembrie 2014.

[23] sondajul Gallup a fost realizat prin interviuri telefonice sau faţă în faţă şi s-a derulat în perioada iunie – octombrie 2014. Au fost realizate 1,000 de interviuri în 27 de ţări membre UE, cu persoane adulte provenind dintr-un eşantion reprezentativ, cu un nivel de încredere de 95% şi o marjă de eroare de ±3%.

legislative elections in a series of European countries determines a dismal perspective in regard to the population's trust in extremist parties. The right extremist Austrian party, Freedom Party, consolidated its position by doubling its result from the previous elections. The problem of political shelter for refugees has played an important role in these elections. The Austrian Institute for Public Opinion Strategies caution that the country's territory is daily entered by thousands of immigrants, the majority of which are from the Middle East, while passing towards Germany and other northern European countries. To this extent, left parties in the Czech Republic have recorded a sudden change for the better in the population's trust especially due to the imposed austerity measures.

Greece, as well as Spain and the recently entered Croatia, are experiencing drastic measures of austerity. Great Britain's concern regarding the Union and euro zone is an element that increases its presence in the European agenda. Limiting the immigrants' access to social aid for a period of 4 years is one of the measures meant to convince the British. A new negotiations project signed by Great Britain and the EU considers that national parliaments of the member states will have the power to block unwanted European laws. Another stipulation in the agreement which will present an interest to Great Britain is that a member state can limit the immigrant workers' access to social aids up to four years. The attempt to convince Great Britain to not leave the European Union is carried out through these proposals.

In this study we have emphasized the European influences on phenomena which mark the current period. We cannot avoid asserting that these influences exceed the European level. They are also not the only elements which will define tomorrow's outcome. The Russian Federation's relations with the West and NATO, China's political, military and economic changes, power rapports in the Middle East and even the evolution of USA – E.U. relations, are elements which can modify the social-economic development on the global level.

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THE REFORM OF NATIONAL SOCIAL-ECONOMIC SYSTEMS AND EUROPEAN REFORM

Carmen RADU [*]
Liviu RADU [**]

Abstract

The paper proposes to analyze from a national and European perspective the reform possibilities of public policies which regard the social-economic sphere. We thus take into consideration the analysis of the public policies' evolution regarding the health system, pensions system, demographic stimulation and the undertaking of key-structural reforms for economy and administration. Resources marked as necessary for a reform are burdened by new challenges emerged on the international agenda: a new economic crisis with starting point in China, managing evolutions on fuel markets, managing the refugees exodus situation which forces the European Union's frontiers, etc. Establishing social-economic security at national level as well as in the European Union depends on the pragmatism of economic and social policies as well as on the courage to start a reform.

Keywords: *reform, health system, national security, public policies, demography, long-term economic sustainability.*

1. Introduction

As we undertook in 2012, the year in which the crisis phenomenon became chronic (through the papers published at CKS 2013 and 2014) we drew attention on the exponential increase of the planet's population while the global resources were continuously decreasing. Resources entail time for discovery, conservation and usage, whilst time for all of these calls for a long period without major conflicts. The economic system represents a total of elements which interact and form a distinct unity. The systematic approach is also available for characterizing social life. Real social activity cannot be reproduced "on segments", but as a whole which consists of diverse contradictory processes, connections and elements. In economy, the principals of systemic analysis have been used since the second half of the 20th century, simultaneously with the emergence of economic cybernetics. Approaching economy as a wholistic systematic formation permits the accomplishment of shaping and managing the social-economic processes. Social-economic systems are complex and difficult to administrate because man, in the role of subject and object, comes with a changing multitude of needs, interests and motivations of behavior. Given that social life is multilateral, it divides in subsystems: economic, political, social, legal, ideological, social and family, as well as a cultural and moral subsystem[1]. The actual historical order in society is determined by the institutional system, whereas world peace is insured by the functionality of the cultural, ethical and moral subsystem. Achieving a risky incursion in the maintenance of a "healthy" state for the moral subsystem as part of the social-economic system is exactly what the authors are aiming. The dynamics of social development is reflected in science rather contradictory. Among the conceptions on humanity evolution, the theories of development are emphasized on one hand in two varieties: a "single-linear" determinant development of K. Marx, I. Schumpeter and a "multi-linear" development (communist ideologies followers) and on the other hand the genetics theories, according to which society is moving from one step to another by means of transmitting an unchanged "genetic code" (A. Smith, K. Menger) or a changed one (T. Malthus, T. Veblen). In the 21st century, with a background of historical challenges which endanger the very future of humanity, a vital necessity is represented by the global change (on a world level) towards a new quality of human social activities, towards development and security. Under the influence of environment factors (weather conditions, geographical position, regional organizational particularities aimed at ensuring human necessities), informal institutions have emerged and affirmed: household traditions and stereotypes, religious habits and norms, peoples' ethics and moral principles. Throughout history, empirical accumulation and natural selection of informal institution have been produced: „unwritten laws, observed by people without being questioned and often without being understood, which were transmitted from one generation to another as something natural and imperative for community

[*] University Lecturer, PhD, Faculty of Social and Administrative Sciences, "Nicolae Titulescu" University of Bucharest (e-mail: **ceradu2005@gmail.com**).
[**] University Lecturer, PhD, Faculty of Social and Administrative Sciences, "Nicolae Titulescu" University of Bucharest (e-mail: **lgradu2005@yahoo.co.uk**).
[1] Păun, Mihai. Analysis of economic systems, All Publishing House, 1997, pages 19-20.

members"[2]. These norms are maintained, transmitted and insure historical sequencing in social-economical development and national character. Under these circumstances every nation forms a distinct entity with a well defined individuality level. Nevertheless, in the current social, political and economic situation, globalization no longer represents an attempt of economically unifying countries in one entity and, instead, seems as an attempt towards an un-natural blend between cultures, norms, traditions, degree of development, etc.

2. Content

We aim to analyze from a national and European perspective the reform possibilities of public policies which concern the social-economic sphere. An analysis of public policies' evolution regarding health system, pensions system, demographic stimulation and the undertaking of structural key-reforms for economy and administration.

2.1. Health system reform

Ensuring population health represents the main objective of any health system[3]. The health system of any country must involve respect for individuals (confidentiality and autonomy) and guiding the sick people through prompt services and superior quality equipments. Health systems are defined by the dominating financing method and those used in the European space are as follows: Bismarck classic system, Beveridge type national health system, Semasko type centralized health securities system, private health securities system.

A financing system was created in our country for the medical act consisting of public and private resources in order to stand on equal chances for medical services and insuring equity in the matter of payment of delivered services. The Romanian health system represents a combination of the above mentioned systems. Health can also be calculated through sub-indicators such as: life expectancy, morbidity and mortality. Each European state has developed its own financing mechanisms; all systems are grounded on a combination of financing sources, however the majority is (directly or indirectly) controlled by the state, as health systems in the European Union are financed by public contributions and direct contributions. The systems; main objective is to distribute costs for medical services between the sick and the healthy persons. No health system is exclusively state owned, primary medical care combines private liberal medicine with public medicine in the majority of the countries in the European Union. The European Union countries[4] have an agreement, a mechanism of solidarity according to which health cannot be left only under the action of the market's mechanisms. Thus, national governments have the responsibility to organize healthcare services and to guarantee such are properly delivered. The European Union has the role of completing national policies through measures of the following nature:

- Aiding Member States in achieving common objectives;
- Generating scale savings by sharing resources;
- Aiding Member States in answering common challenges such as pandemic, chronic diseases or the pressure that health systems are facing in the context of increased life expectancy.

The European Union's policy which was implemented through the health strategy, aims at the following:

- Prevention – especially by promoting a healthy life style;
- Ensuring access to quality healthcare services for everyone;
- Approaching serious threats on health which affect an increasing number of European countries;
- preserving a good state of health along with aging;
- Promoting dynamic health systems and new technologies.

Actions specific to the EU:

- The EU establishes norms and standards practicable in the entire Europe regarding medical products and services as well as patients' rights;
- The EU places at the disposal of Member States instruments that facilitate collaboration and identification of good practices;
- The EU finances projects through its program in the health domain.

Preventing diseases. The EU supports diseases preventive actions . For example:

- Promoting responsible food products labeling in such way that consumers are aware of what they consume;
- Taking measures against breast, uterine and rectal cancer, by carrying out screening programs in the entire Europe, supplying orientation for treatments quality assurance, sharing knowledge and resources;
- Taking measures for promoting physical activity and healthy diets, encouraging governments, NGOs and the industry to work together and help citizens with changing their life style;

[2] E. Feuraș. Institutional environment: shaping, functionality, reshaping, ASEM, Chișinău, 2001, page 91.

[3] PRACTICA MEDICALĂ – VOL. 3, NR. 3(11), AN 2008116 1PRACTICA MEDICALĂ REFERATE GENERALE Sisteme de sănătateeuropene Dd. Ec. I. BÂRLIBA, Spitalul de Urgență „Sf. Spiridon", Iași și Prof. Dr. GEORGETA SINIȚCHI Universitatea de Medicină și Farmacie „Gr. T. Popa", Iași.

[4] European Commission General Direction of Communication – Informing citizens 1049 Bruxelles BELGIA, Manuscript actualizat în noiembrie 2014.

- Combating smoking by elaborating the legislation regarding tobacco products and by carrying out programs for awareness, promoting and sponsoring.

Preventing diseases. The EU supports national governments to more efficiently getting prepared for fighting against threats on health which affect more countries and to better coordinating reactions. The European Center of Disease Prevention and Control, with headquarters in Stockholm, evaluates emergent dangers in order to allow the Union the possibility to rapidly react. The Center collects information related to existing threats and collaborates with similar institutions in Member States for implementing European systems for monitoring diseases.

Pharmaceutical products.

All medicinal products in the EU must be approved nationally or at EU level, prior to being launched on the market. The safety of a medicine traded in the EU is monitored throughout its entire life cycle. If it is found dangerous, rapid measures are taken: sales are suspended or the marketing authorization is withdrawn. The European Commission, national authorities and European Medicines Agency (EMA), with headquarters in London, play an important role in this system. EMA comes to support national regulators by coordinating activities of scientific evaluation of the quality, safety and efficiency of medicinal products.

Research and innovation. Through its research program, Horizon 2020, the EU will spend, between 2014 and 2020, approximately 7.5 billion Euro for research actions meant to improve European health systems[5].

Abroad treatment. The EU takes measures to support patients in getting healthcare services abroad, in cases when this is imperative or easily achieved: for example, if the nearest hospital is situated on the other side of the border or if a specialized treatment is available only abroad. The right of citizens of the EU to benefit from treatment in another Member State is clarified by the EU legislation regarding patients' rights within cross-border healthcare.

The European card of social health securities facilitates access for citizens to medical services if they become ill during a trip in another country member of the EU.

International cooperation. The EU collaborates closely with strategic partners such as the World Health Organization in regard to improving medical services worldwide. To this end, they finance research projects, support development, increase access to medicinal products etc.

2.2. The pension system's reform

It is well known that everywhere in the European Union the pensions system's reform faces strong opposition from the people, as it can be seen in countries such as Spain, France and Greece. For instance, Spain is the country that fully felt the financial shock impact of the economic crisis that emerged in 2008. The country faced an unemployment rate of 23%, the real estate market's crash and an increased level in the people dissatisfaction. In 2011 it was forced by European organisms to reduce its budgetary deficit by 6%. In spite of this, in 2013, Spain adopted a package of economic reforms and austerity budgetary measures. The radical measures came as a result of concerns that the country could enter bankruptcy on financial markets.

More than ten strikes of large proportions took place in France[6] against the pensions reform in 2010, especially for increasing the minimum retirement age by two years, from 60 to 62 and of the legal retirement age from 65 to 67; these strikes lasted from March to October, and included several millions of employees in the public and private sectors, severely affecting sectors such as education, urban public transport, SNCF, telecommunications, French petroleum refineries. The organizers were convinced the reform was not adapted for financing pensions, similar to previous reforms which failed to solve the problem (Balladur in 1993, Fillon in 2003 or the 2007 special regimes reform). A number of 615 amendments were filed by the presidential majority and by the opposition, among which the 249 amendment as well, which requested for a rapid alignment of special pensions regimes for government and parliament members.

As far as Greece is concerned, the country was heading towards the edge of the cliff in 2015, being one step away from bankruptcy. Being excluded from international bonds markets, the country was close to reaching payment incapacity and called to a new installment of funds from the aid program. In this context a series of European countries requested that Greece would be excluded from the euro zone. Greece intended to adopt a profound reform in the financial field in general and in particular in the incomes derived from pensions.

In Austria the retirement age starts from 65 years of age for full pension, 62 years of age for early retirement in the case of unemployed persons, while employers in „long careers" retire between 57 and 62 years and persons working in "shameful" conditions retire after 60 years of age without any penalties. In Italy the early retirement system called "seniority pensions" allowed people to retire after 35 years of activity regardless of age and without penalties. In

[5] http://europa.eu/pol/health/index_ro.htm
[6] http://necenzuratmm.ro/social/42414 - Thomas Csinta

spite of all these, the Italian government[7] increased the age of retirement without generating protests, especially because of trade unions segregation. This reform is based on a progressive increase, starting with 2015, of employees' retirement age from private and public environment, depending on life expectancy. Its principle was already present in a law voted in the summer of the year 2009, but the recently adopted austerity plan mentions the implementation methods. These measures would lead to allowing savings of 86.9 billion Euros until 2050, considering that the pensions system, reformed in 1995 and 2007, has reached a balance. Savings are welcome in Italy, which has an enormous public debt. According to estimates, between 2015 and 2050, the legal age would be increased from 65 up to 68 years and four months for men in the private sector and magistrates and from 60 to 63 years old and five months for women in the private sector, within the „age retirement" which sets forth a minimum of 20 years of tax payment. For „senior retirement" which sets forth a minimum of 35 years of tax payment, the retirement age is expected to increase from 62 to 65 years and four months. On the other hand, the new measures do not apply to people who have paid taxes for a period of 40 years, who can retire even if they do not reach the legal retirement age.

Should we take into account the MMGPI[8] (The Mercer Melbourne Global Pension Index) in regard to different systems of pensions regimes which dominate the global system (with the following characteristics: 40% adequacy, 35% sustainability and 25% integrity out of the total index), in the year 2010 the situation was as follows:

Table 1: Countries' position according to MMGPI

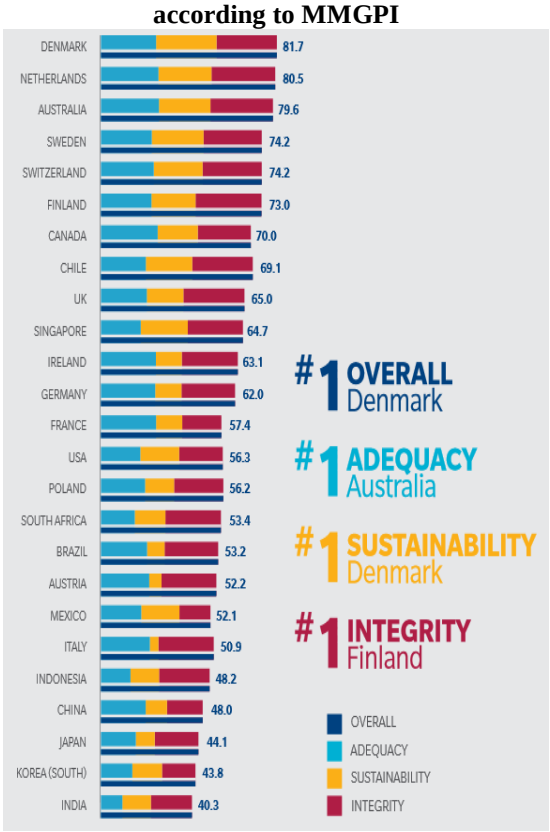
Country	Position		Overall Index Value	Sub-Index value %		
	2010	2009		A 40%	S 35%	I 25%
Netherlands	1	1	78.3	76.1	71.6	91.4
Switzerland	2	-	75.3	73.1	71.8	83.5
Sweden	3	3	74.5	72.8	72.9	79.5
Australia	4	2	72.9	68.1	71.7	82.4
Canada	5	4	69.9	75.0	56.8	80.1
Great Britain	6	5	63.7	64.9	47.1	85.3
Chile	7	7	59.9	52.1	54.7	79.8
Brazil	8	-	59.8	72.9	29.1	81.7
Singapore	9	8	59.6	43.7	63.6	79.5
USA	10	6	57.3	54.3	59.0	60.0
France	11	-	54.6	74.9	29.7	56.8

Source: http://necenzuratmm.ro/social/42414

The Netherlands occupied the leading position, having the highest integrity rate and the smallest adequacy, followed closely by Switzerland. The two leading countries had an index exceeding 75, while France occupied the 11th position with an index of approximately 50. Currently (for the year 2015), according to the Australian Center Financial Studies (MERCER), the situation presents Denmark in a leading position[9], with an index exceeding 80, followed by the Netherlands, while France is placed on the 13th position, immediately after Germany, with an index little over 50.

Actually the most recent European Pensions Classification made public, carried out by Aon Consulting, reveals that retired people in Denmark, Estonia, Ireland, Latvia and the Netherlands benefit of a well organized pensions system with one of the highest living conditions from the civilization standpoint. Over 95% of Danish pay taxes to private pensions funds, thus adding to the incomes obtained after retirement. The Danish pensions system represents a success also because of the high age until which a person can work. Not as far from Romania, in Bulgaria, the first facultative private pensions fund was created in the year 1994 and the mandatory pensions funds were initiated in the year 2000.

Illustration 1: The most developed countries according to MMGPI

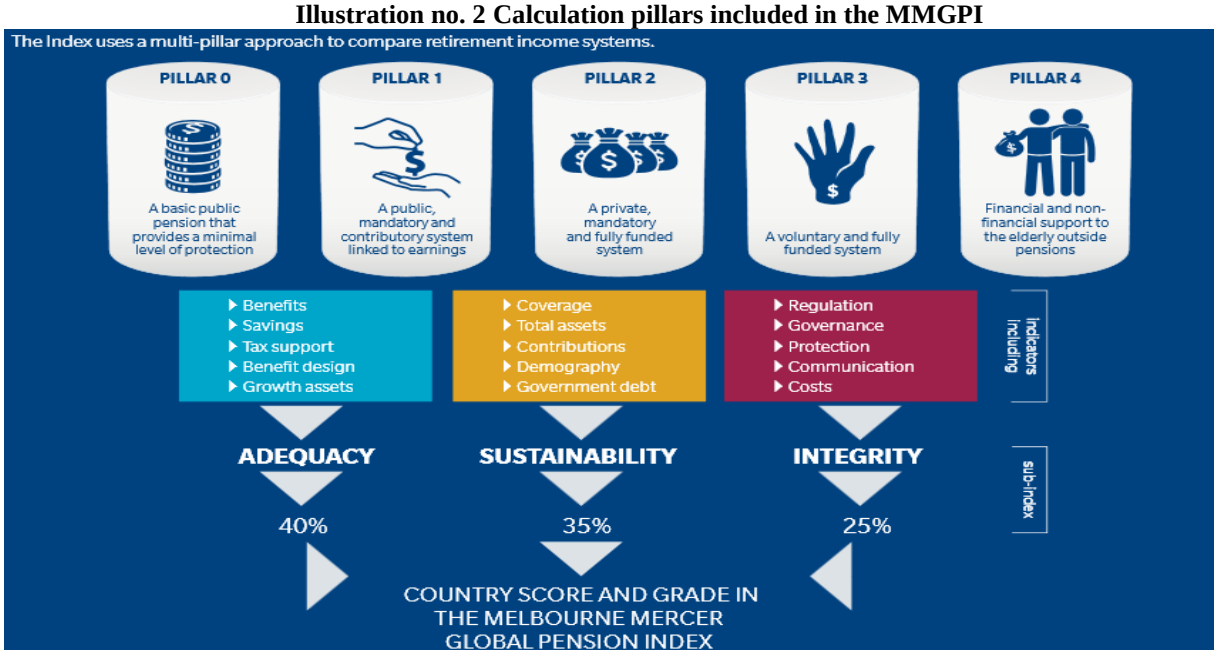


[7] Online news, July 29, 2010.
[8] http://www.globalpensionindex.com/wp-content/uploads/Melbourne-Mercer-Global-Pension-Index-2015-Report-Web.pdf
[9] http://www.mmuncii.ro/pub/imagemanager/images/file/Integrare/Danemarca.pdf

Source: http://www.globalpensionindex.com/wp-content/uploads/Infographic.pdf

The pensions system in the Netherlands is considered to be on the first places in the EU[10] (as it can be seen in Illustration 2). The Netherlands can afford to pay strong pensions without endangering sustainability of the public pensions system is reached only by adjusting either benefits or contributions. Moreover, in recent years it has been noticed that adjustments made to benefits (pensions) have generated temporary corrections in the public budget, but have not changed the pensions system,

Illustration no. 2 Calculation pillars included in the MMGPI



Sursa: http://www.globalpensionindex.com/wp-content/uploads/Infographic.pdf

the system's equilibrium. By comparison, Romania has one of the weakest performance indicators in the Union. An analysis made on the indicators shows that the system is unbalanced: we pay pensions a lot higher than the system can support. The Netherlands has the best and most balanced pensions system among all countries in the European Union. At least that is what has been revealed by the results of a research made by specialists from the National Institute of Scientific Research in Labor Domain and Social Protection under the Ministry of Education. The Dutch system is a multi-pillar one, as well as the Romanian one. Pillar I provides a basic universal public pension, which means that all people with ages above 65 have access to this basic public pension, under the sole prerequisite of being that residents, and not that of having been tax payers. In order to obtain a complete basic pension one must live 50 years in the Netherlands. In Romania, in order to optimize the public pensions system[11] it is not enough to simply make corrections in the explicit debt of public pensions, but to implement policies in rapport to the „implicit public duty"[12] in the public pensions system. Under these conditions we could overcome the phase in which the financial the configuration of which depends too much on electoral elections and too little on the economy. Furthermore, interventions in the pensions system through which a budgetary balance was aimed, were filed against in court so that their effect is obscured and we thus return to the same reference system. The international practice[13] demonstrates that in some countries a fund reserve of public pensions plays the role of a "bumper" for balancing the public pensions system. In other states, the same type of fund is used both as a bumper as well as for savings and payment. Thus, in France, the fund reserve (established in 2002) has the role of contributing to the PAYG scheme's sustainability (Law nr. 2001-624 of July the 17th, 2001). In Ireland and New Zeeland the reserve fund plays the role of „tax smoothing", meaning that it covers future deficits, without the right for withdrawals to be made sooner than a certain term. In Japan the system is more liberal, the reserve fund predominantly has an accumulation function and implicitly an investment function. In South Korea, Sweden and Norway the reserve funds are for accumulation, being oriented towards moderate or low risk investments.

[10] http://www.ier.ro/sites/default/files/pdf/SPOS_2011_-_nr_4_anexe_RO.pdf
[11] Nicolae Mardari și Valentin M. Ionescuhttp://www.contributors.ro/wp-content/uploads/2012/10/studiu-pensii-Institutul-Ordoliberal.pdf
[12] Carmen Radu, Liviu Radu "Resursele umane în contextul crizei economice" CKS 2014.
[13] Robert Holzmann, Robert Palacios and Asta Zviniene: op.cit. 2004.

2.3. Demographic stimulation or a collapsing EU?

Romania as well as the entire Europe[14] *is facing serious demographic problems and somber perspectives. A problem that in 15-20 years will create difficulties for the labor market – as labor force, as well as health and pensions budgets – increasingly expensively supported from the state budget. Nevertheless, public policies lack the perspectives which should be the concern of the officials' that have a medium and long view. The few measures that are actually taken are rather of social support than of strategic policy, unless they are purely electoral. In few cases they are accompanied by impact studies and a scientific analysis. Changes on a demographic level*[15] *have a significant impact on the lives of Europeans. In 2014, there were 507 million regular residents in the European Union. This number represents little over 7% of the total world population, a percentage almost two times smaller than it was approximately five decades ago.*

The structure and profile of the EU's population have changed considerably, mainly due to: lower fertility indications; changes in the family forming patterns; the desire for larger personal independence; changes of men and women's' responsibilities; higher migration levels; higher geographical mobility and an increase in life expectancy. These demographic changes have lead to changes in families' characteristics and have generated: a decrease in average sizes of households; different forms of living relationships and a record number of people who live alone. As a consequence, there are considerable differences in the way we currently live as opposed to 50 years ago and it seems that the future decades will continue to produce important changes considering that, for example, the aging level of the EU population is progressively increasing. Indeed, it is estimated that the growth rhythm of the EU population will continue to decrease, thus it is anticipated that in the following 30-40 years the total number of people regularly residing in the EU will stagnate and, possibly, start to decrease.

Also, as we showed in the 2014 article[16]*, in 19th century England, the well-known mathematician and demography specialist Thomas Robert Malthus, made some predictions regarding the intensification of economic crises caused by overpopulation. In his study,* „An Essay on the Principle of Population" from 1798, Malthus predicts humanity's collapse through the fact that „the population's force highly exceeds the earth's capacity to ensure resources necessary for human subsistence". We then emphasized the planet's increasing population with all the consequences which derive from this, while today we ask ourselves if an inversely proportional rapport exists between the degree of economic development and the population growth. Unfortunately history has confirmed these concerns.

Between the years 2007 and 2011 a very large number of refugees entered European territory without legal documents. The majority of immigrants com from the Middle East, Africa and South Asia. According to the European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union[17] (FRONTEX, operational from the year 2005), we are currently facing the biggest refugees wave since World War II. According to the same source emigrants mostly come from Syria (28%), followed by Eritrea, Afghanistan, Mali, Gambia, Nigeria and Somalia[18].

The more developed a country is, the more its birth rate is dropping and the older its population is. In this context, Germany is counting on integrating millions of immigrants in order to cover the labor deficit and to maintain economic growth in the following decades. According to German expert's estimations, Germany's active population will decrease by six million people by the year 2030, in the context of a decreased birth rate. The labor force deficit risks generating problems for preserving the German economy rhythm. In spite of all these, the wave of immigrants will not be so easily assimilated. Although some immigrants, especially those arriving from Syria, are higher education graduates, approximately 20% are illiterate. In this case, the immigrants risk making the social situation in Germany more difficult. The number of beneficiaries of social aids could increase with almost 500 thousand.

3. Conclusions

The current global recession, the increasing interest rate in the USA, as well as the increasing oil prices and the disappearance of large companies listed on the international stock markets – startups, most of them in technological domain, evaluated at 1 billion dollars at least – are some of the predictions

[14] Juan Yermo, quoted paper.

[15] **Vasile Gheţău, directorul Centrului de Studii demografice al Academiei Române.**

[16] Carmen Radu, Liviu Radu "Resursele umane în contextul crizei economice" CKS 2014.

[17] Cooperation between national border authorities. Frontex is headquartered in Warsaw, Poland. In 2011, folllowing an assessment of the activity of Frontex and in response to the requests fromthe European Council regarding the increase of its role and operational capacities in fighting against illegal immigration (also in the European Pact for Immigration and Asilum adopted in 2008 and the Stockholm Program adopted in 2009), the original document for creating Frontex was amended, further increasing the possibilities for this agency to strenghten cooepration.

[18] http://publications.europa.eu/resource/cellar/b8253170-cd6a-48c5-9a6a-2b91d31f7374.0014.02/DOC_1

made by economists and financial analysts for the year 2016. In Europe, the main political economic threat will be, as it is easily observed, the refugees' exodus.

The highest risk which European states might face in the year 2016 is represented by the refugees' crisis[19]. „We consider this to be the biggest threat the European Union has ever faced. The terrorist attacks in Paris have increased risks regarding the refugees' crisis impact, which could cause political changes in the EU, or in consumers' behavior regarding expenditures. Any of these changes could negatively affect the investors' view regarding the European economies' evolution and corporations' profit". The American investments fund manages assets of over 100 billion dollars and is held by 2,200 clients worldwide. As a result to recent concerns on an international plan, investors have become more alert to the possible implications the refugees' crisis might have on European states and capital markets in general.

The Brexit threat. According to the pro-European Open Europe organization, the probability that Great Britain leaves the EU with the current parliament is of 17%. Most British people would vote in a referendum that their country remains in the European community. A survey carried out for The Times shows that 34% of voters would choose the EU, as opposed to 18% who would prefer the Brexit. Also, the support for organizing a referendum decreased two years ago from 58% to 50%. The problem is that 32% of the voters mention they could be influenced by either side. Another survey, carried out for a well-known daily newspaper, suggests that 45% British people would vote in favor of the EU, and 38% against it. However, the results of British elections, which came as a shock for the majority of market research firms, show how unreliable these surveys are. As the above mentioned daily newspaper remarks, considering that the surveys were not able to reflect the popularity of conservators, they probably fail to capture the entire frame of hostility towards immigration, which is a sensitive problem in Great Britain. It is likely that many people do not admit in front of interviewers that they feel uncomfortable living next to an immigrant neighbor. We must mention that many British publications have clear positions regarding the Euro zone and the EU and that they would not hesitate, any time they have the chance, to criticize European institutions.

It is considered that the law required for organizing a referendum in Great Britain could be approved until June 2016, which will make plebiscite possible in July or September 2016, at the end of the summer vacation. One of the reasons for organizing the plebiscite next year is that the most important negotiators, France and Germany, will be occupied with their own elections, a factor which will influence the number of concessions that they would make to London .

The Brexit perspective has been received with coldness by finance and business communities. In a survey in which 2,600 executives from 36 countries participated, conducted by Grant Thornton, almost two thirds of the respondents mentioned that England's leaving the EU would have a negative impact on Europe. By comparison, 45% of them mentioned their concern that the Grexit would harm the EU economy. A serious amendment of European treaties is highly unlikely, however it can be assumed that the British Prime-Minister could obtain a few concessions through negotiations, perhaps for rules regarding immigrants or voting rights.

However, if Greece leaves the Euro zone, the probability will increase that Cameron's government obtains more of what it demands. The ambitious European project will be in difficult to manage state, should the monetary union lose one of its member states. Losing one of the largest economies could be dangerous for the EU. The Grexit depends on the integrity of a monetary union of 19 members, which does not include Great Britain, while the Brexit strikes the integrity of the EU, the largest commercial block in the world. Greece has a small economy and a reduced population. Great Britain is the second largest economy in the EU.

On the other hand, it is considered that Great Britain will not have too much to lose should it leave the EU as Switzerland and Norway are not members of the EU and yet their economies are prosperous. England can negotiate free trade agreements with the EU, but in which the dominant force would be EU. Also, without England, Germany's political and economic domination in the EU will be higher. It is very likely that the Brexit accelerates the Scotland's parting from the Great Britain. In any referendum, the Scottish would probably choose to continue being a part of the EU. Also, if Great Britain leaves the EU, it risks becoming a smaller player in a globalized world.

Although the word Grexit is on everyone's mind, the probability that Greece will leave the Euro zone is low. The Syriza government party has renounced on some of the promises with which it had allured the electorate, such as cutting a part of the country's debt and stopping austerity. The Euro zone, CEB and IMF have never said they would not support Greece. The majority of analysts agree that the Grexit would be harmful mainly for common Greeks that after the damage caused by austerity will also have to support the damage of reconfiguring an economy that no longer receives external financial support. Simultaneously, Greek banks and their

[19] According to the chief of investments with the american private equity fund Bessemer Trust, Rebecca Patterson - http://www.profit.ro/stiri/economie/criza-refugiatilor-principala-amenintare-politica-si-economica-in-europa-in-2016-14473386

subsidiary abroad will encounter problems in keeping clients and their deposits. However, the Euro zone has sufficiently recovered in order to resist the shock waves produced by the Grexit.

Along with the refugees' crisis, the global economy is facing a new recession which this time is based on China's deceleration economy[20]. It is considered that we find ourselves one strong shock away from a new global crisis which could most likely emerge from China, where factors such as over-debt, aging population and excessive investments undermine economic growth. In case of a new recession, Eastern European and South Asian states that have a relatively low level of public debt appear to be better positioned for facing changes determined by the next cycle of economic growth. Not all analysts share the opinion according to which China's transition from an export based economy to an economy supported by internal consumption will generate a chain reaction strong enough to reverse economic growths on the world level. „I do not believe we will experience the Chinese economy's forced landing[21]. The labor market remains balanced on mostly all segments. Even if the gross domestic product advances by 5.8%, the Chinese economy will create new work places, especially in the sector of services based on intensive manual labor. In addition, it is less likely that China's financial sector will enter a crisis, taking in consideration that the majority of industries are supported by the government". Nomura company has recently reviewed as strongly decreasing the estimation regarding Chinese economy in 2016, from 6.7% to 5.8%.

As regards the growth of the monetary policy interest rate in the USA, most analysts anticipate that the Federal Reserve (Fed) will increase the interest in more phases over the following year. USA's 10 years bonds performance will increase and reach a level of 2.6 – 2.8% a year by the end of this year, with assets of 20 billion dollars.

Large differences in Fed and European Central Bank's (ECB) policies will probably be encountered. The first will wager interest rates in a few steps next year while the latter will extend the balance of assets even more than it has announced up until now.

The majority of economists anticipate good performances in 2016 for the companies listed on the stock exchange market, especially for blue-chip shares and those in the banking industry. On the other hand financing for startups which invest in new technologies might be reduced starting next year, and many companies might not survive to a public offer on the market. In the last two years, Greycroft Partner reported earnings of 2.6 billion dollars from portfolios sales.

Just as important, the oil price will recover until a level of approximately 60 dollars per barrel in 2016, and the main growth catalysts will be the governments of the major oil exporting countries. It is also possible for the prices of natural resources to grow, especially due to political reasons. Sovereign investment funds, such as the ones in Norway and Saudi Arabia, have already started to report decreasing assets and the process will be reversed since authorities cannot afford to register fluctuations at state reserves level. The oil price for will probably stabilize around 60 dollars/barrel.

The European Union is facing a major paradigm change, which is perhaps the biggest change since its creation. The EU can choose between two models: the first implies the reformation of actual structures while maintaining the identity of the 28 Member States (one of Great Britain's basic requirements in view of Brexit); the second, much more radical model regards a profound unification of all European structures eventually leading to the creation of the United States of Europe.

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[20] Ruchir Sharma, chief of emerging markets and macroeconomy of the Morgan Stanley Investment Management - http://www.profit.ro/stiri/economie/criza-refugiatilor-principala-amenintare-politica-si-economica-in-europa-in-2016-14473386

[21] Yang Zhao, chief at Nomura Holdings, financial division for the Nomura Japonese group.

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LEARNING GERMAN AS A THIRD LANGUAGE THROUGHS ESL. STRATEGIES TO DEVELOP VOCABULARY

Carmen-Daniela CARAIMAN[*]
Camelia NEAGU[**]

Abstract

This article aims at revealing advantages of studying German (acquired as an L3) by a speaker who has a high level of knowledge in English (acquired as an L2). Those interested in learning German as a third language through ESL may benefit from a set of facilities that could fasten the process of learning vocabulary and enhance the disambiguation process in case of synonymy, false friends and pseudo-Anglicism.

The approach we have adopted in the present paper is a practical one. We have appreciated that the process of assimilating German as an L3 through ESL could offer another benefit to learners, i.e. the possibility of simultaneously activating and practicing both foreign languages that they either master or intend to master.

In the present paper, we are not going to refer to the influence of the socio-cultural environment[1] on the learners of German as an L3 through English as a Secondary Language, as we are not going to make reference to psycholinguistic elements[2] that are characteristic of third language acquisition.

After explaining terminology and giving an overview of the theoretical background that we related to when writing the present article, we are going to insist on enumerating some basic strategies that could be successfully used to build and develop vocabulary in German by using English as a secondly acquired foreign language.

Keywords: *multilingualism, ESL (English as a Secondary Language), SLA (second language acquisition), TLA (third language acquisition), vocabulary development strategies.*

1. Introduction

In a world that is more and more defined by multiculturalism, linguistic studies on second and third language acquisition have become numerous.

Multicultural societies are not new (there were multicultural societies in ancient times), but they have become more visible and influential today due to the fact that demographically they are well represented and, thus, one cannot fail to ignore them, as one cannot fail to spot their particularities; similarly, multiculturalism is more visible due to the fast flow of information in the world of education and in mass media. Thus, on the one hand, educational systems have found themselves facing a new challenge – dealing with multicultural classes, schools and curricula, as well as with all the advantages and disadvantages that the multicultural phenomenon might generate in the system of education; on the other hand, recently, in the EU, the flow of information recorded by mass media has mirrored the more or less controversial absorbtion by the Western European local communities of different ethnical groups[3], not only from Eastern Europe, but also from Asia and Africa.

Multiculturalism has triggered a deep interest in the study of multilingualism, which has been approached from various perspectives: educational, cultural, sociological and psychological ones. Multilingual societies have developed under the influence of a set of factors like: immigration, asylum seeking, internationalization of education, the availability and recruitment of staff on labour markets from all over the world (e.g. subsequent to

[*] Lecturer, PhD, Faculty of Social and Administrative Studies, "Nicolae Titulescu" University of Bucharest (e-mail: **cdcaraiman@univnt.ro**).

[**] Lecturer, PhD, Faculty of Social and Administrative Studies, "Nicolae Titulescu" University of Bucharest (e-mail: **camelia.neagu@univnt.ro**).

[1] See Maria Pilar Safont Jorda, *Third Language Learners: Pragmatic Production and Awareness*, 2005, Multilingual Matters Ltd., UK, Clevedon, pp. 19-20: "Another important factor affecting third language acquisition is the sociocultural context in which the languages are learned and used. In most multilingual and bilingual societies (if not all), languages have different privileges; that is, they are not used in the same way or the same purposes. In fact, we find diglossic societies where the L2 is used in the media, for educational purposes and the like, while members of these societies resort to their L1 and L3 in their everyday conversations (at work, with their families and the like). This fact affects education (Gonzales, 1998)."

[2] See Maria Pilar Safont Jorda, *Third Language Learners: Pragmatic Production and Awareness*, 2005, Multilingual Matters Ltd., UK, Clevedon, pp. 21: "The third factor influencing third language acquisition and raised by Cenoz (2000) refers to the psycholinguistic processes involved. The successsive or simultaneous acquisition of more than two languages may share some characteristics with second language processing. However, the additional language complicates internal cognitive processing by presenting a unique situation of language acquisition (Clyne, 1997). The main research areas in this respect, as reported by Cenoz (2000), have focused on early multilinguism (Harding and Riley, 1986), individual factor affecting third language acquisition (Navak et al., 1990; Obler, 1989), the role of the proficiency level in the L1 and L2 in the acquisitions of a third language (Wagner et al., 1989), and the cross-linguistic influence in third language acquisition (Clyne, 1997)."

[3] From this point of view, linguists have studied since the 1930's the particular manner of learning a second and a third foreign language by the ethnically mixed population living in Canada, North and South America, Australia, New Zealand, Spain or the Indian Subcontinent.

the free movement right granted to the EU citizens), the setting up of new branches belonging to large companies all over the world, inculding in countries where workforce is cheap, etc.

Similarly, the process of learning a second and a third foreign language has become a major concern for many young people, in particular, e.g. for those who are interested in either furthering their studies abroad, hoping to find better job opportunities later on, or for those who are living with their families in another country.

Consequently, we can conclude that there is a deep concern for multilingual education and studies, both in the Western world (the US, Canada, and Europe: Germany, France, the UK, Spain, Finland and Sweden) and in the Russian Federation and Asia.

2. Theoretical background

In specialised literature, multilingualism[4] has been defined as the ability to speak at least one foreign language. Definitions regarding the terms of bilingual and multilingual have been different in time. Initially, multilingualism was considered to belong to the larger category of bilingualism[5], whereas later on, i.e. nowadays, bilingualism is subsumed to multilingualism[6]. When we use the expression *third language acquisition*, we refer to the second foreign language that a person can speak. As anyone would expect, the thirdly acquired language has characteristics that are influenced by the period within which the third language was learned, i.e. simultaneously with L2 and L1 or subsequently[7].

As regards the advantages of acquiring a second or a third foreign language, specialists have had different opinions in time. According to Ulrike Jessner, "The misunderstanding of the phenomenon of multilingualism is rooted in the long-standing Western tradition of prejudice against bi- and multilingualism, ascribing negative and harmful effect on the cognitive development of bi-and multingual children."[8] However, nowadays, such a perspective over foreign language acquisition is rarely shared. Most specialists agree that bi- and multilingualism grant cognitive advantages to the ones who are able to use an L2 or L3/L4 etc. in comparison with monolinguals. The faster and easier process of learning a third language has made the object of many studies on SLA and TLA.

However, the perception of multilingualism has not always been praised for its benefits in the process of learning a second or a third language. In the 30's, last century, many scholars, e.g. Leo Weisgerber, regarded bilingualism critically, considering that it negatively influenced intelligence and cognition. In the 60's and the 70's, Věroboj Vildomec (1963)brought into evidence the positive effects of multilingualism on language learning.

Opinions as to whether the processes of learning a second and a third language are similar also differ[9]. If M. Sharwook Smith reveals the negative effect of SLA on TLA, Cenoz has a totally different perception, praising multiculturalism and polyglots for their more developed languages skills and linguistic competence.

In our paper, we are going to refer to the studying of German as an L3 subsequent to the thorough study of English – as an L2 with a view to identifying helpful strategies for building, enriching and disambiguating the newly acquired vocabulary. The advanced level of English, with all its skills, is fundamental for being able to resort to the vocabulary developing strategies that we present in our paper.

As it is well known, the in-depth study of vocabulary in a foreign language is generally approached starting with B2 and C1 levels, when learners are encouraged and guided to study idioms, numerous phrasal verbs and false friends. Up to that level, learners are offered information that they could apply in everyday situations and contexts, including the grammar basic knowledge that supports them in speaking reasonsably well and correctly; however, up to B2 level learners do not normally study lists of synonyms in which the disambiguation of synonymous terms is explained in contexts. Their concern for learning phrasal verbs, idioms and false friends is also quite limited, which is reasonable and normal. Their progress has to be made step by step. The strategy we suggest in this article offers the learner of German the possibility of actively using his/her English knowledge to study vocabulary in the third language in a more practical and efficient manner.

In writing the present paper, we have relied on the experience that we have had in learning English and German (English – as the first foreign language and German as the second one).

The vocabulary of every language is particular. It has its own structure, so that we can never speak

[4] See Maximilian Braun, Věroboj Vildomec, U. Weinreich, Einar Invald Haugen, Jasone Cenoz, Philip Herdina, Ulrike Jessner, to name but a few of the linguists that contributed to the development of bilingualist and multilingualist studies.

[5] See Einar Invald Haugen, *Bilingualism in the Americas*, 1956.

[6] See Philip Herdina and Ulrike Jessner, *A Dynamic Model of Multilingualism*, Multilingual Matters, 2002.

[7] Ulrike Jessner, *Teaching third language: findings, trends and challenges*, 2008: Cabridge University Press, 41:1, pp. 15-56.

[8] *Ibidem*.

[9] See M. Sharwood Smith, "On first language loss in the second language acquirer: Problems for transfer", in S.M. Gass and L.Selinker, editors, *Language Transfer in Language Learning*, Rowley, MA: Newbury House, pp. 221-231; see also J. Cenoz, "The successive effect of bilingualism on third language acquisition. A review", *International Journal on Bilingualism*, pp. 71-87.

about a perfect correspondence between two or more languages. Hence the need for rigurously storing any new information related to the newly acquired vocabulary.

In this paper, we have taken a few arguments into consideration when stating that an L3 could be learned more easily and faster by making use of English as an L2. Thus, we have appreciated that the Germanic root of English is a strong argument for simplyfing the assimilation of English-German cognates[10], as well as for avoiding false friends and pseudo-Anglicisms, for example.

On the other hand, we have also appreciated that for conceiving lists of synonyms in German, it is a good idea to write down the English synonym for any newly identified meaning, alongside with indicating an example to reveal the contextualization of the differentiated meanings. The purpose of this strategy is to disambiguate meanings and to build a solid awareness of the newly acquired vocabulary, while relying on the already structured differences in meaning that the speaker masters thanks to ESL.

In the present paper, we are not going to refer to the influence of the socio-cultural environment[11] on the learners of German as an L3 through English as a Secondary Language, as we are not going to make reference to psycholinguistic elements[12] that are characteristic of third language acquisition.

3. Content

The fact that English is a Germanic language can be used as a helpful hand by the learner of German. However, if the learner does not look up new words to check all their meanings and usage in different contexts, the fact that English is a Germanic language can become a trap. We refer to the false friends that exist in the two languages, the unexpected meaning of some English words created by German speakers, as well as the apparently known meaning of some misleading German compound words. Last but not least, we also refer to pseudo-Anglicisms.

As Martin Durrell[13] underlined in the Introduction to his dictionary, the vocabulary of every language is particular for it has its own structure, within which semantic fields are particularly distinguished; thus, according to the author of the quoted dictionary (*Using German Synonyms* – see the footnote below), we can never speak about a perfect correspondence between two or more languages; for example, even if words like *Straße* and *leben* are simple to be learned by an English speaker, the latter has to be careful when using these terms in different contexts in German because in English we make a distinction between *street* and *road*, for example, while as for the verb *to live*, we can use it to say that we *dwell* in a place, whereas German uses another verbal form for this meaning (i.e. *wohnen*). Such examples are numerous and they should be spotted and noted down once a learner identifies them so that, in time, he/she could build a selected list of 'problems' that are specific for the thirdly acquired language in relation to the secondly mastered one.

The use of German-English cognates can facilitate the assimilation of new German words. Sometimes, English-German cognates are spelled approximately in the same way, apart from the fact that German nouns are always written with capital letters:

German	English
die Algebra	algebra
der Bank	bank
der Kalender	calendar
der Dezember	December
der Finger	finger
das Gold	gold
das Hand	hand
das Land	land

[10] See Maria Pilar Safont Jorda, *Third Language Learners: Pragmatic Production and Awareness*, 2005, Multilingual Matters Ltd., UK, Clevedon, pp. 19: "The relationship between the languages being learned, as far as linguistic typology is concerned, constitutes another factor affecting third language acquisition. Languages typologically closer to the target language may facilitate its acquisition or favour code-mixing procedure. In the latter case, learners may tend to borrow terms from those languages that are typologically closer to the target language.".

[11] See Maria Pilar Safont Jorda, *Third Language Learners: Pragmatic Production and Awareness*, 2005, Multilingual Matters Ltd., UK, Clevedon, pp. 19-20: "Another important factor affecting third language acquisition is the sociocultural context in which the languages are learned and used. In most multilingual and bilingual societies (if not all), languages have different privileges; that is, they are not used in the same way or the same purposes. In fact, we find diglossic societies where the L2 is used in the media, for educational purposes and the like, while members of these societies resort to their L1 and L3 in their everyday conversations (at work, with their families and the like). This fact affects education (Gonzales, 1998)."

[12] See Maria Pilar Safont Jorda, *Third Language Learners: Pragmatic Production and Awareness*, 2005, Multilingual Matters Ltd., UK, Clevedon, pp. 21: "The third factor influencing third language acquisition and raised by Cenoz (2000) refers to the psycholinguistic processes involved. The successsive or simultaneous acquisition of more than two languages may share some characteristics with second language processing. However, the additional language complicates internal cognitive processing by presenting a unique situation of language acquisition (Clyne, 1997). The main research areas in this respect, as reported by Cenoz (2000), have focused on early multilinguism (Harding and Riley, 1986), individual factor affecting third language acquisition (Navak et al., 1990; Obler, 1989), the role of the proficiency level in the L1 and L2 in the acquisitions of a third language (Wagner et al., 1989), and the cross-linguistic influence in third language acquisition (Clyne, 1997)."

[13] Martin Durrell, *Using German Synonyms*, Cambridge: 2004, Cambridge University Press, pp. x.

die Liste	list
der Name	name
das Objekt	object
passiv	passive
das Quiz	quiz
der Ring	ring
der September	September
die Theorie	theory
unter	under
die Vision	vision
der Wind	wind

Some other times, German and English cognates are spelled slightly different. However, this happens according to some phonetic transformations, as illustrated in the following list of shifted consonants and vowels:

Shifted consonants from German to English:

ch – gh (Nacht – night)
ch - k (Buch – book)
d – th (Bad – bath)
k – ch (Kinn, chin)
pf – p/pp (Apfel – apple)
ss - t/tt (besser – better)
t/tt - d (Bett – bed)
z - c (Eleganz – elegance)
z – t (Salz – salt)

Shifted vowels and diphthongs from German to English:

a – o (alt – old)
au – ou (laut – loud)
e – i (Recht – right)
ei – i (Wein – wine)
o – ea (Strom – stream)
u – oo (Schule – school)
u – ou (rund - round)

We strongly encourage persons who master ESL to use English translations for German lists of synonyms and German synonyms for the newly acquired meanings. Naturally, after the meaning is revealed through ESL, real contexts should also be used for every word in order to illustrate its usage in spoken German. In our opinion, the firstly acquired foreign language (SAL), i.e. English – in our situation, establishes a set of semantic patterns that the speaker is already familiarized with. Thus, by using the SAL for indicating synonymy before illustrating the meaning in a German context may simplify the learning process and help disambiguate the different meanings according to every context in which they are used. On the other hand, this method of building, enriching and practicing vocabulary has the advantage of activating both foreign languages that the speaker wants to consolidate or master, so that the latter could get used to establishing correlations, links and spotting differences between L2 and L3. Below, we illustrate a practical method of learning German vocabulary and synonyms through English by using German-English dictionaries of synonyms.

E.g.:

kochen[14]:

1. (cook) Er kocht besser als mich.

2. (boil) Wir müssen das Ei 10 Minuten kochen.

őffnen[15]*:*

1. (to open or to get something open → etwas aufbekommen): Ich kann die Bierdose nicht őffnen (aufbekommen).

2. (to come open → aufgehen): Das Fenster őffnete (ging auf) wann wir traten herein.

3. (to be open → aufhaben): Bis wann hat der Bank heute auf? / Bis wann ist der Bank geőffnet?

richtig[16]*:*

1. (correct → korrekt): Ihre Deutsche Sprache ist richtig/korrekt.

2. (appropriate → recht): Das ist nicht der richtige/rechte Moment fűr so einen Scherz.

3. (faultless → fehlerfrei): Der Text ist richtig/fehlerfrei.

Lists of false friends must also be considered for enriching misleading vocabulary in a simple manner (see the chart below).

German words	English translation	English	German translation
also	so	also	auch
die Art	type	art	die Kunst
bald	soon	bald	kahl
bekommen	to receive	become	werden
das Gift	poison	gift	das Geschenk
die Hose	trousers	hose	der Schlauch
das Kind	child	kind	nett
das Rat	council; advice	rat	die Ratte
der Stern	star	stern	hart
die Wand	wall	wand	der Zauberstab

[14] Examples are adapted from Martin Durrell, *Using German Synonyms*, Cambridge: 2004, Cambridge University Press.
[15] *Ibidem.*
[16] *Ibidem.*

As we underlined at the beginning of the Content part in our paper, a German learner who masters English should also be careful with the:

- unexpected meaning of some English words created by German speakers (pseudo-Anglicisms). We confine ourselves to giving two illustrative examples, maybe the best known by German learners who master English:

e.g.: das Handy (= mobile phone) & Twen (= a person in his/her twenties);

- the apparently known meaning of some misleading German compound words; we give two simple examples to illustrate how easily a German learner could mistakenly use them by establishing a parallelism with English:

e.g.: alltäglich (= 1. *everyday, daily*; 2. *banal*; attention: the meaning is not *all day*; German synonyms: 1. *tagtäglich*; 2. *banal, gewöhnlich*) & Hochschule (= college, university; pay attention, the meaning is not *high school*).

4. Conclusions

The present paper, which is a practical approach to the learning process of German as an L3 through ESL, strongly encourages German learners to resort to lists of synonyms (indicated in both L2 and L3), false friends (in both languages), pseudo-Anglicisms (translated in German and English) and cognates (with both translations) when studying new vocabulary.

By organizing the new information into categories of linguistic issues they can become more successful, more competent and faster in studying the third language. Last but not least, they activate both foreign languages in the process of learning.

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CONSOLIDATING FEMINISMS IN ROMANIA – A CONTERFACTUAL ANALISIS

Diana Elena NEAGA[*]

Abstract

In Romania, only after almost quarter-century since the fall of communism we can talk about feminismS. Furthermore, we can also talk about left feminism (anarchist and socialist formal and informal activist groups) and about the upsurge of a more and more grass-roots women's rights movement. What are the variables that can explain such a state of affair and what lessons can be learned from this experience are the main questions that I am trying to give possible answers in this paper. In doing so I will first use a descriptive approach for presenting a brief summary of the way Romanian feminist/women's rights movement has developed and I will use a methodology mostly based on documents analysis. Some locally developed theories are definitely important here: feminist vs Phoenix organization theory, state men-market women theory, the theory of the feminism lost opportunity in transition, the contradiction between communism and feminism theory, the domination of liberal feminism etc. More than that, my proposal is a counterfactual meta-analysis of the data first presented using here, beside the critical approach, also my subjective experience as a scholar and activist form more than 7 years of participative observation in the field of feminist phenomenon in Romania.

Keywords: *feminism mouvement, postcomunism, postfactum analysis, Romania.*

Introduction

Even though the history of women struggles, especially the western one, is already consistent, with multiple demands and theorizing ways, I believe it is never enough to try a new (meta)analysis of facts and contexts and to learn from these sort of academic experience. As much as it would seem trivial, we cannot just learn from the experiences of others, but mostly we can use these experiences in order to set out expectations and strategies for actions in conformity with the objectives that we assume at a given point. I believe this is even more important when it comes to social movements for rights (human rights) and even more social movements of marginalized groups (women, ethnic minorities, sexual minorities, etc.) Why? Because I have a feeling of urgency in developing strategic actions with concrete results in public policies and grass roots projects (civic action and civil society as a service provider), substantial and directly beneficial to those claiming the statue of citizen, not just formal, but especially substantive (see the concept of substantive citizenship). In this respect, and also from the personal need to clarify and conceptualize the evolution of the women's movement/s in post-communist Romania I my aim in this paper is on the one side to do a short and compressed presentation of the history/evolution Romanian women's movement, in parallel with a review of some theories developed on this issue, and on the other side to do that in order to review the facts trough a critical post-factual framework of those data.

The women's rights movement in Romania still remains marginal and outside the spectrum of public and political discourse, even after 25 years from the communist revolution. Most women involved in politics rush into declaring their non-feminism; male politicians (especially right wing ones, but not only) decry the "lost masculinity" caused by this "unnatural" development[1]; the mass-media discusses issues linked to women interest only from sensationalist perspectives and trough tabloidization it perpetuates patriarchy and misogynistic attitudes; gender studies remain concentrated at the level of superior studies and it can be found in just a few higher education centers across the country (3 to be exact- Bucharest University, The National School for Political and Administrative Studies, Babes Bolyai University from Cluj). All this while Romania "occupies a shamefull 91th place in regard to political representation of women, fact that substantially affects the presence of women interests on the political agenda."[2] Romania, a Member State of the European Union (EU), lags far behind the rest of the EU in advancing the sexual and reproductive health and rights of adolescents and women (according to official statistical data, the maternal mortality rate in Romania is twice the EU average); the country has the highest number of live births among girls under 15 years of age; the United Nations Committee on Economic, Social and Cultural Rights (U.N.

[*] Political Studies and Public Administration Department, Nicolae Titulescu University, Calea Văcărești, no. 185, 0040 740 28 60 10, (e-mail: **diana_elena_neaga@yahoo.com**).

[1] See Mihail Neamțu's article from Adevărul "Criza bărbatului occidental" (The Crisis of The Occidental Man),accessible at http://adevarul.ro/news/societate/criza-barbatului-occidental-1_55f040c1f5eaafab2c6d7aa1/index.html

[2] Mihaela Miroiu (coord.), Andreea Molocea, Ioana Vlad, Cristian Ionuț Branea, *Mișcări feministe și ecologiste în România (1990 - 2014) (Feminist and ecologist movements in Romania),* Polirom, Iași 2015, pp. 14.

CESCR) has called on the Romanian government to revise its laws and policies to ensure access to reproductive health care for women and adolescents in the country (in its recommendations, issued on 28 November 2014, the Committee stressed that in order to comply with its international human rights obligations, the Romanian government should adopt a national strategy on sexual and reproductive health and implement comprehensive mandatory policies on sexual and reproductive health in schools to reduce teenage pregnancies); U.N. also expressed concerns at the increasingly common practice of health professionals refusing to perform legal abortions based on personal and moral objections etc[3].

In this context, seen from outside, Romanian feminism remains an alternative movement, elitist, urban, academic, just a coquettishly of women who can afford to be different, and at the level of public perception stereotypes and classic prejudice regarding feminist are dominant (woman are hysterical, they hate men, lesbians, etc). In the same time, issues approached in diverse campaigns seem to endlessly repeat (violence, political representation and mostly integration on the work market (sic!) etc.), as if there was no generational capitalization of the knowhow in this domain that would be able to generate add value and awareness regarding gender equality**.** From my personal experience, but not only, the filing you have when you join the movement is that all needs to be done, that everything is new and that you become part of some sort of guerilla that promotes atypical values and principles that were developed by the first feminists.

Regardless, who is truly interested in the way in which feminism in Romania evolved over time could maybe be surprised to know that the movement is a consistent one, genuinely alive in its demands and transformation. We might even speak of a tradition for such attitudes and manifestations in Romania, solid proof for this being the archive research made by Stefania Mihalescu and published in two volumes which have the purpose of preserving the memory of Romanian feminism (see From the history of Romanian feminism, vol. 1 and 2). Even more, a closer look on the phenomenon, can highlight serious and sustained preoccupations in this regard, research books and articles, projects, campaigns, legislative proposals, etc – not few and not lacking in impact in their historical periods (see for example the collection of gender studies books published by the Polirom Publishing House, multiple petitions at the National Council for Combating Discrimination trough witch different persons were sanctioned, and even stopped offensive media campaigns, improved legislature, etc). What's more, in the past years we might even speak of feminisms, of a rearranging of the movement in respect with the ideological orientation, but also regarding strategies of action (grass-roots organizations), fact that can be seen as proof of a growing up movement overplayed on a period of transition. As Mihaela Miroiu says: "our programmatic omogenity from the 90s and the period of pre-adheration to the EU is over. Except for some successful influences on the political agenda, the substantial growth of the knowledge in the area of gender policies and gender representation, the understanding of the social state of women, the most significant success is represented by the internal diversification of feminism and its transformation in a movement (including a critique dimension)"[4].

Thus appears the paradox for a living movement, in his way for consolidation, that still remains invisible and seemingly developing a dynamic that seems to emanate from the reality of the social needs clearly identified trough statistics (see here the eternal accusations of elitism brought up against feminists).

Of course the most convenient explanation, one of intrinsic value, for such a state of affairs is in fact witch brings into discussion the patriarchal domination, the masculine hegemony which in virtue of its character leaves permanently in offside any anti-hegemonic initiatives. Another category is that of an intrinsic nature, more precisely those that try to relief characteristics, evolutions, facts from inside the movement meant to highlight the way in which the internal dynamic this time contributes or not to the construction of a solid alternative discourse, with a wide impact. The second way of interpreting facts will be developed in the following pages.

As I was saying, I prefer to present the evolution of the feminist movement in post-communist Romania by mainly referring to theories elaborated by Romanian scholars that will be presented in the following pages because above their explicative value per se, these can be used also in the sense of a critical post-factual/post-contextual approach with the effect of generating much information for theoreticians and activists involved in this sort of research. So, the work method I will employ in this paper will be that of a post-factual meta-analysis that implies: a) critical analysis of events and theories generated from these; counter-factual analyses or what would could happen if not, work method that implies approximation of the effects and if possible referencing to a reference group as basis for comparison. "The basic idea of

[3] UN Committee on the Elimination of Discrimination against Women February 26th, 2016, accesed at http://tbinternet. ohchr.org/ Treaties/CEDAW/Shared%20Documents/ROU/INT_CEDAW_NGO_ROU_23166_E.pdf

[4] Mihaela Miroiu (coord.), Andreea Molocea, Ioana Vlad, Cristian Ionuț Branea, *Mișcări feministe și ecologiste în România (1990 – 2014 (Feminist and Ecologist Movements in Romania),* Polirom, Iași 2015, pp. 190.

counterfactual theories of causation is that the meaning of causal claims can be explained in terms of counterfactual conditionals of the form "If *A* had not occurred, *C* would not have occurred"[5], b) understanding elements of context that led to such evolutions."In recent years a great deal of attention has been paid to the context-sensitivity of causal statements (…) Those who accept the arguments above for the context-relativity of causal statements think that the canonical form of causal statements is "*c* rather than *c**caused *e* rather than *e**", where the contrast situations *c** and *e** are supplied by context[6]. Counterfactual analyses of causation focus on counterfactuals that tell us what would have been the case if the world had been different. In the main, they focus on counterfactuals concerning temporally successive, suitably distinct events that describe cases and events that occurred.[7]

Debates in Romanian post-communist feminism

From my point of view some big debates animated the feminist scene in post-communist Romania, being further used in order to explain and defend certain positions and strategies of action. I will make in the following pages a chronological presentation of these in order to surprise the way in which the context has contributed to such references, but mostly to propose a critical analyses meant to underscore empowering elements that were in a way or another "failed" exactly in virtue of this immersion in the context. So, the milestones I will be analyzing are:

o) **Constructing civil society for women's rights** – between Phoenix and feminist organizations (the first divide) – the need to impose ideas trough appealing to epistemic authority thus falling in the trap of elitism.

p) **State man, market women** – feminism in transition, the last inequality and the failed chance of women to negotiate a better representation of their interests.

q) **The domination of liberal feminism, room-service feminism and the second break** (femismS – consolidation of Romanian feminism trough settling on diverse ideological formulas, trough criticizing mainstream feminism, "liberal feminism" and the risk of dissociation from within the movement).

Constructing civil society for women's rights.

Passing from a totalitarian regime to a democratic one meant also for women rights filed starting process of constructing the civil society. But what is important to mention for the current endeavor is the break that characterized the process of constructing the feminist/women rights civil society in Romania - phenomena I will further call 'first break' – namely that between the Phoenix organizations and the feminist organizations, the one between the former "party organizations" (tolerated in the communist period) who made efforts to adapt to the new context and "new" organizations[8]. "On the basis of a strong anticommunist current present in the public space in that period, the fact that immediately after the revolution we witness the emergence of women organizations such as The Association of Women in Romania (it was mentioned as the first women organization in Romania, with subsidiaries in all districts and tens of thousands of members) later gave rise to sentiments of suspicion towards feminist NGOs (who were born years later). This suspicion was also based in the fact that this organizations rooted in old structures were in a conflictual state <There was a battle on the field of this organizations who were being revitalized and the young organizations feared to enter in this game>"[9].

Even if the struggle for women's rights represented for both types of organizations the assumed objective and thus the relevant criteria for solidarity, in that context the intense need to take distance from the communist regime seems to had priority, being reinforced also by the fact that the power was in fact taken by reformed ex-communists led by Ion Iliescu (see here the Piata Universitatii phenomena). Thus, in a very natural manner, even though the Pheonix organizations had generous infrastructure and assumed objectives linked to women emancipation, even if the left ideology per se (if we assume these organizations kept also an ideological substratum) encompass more than the right wing ones formulas of women emancipation, the dominant cleavage (communist/anticommunist) broke the possibility of solidarity for the cause. More than that, it feed from my point of view another break, that between the professional feminists (generally of a academic background) and women involved in diverse actions against inequality and the organizations they formed.

It was, even if not explicitly, a fight to legitimize the discourse for women rights starting

[5] Menzies, Peter, "Counterfactual Theories of Causation", *The Stanford Encyclopedia of Philosophy* (Spring 2014 Edition), Edward N. Zalta (ed.), URL = http://plato.stanford.edu/archives/spr2014/entries/causation-counterfactual/

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[9] Mihaela Miroiu (coord.), Andreea Molocea, Ioana Vlad, Cristian Ionuț Branea, *Mișcări feministe și ecologiste în România (Feminist and ecologist movements in Romania) (1990 - 2014)*, Polirom, Iași 2015, pp. 25.

from the implied question: "who has the right to bring the issue of inequality on the public agenda?". And the answer was one intensified by the context, one in which a main figure was Mihaela Miroiu and her connections with the West (emancipated and a source of inspiration for a Romania longing for democratization and implementation of capitalism) have put the basis of an academic feminism, elitist in its essence, but who fulfilled very well at that moment the function of detachment from communism, but also enforcing an anti-patriarchy discourse by appealing to 'scientific'/'intellectualist' arguments. So, the organizations existing on this side of the barricade, the feminists – from whom the most representative remains the Society for Feminist Analyses Ana – developed " while remaining circumscribed to academic feminism, which was probably deemed as the best transmission vehicle in a society in which any form of affirmative policy was associated with communism and rejected from the start. Therefore, emancipative ideas seemed to sell best if they were wrapped in scientific arguments coming from credible experts, from the ranks of the academic-intellectual elite, and this is the development path followed by academic feminism"[10]. On the other side there remained women organizations that could access a large number of women, who had infrastructure, but who lacked authentic feminist knowhow but who organized projects "mainly for raising awareness and charity".[11]

Of course a post-factual analyses underlines the fact that at that moment there was available a combination of resources and even the energy necessary to lay the foundation of a feminist/women rights movement and that essentially, having in consideration the common cause, could have materialized in collaboration and consolidation. In spite of this fact this only happened punctually in the case of a few collaborations (seminaries, workshops) that could be considered by opportunity (see here the examples presented by Andreea Molocea in her study[12]. So it seems the need for legitimization in an unstable ideological context generated by the regime change canceled the coagulant potential of the cause and more than that, it turned it into a potentially divisive argument in the sense in which it imposed definition and identification formulas on the one hand regarding the ex-regime, and on the other hand reported to the feminist-non-feminist dichotomy (or just "by/for women"). The fact that some of these organizations had connections with the party nomenclature could as well been a variable, but not an ultimate criteria for deconstructing legitimation, even more as we well know that not rarely, collaborating with the party was in fact a survival strategy in a totalitarian system and can't be blamed per se, even more as there was also a sort of acceptance for the epistemic authority that the feminists offered – "here there were very helpful Mihaela Miroiu and AnA. In fact, this was our biggest advantage, was that we could either find ourselves the arguments, what we found reading or talking to Mihaela or Laura Grunberg, or we asked them. And then, it was certain"[13] (interview with M.S. 2012 – Molocea, in Miroiu et al, 2015, e28). Even more than that, many other aspects could be brought up in discussion to generate some sort of coalition of these categories of organizations such as for example common experiences linked to the pro-natalist policies of Ceausescu, but these variables remained subsidiary to the dominant cleavage – communist/anti-communist.

This need for legitimization and differentiation regarding any formula associated with the past gave rise, from my point of view, to the elitism for which even today the first generation of feminists in post-communist Romania is so criticized, the communist/anti-communist cleavage having a big say in this matter also. More precisely, the "intelighentia" represented in Marxist ideology as exploitive and dominant is reborn after 89' and is detached from the past party nomenclature seen as incompetent[14], position mostly sustained by the cadre policy from the communist period and even more the PMR position "in favor of a severe standard 'of cleaning the party' on priory ideological and class criteria, with the intentional reduction of the percentage of party members that were part of public servants or intellectuals categories" [15].

It is also worth mentioning the fact that Mihaela Miroiu, Laura Grunberg, Anca Jugaru –

[10] Neaga Diana Elena, Nicolescu Valentin Quintus, "Shaping the agenda: feminist strategies of civic and political action in post-communism", *Romanian Journal of Society and Politics*, 2013, pp. 23.

[11] Mihaela Miroiu (coord.), Andreea Molocea, Ioana Vlad, Cristian Ionuț Branea, *Mișcări feministe și ecologiste în România (Feminist and Ecologist movements in Romania)(1990 - 2014),* Polirom, Iași 2015, pp. 27.

[12] Mihaela Miroiu (coord.), Andreea Molocea, Ioana Vlad, Cristian Ionuț Branea, *Mișcări feministe și ecologiste în România (Feminst and ecologist movements in Romania)(1990 - 2014),* Polirom, Iași 2015, pp. 27.

[13] interview with M.S. 2012 – Molocea, in Miroiu et al, 2015, pp. 28.

[14] To see here also the mainstream literature that brings to discussion the competence of the ex-nomeclature staff, especially in the period of Nicolae and Elena Ceausescu, period in which "means the replacement of competence with the documentation of the staff file in which the criteria of selection were manly political and subjective ones" (Cornel Ilie, Șerban Constantinescu, "Cultul personalității" "The Cult of Personality", accessible on www.comunismulinromania.ro).

[15] Apud. Alina Tudor-Pavelescu, *Politica de cadre a Partidului Muncitores Român, Studiu introductiv,* p. VIII-IX, în Andrei Folrin Sora, "Staff files of communist nomenclatura", în History Institut George Barițiu Year Book, Cluj Napoca, Romanian Academy Publishing House 2013, pp. 65/6.

central figures of the Romanian post-communist feminism were members of the informal Cât-Mât, a group of intellectuals critic about the past regime[16].

Also, a very important element in maintaining the elitist tendency of feminism, which must be mentioned and also related with the need of legitimization of such a discourse is that of ideas dynamics in a hegemonic framework. In other words, in the above mentioned context, were necessity to construct a modern society is manly connected with reason as an incontestable value, the consolidation of a contra-hegemonic formula in rapport with patriarchy couldn't neglect the appeal of some sort of epistemic authority. Gramsci himself acknowledges the role that the elites (intellectuals) should have in constructing contra-hegemonic discourse, just that it seems in the case of Romanian feminism this construction was halted at the "traditionalist intellectuals" and didn't manage but very little to have contact with grassroots movements. "The intellectual realm, therefore, was not to be seen as something confined to an elite but to be seen as something grounded in everyday life. The role of informal educators in local communities links up with Gramsci's ideas on the role of the intellectual. The educator working successfully in the neighborhood and with the local community has a commitment to that neighborhood. "[17]

So, in a profound patriarchal society, in which passing from communism to democracy also meant the relapse from a state patriarchy to a traditional patriarchy[18], for feminism, this exotic movement, would have been difficult to generate a space for action if it would not appeal to elitist, academic formulas meant to produce legitimacy. Proof for this resides also in the fact that in the academic space we can easily identify a consolidation of feminist thought (see here de gender studies master from SNSPA, the one from Bucharest University, the one from Cluj, more and more doctoral thesis on the subject) which is at least debatable if it much later sustained the apparition of a movement and actions more of a grassroots type (see here also the subchapter **Domination of the liberal feminism, room-service feminism and the second break (appearance of feminismS**).

Feminism in transition – state men, market women – the last inequality and the failed chance for women. The transition period meant of course for Romania vast reforms**,** especially in the economic sphere. If in the social sphere from the point of view of gender relations we might say we had to face a recoil generated by the return to traditional patriarchy (salvation from the communist indoctrination came as returning to tradition[19]), regarding the economic sphere things were completely different. Studies and research realized in the transition period lead us to the conclusion that there were important changes that could have been used in the interest of women, but this thing did not happen. "The restructuring of the industrial sector mainly impacted the men as much economically, as ideologically. From an ideological point of view, the restructuring contested and eliminated the list on industrial and economic priorities of socialism. Mainly male dominated extractive industry, the metallurgic and the car construction industries not only went through a severe process of diminishing, which very fast became a process of decay, but were also dethroned ideologically. From their statue as "industrial citadels, the big male dominated enterprise become "a bunch of scrap metal" or the giants with massive losses of the Romanian economy, condemned to massive restructuring equivalent to closing. The result was a spectacular restructuring of the salaried work force, in favor of women."[20]

Vladimir Pasti discusses in this sense about the failed chance of women, and Mihaela Miroiu about the state's men and the women of the market – "during the Romanian post-communist transition, due to left conservatism, men have successfully appropriated the state, while women were simply delivered to the market"[21] – with direct reference to the fact that masculine industries benefited from compensatory policies, in the meanwhile women got into direct competition on the market, industries such as the textile one for example never being paid attention by the governing body for measures of support and professional reorientation. While Pasti offers sociological arguments for such a state of affairs (perceived as an anomaly and that being the motif for which women failed to fructify the context[22]), Mihaela Miroiu offers an arguments closer to the way in which I personally interpret post-factum the realities of the transition – more precisely men have managed to form coalitions and to back up their interests, while the women acted mostly as individual agents in virtue of the fact that there were

[16] Vezi Mihaela Miroiu, "Mihaela: Cât - Mât", in Miroiu Mihalea, Miclea Mircea, *Restul şi Vestul (The Rest and The West),* Polirom, 2005, pp. 162 – 174.

[17] Burke, B. (1999, 2005) 'Antonio Gramsci, schooling and education', *the encyclopedia of informal education*,http://www.infed.org/thinkers/et-gram.htm

[18] Mihalela Miroiu, *Drumul către autonomie, (The Road to Autonomy)*Polirom, Iaşi, 2004, pp. 44.

[19] Mihalela Miroiu, *Drumul către autonomie, (The Road to Autonomy)* Polirom, 2004, Iaşi, pp.215 – 216.

[20] Vladimir Pasti, *Ultima inegalitate (The Last Inequality),* Polirom, 2003, pp. 152.

[21] Miroiu M.,"State men, market women. The effects of left conservatism on gender politics in Romanian Transiton", *Mujer I Participacion Politica*, Monica Moreno Seco, Clarisa Ramos Feijoo (coord.), 2004, Feminsimo/s, 207 – 234.

[22] Vladimir Pasti, *Ultima inegalitate (The last inequality),* Polirom, 2003, pp. 157.

no consolidated organization capable of representing them, or we couldn't talk about the lack of organic intellectuals, but also we couldn't talk of one of traditional intellectuals as Gramsci sais in the case of women[23]. In other words, men managed to keep their domination using the advantages of structural patriarchy while women didn't manage to use a favorable economic context clearly observable by statistics, one explanation being the lack of a political feminism "without political feminism structural patriarchy remains untouched"[24], but mainly because of the absence of a feminist movement connected to the daily realities of women's lives.

It is interesting to observe the fact that in their presentations, none of the two authors makes references to the feminist/women's movement as a relevant actor in the equation of under - representation on women's interest in transition. Nevertheless, we should obviously aks: where were the women's rights organizations doing at that time and how come they didn't manage to capitalize that favorable context? And the answer is a relatively easy one – they were consolidating organizationally and were contributing to the consolidation of the civil society (as an essential element in the process of democratization – see here the financing programs like UNDP, UNFPA, ILO, USAID, etc.), all this effort in itself distancing them from the function of mediator between citizens and the political sphere. In other words, feminists were preoccupied by institutional consolidation which the needed so much, but also by defining they area of study (academic feminism), while Pheonix organizations got under way small social support programs for different categories of women. Obviously, Mihaela Miroiu is right by saying that feminists in Romania lacked the conscience that political in personal during transition, powered again by the acute need for legitimacy which manifested also by a distancing from politics (seen as dirty – see the parallel with the assumed elitism) and this kind of politics. More than that, the employed strategy seems to have been a non bellicose one (maybe also in order not to fuel the prejudice towards the movement) – with interventions mostly in the field of education and as partners in the process of democratization, fact which led to the permanent placement of women's interest at the bottom of the priority list and to the isolation of the feminist approaches (politics with power, feminists with their small academic and community projects), thus fueling the fact that feminists were not able to create a "system of solidarity" in the Romanian transition period.

Domination of the liberal feminism, room-service feminism and the second break (appearance of feminismS). Maybe now we can understand a bit more clearly why the Romanian feminism after 89 was one with a dominant liberal ideology. So, this ideological affiliation was overlaid by two existent needs in the transition period, but none of whom, as ironic as it may seem, were in conformity with the needs and interest of women (see the failed chance of the transition): **the need to distance from communism and the need to construct a legitimate identity trough solidarity with western, liberal democracies.** In the framework of this debate we cannot forget the relevance of Mihalea's Miroiu papers *Feminism was a state patriarchy, not a state feminism* (Aspsia, vol 1, 2007) and Retro Society (1999) in which she discusses the ideology of left conservatism as being collectivist, statist, skeptical in front of economic growth and inspired by egalitarianism, religion and nationalism[25]. A very interesting observation is made here by Roxana Cheschebe who remarks in Mihaela Miroiu's case the lack of doctrines as options in evaluating the historic evolution of Romanian feminism. "If one agrees in explaining the evolution of historical feminisms in terms of equal vs different or individualist vs relational, then is unclear why the author (see Mihaela Miroiu) chose to draw a Romanian historical tradition only for the liberal and socialist feminisms and not for the communitarian feminism also presented in her book. One answer might lie in Miroiu's interest in promoting the development of a liberal feminism in contemporary Romania in order to counteract the 'leftist conservatism' installed after the dismiss of the communist regime"[26]. In the same time,

[23] "Traditional intellectuals are those intellectuals linked to tradition and to past intellectuals; those who are not so directly linked to the economic structure of their particular society and, in fact, conceive of themselves as having no basis in any social class and adhering to no particular class discourse or political discourse. Organic intellectuals, on the other hand, are more directly related to the economic structure of their society simply because of the fact that "every social group that originates in the fulfillment of an essential task of economic production" creates its own organicintellectual (…) Traditional intellectuals, important in civil society, are more likely to reason with the masses and try to obtain 'spontaneous' consent to a social order. Yet, in the struggle of a class aspiring for hegemony the organic intellectuals created by that class operate on the level of pursuit for direct consensus and as such hold no position in the coercive political structures to operate on a coercive basis. Hence, it would seem that in the struggle for social hegemony these organic intellectuals must reason with the masses and engage in a decisive 'war of position' to consolidate the hegemonic status of the class the interests of which they share." (Velriano Ramos, The Concepts of Ideology, Hegemony, and Organic Intellectuals in Gramsci's Marxism, *Theoretical Review*, March – April, 1982, Transcription, Editing, Markup Paul Saba, accesed at https://www.marxists.org/history/erol/periodicals/theoretical-review/1982301.htm

[24] Miroiu M.,"State men, market women. The effects of left conservatism on gender politics in Romanian Transiton", *Mujer I Participacion Politica*, Monica Moreno Seco, Clarisa Ramos Feijoo (coord.), 2004, Feminsimo/s, 230.

[25] Mihaela Miroiu, *Societatea retro (The Retro Society),* Editura Trei, București, 1999, pp. 150 – 151.

[26] Roxana Cheșchebec, "Reclaming Romanina Historical Feminism. History writing and feminist politics in Romania", *Aspasia*, 2007, vol. 1, pp. 262.

Romania feminism did develop in close connection and reaction to Western models of women's emancipation and to the idea that Romania ought to follow the developmental trajectory similar to that of western countries. In this perspective, "Mihalela Miroiu assumes that Romanian feminism had important doctrinal commonalities with a first wave feminism, that is with a equal rights liberal feminism. This was because, although Romanian feminism emerged in different conditions than those in the West, the same concern with altering the legal inferiority of women motivated the firs Romanian feminists."[27] But this perspective is criticized by Roxana Cheshebe in relation with eluding the nationalist dimension of Romanian feminism and can be understood as an ideological bias generated by the context and local particularities, in which the need of a ideologically coherent feminism, generally by comparison to the west, has put in brackets the diverse forms of manifestation that seemed not to fit. "Yet, Romanian feminist formulations of women's emancipation do not fall easily into predetermined theoretical categories. The usual mixture of 'individualist' with 'relational' arguments in Romania feminist formulations for women's emancipation and their support Romanian nationalist politics prevents such attempts. Miroiu answer some of these difficulties by downplaying the exclusionary dimensions of Romanian nationalism usually ascribed as its extreme right variant (…) At the same time all Romanian feminists engaged within suffragist militancy are subsumed under the category of liberal feminism".[28] If we add here the ingredient that Mihaela Miroiu has intellectually enriched in the school of western feminism[29], but also her defining contribution to the construction of the first and possibly the most productive feminist school in Romania (at SNSPA) [30] it becomes clear the fundament which intensified a dominant liberal feminism in Romania.

In this context another interesting phase in the analysis of romanian feminism was constituted by the adherence of Romania to the EU, phase that the same Mihaela Miroiu defines as that of the room-service feminism. „The most semnificative modernization in gender relations trough political decision happen trough the influence si intervention of international organisms, especially in the contect of adherence to the EU. As these new norms regarding gender equity are often not the result of movements of politicaly active women or politics motivated explicitly by rezolving internal unjustices, the most frequent phenomena is that of the divorce between the partnership of legal norms and the patriarchy of institutions and practices. We are dealing with (...) a room-service feminism."[31] So we can observe the missing variable in this equation is the feminist movement itself, who couldn't manage to bring on the formal agenda the women's interests also because of anti-politic rhetoric that functioned in a context of a very young democracy like the Romanian one. As Laura Grunberg writes "Significantly Romanian Women's NGO's contribute to their own marginalization because they lack open dialogue with the very women they purport to represent (…)Women in particular, although they are redefining the politics of reproduction, social, welfare and education resist the notion that their activities are political"[32]. What is certain is that we cannot talk in the case of Romania of a diversity of feminist opinions regarding the EU entering, this also in virtue of the countless legislative and institutional gains (even if from top to bottom and unrelated to the realities in the field) who came once with the begining of the process of adherence[33]. We might call this period as a phase of solidarity, characterised trough a large consensus regarding the necesity of integration in EU, but also in NATO.

In the same time, in this phase of solidarity we can also identify the ferment of the second break, which I personally see more as a phase in which the

[27] Roxana Cheșchebec, "Reclaming Romanina Historical Feminism. History writing and feminist politics in Romania", *Aspasia*, 2007, vol. 1, pp. 262.

[28] Roxana Cheșchebec, "Reclaming Romanina Historical Feminism. History writing and feminist politics in Romania", *Aspasia*, 2007, vol. 1, pp. 261 – 262.

[29] Vezi aici din CV-ul acesteia Visiting Fellow, Institute for Advanced Studies, Indiana University,Bloomington, March-April, 2007; Fulbright research grant, Department of Political Sciences, Indiana University, Bloomington, September, 2003 February, 2004; Institute for Advanced Studies, Indiana University, Bloomington,April, 2001 (Visiting fellow). Central European University, Gender and Culture, 1995-1996 Feminist Ethic; Central European University, 1994-1995:Towards a Philosophical Ecofeminism.

[30] The initiation of Gender Studies in Romania, 1993; The first classes in Feminist Philosophy, Philosophy Faculty, BucharestUniversity (1994); The first Romanian book in Feminist PhilosophyGandul umbrei (The Shadow's Thought),1995; The first book on Feminist Ethics (Convenio, despre natura, femei simorala (Convenio. On Nature, Women and Morals),1996: convenience theory; The first book on Feminist Political Theory: Drumul catre Autonomie (The Road to Autonomy) (2004);The first dictionary on the topic: Lexicon Feminist (Feminist Lexicon) 2002,as co-editor with Otilia Dragomir; The initiation of the first MA in Gender Studies in Romania: 1998; The initiation and coordination of the first collection series in Gender studies, Polirom Publishing House, since 1999.

[31] Mihaela Miroiu, *Drumul către Autonomie, (The Road to Authonomy)* Polirom, Iași, 2017.

[32] Laura Grunberg, 'Women's NGO's in Romania', in Susan Gal, Gail Kligman, *Reproducing gender. Politics, publics and everyday life after socialism*, Princeton University Press, New Jersey, 2000, 308 – 311.

[33] Paternal leave legislation, legislation regarding prevention and combating of all forms of discrimination (2002), The law for preventing and combating domestic violence (2003). Marital rape and sexual harassment have been recognized as felonies. At the end of the year 2003, Romania adopted a new constitution which recognizes the principle of equality of chances for women and men. Two agencies were created: The National Council for Prevention and Combating of All Forms of Discrimination (2002) and The National Agency for equality of chances for Women and Men (2003).

movement is maturing by transforming itself from a dominant liberal feminism in feminismS. One of the events tha has marked this break was the anti-NATO protest in 2008. We are in fact talking of one of the symbolic events unwound by an incipient anarchist movement in Romania, movement which had also a inplicit feminist dimension. This movement, whose roots we can identigy somewhere in the year 1994 when the first Punk/Underground Zine appears in Romania, seems to have also lost the start generated by the context of the transition period, exactly as Pasti describes what happened to the mainstream feminist movement. Thus, the chaotic period of the 90s-2010s is seen as a period in which the alternative movements seem to „loose an important space for expression (...) the public could have been slowly educated to buy zines and music (...), and trough reviews of concerts the public could have been educated regarding the importance of real and active participation of every individual in the frame of the movements concerts"[34].

Still, the otherground movement generated what i call „the second break" of romanian feminism, the ideological rupture that marks this time the process of maturization, of ideological refining so fundamental necesarry in a democratic society, unlike the first rupture (Pheonix organizations vs feminist organizations) that can be better understood trough the lens of ideological immaturity generated by a very strong cleavage that dominated Romania's past 25 years – communist/anticommunist. Maybe not by chance, this break overlays also a generational organic break, in which many of the feminists formed in the school developed by Mihaela Miroiu are starting to think with their own heads, this meaning a critical detachment from that who was their menthor. In this sense, in a dialogue with Daniel Cristea Enache, Mihaela Miroiu discusses what she names a cultural matricide born from the need to escape the mainstream. „I didn't even suspect that, after nine years, the Romanian leftist feminism will be born intensly criticizing the romanian mainstream liberal feminism which, ultimately finds its intelectual source in The Road to Autonomy. With this critic, a part of the new generation feels the need of a cultural matricide necessary in order to evade the mainstream. I am in a phase when i feel the bitter-sweet taste of ripe intelectual maturity. I am happy that the ones that are coming have a person to hit so that they might find their place under the sun."[35] Some of the representatives of the new current we can remember organizations and informal groups such as: Claca, Grupul Fia, Quantic, Grafittia, Sofia Nadejde, Biblioteca Alternativă, Macaz – Bar, theater and Cooperative, and as publicatinos Gazeta de Artă Politică, H.A.R.T.A group publications, Hecate Publishing House.

Conclusions

The development of post-communist feminism in Romania was, without a doubt, irretrievable marked by the force with which the communist/anti-communist cleavage has manifested, but also by the political immaturity of feminists during the transition generated by the same contextual variables (see here the dictatorial regime and a mostly dependent political culture) which made the action of coping with the power and political sphere unfrequentable, despicable practice. This state of affairs has on one hand detached the feminist movement from the ones it should have represented, including trough the development of a liberal feminism that failed in bringing on the table themes as poverty, reconciliation between family life and career, the lack of care infrastructure, themes linked to intersectionality in virtue of the fact that it concentrated on the women's accession on the market, the construction of a formal-legal frame, undoubtedly necessary for more consistent reforms, with emphasis on competence and competitively. All this while, on the other hand, women in Romania were better adapting than men on the work market, not because they were supported by a movement of women, not because they were supported by the state but because in patriarchy they interiorized very well the ideology of sacrifice, and also of being disconnected from power. Thus they lose the chance to politically capitalize this trump and this fact mainly happend in virtue of the spill over effect generated by the internal dynamics of the women's/feminist organization – see the first break. The need for hyper-legitimization (see here also the Elena Ceausescu syndrome) in rapport with the dominant patriarchal structures, but also the need to detach form the ex-regime casts away Romanian transition feminism into a spiral of desolation and elitism. It is a spiral that was internally productive (see studies, volumes, written rapports) and who, in virtue of this productivity offered the seeds and ferment for its own critique and transformation which will in turn into the second break. Started either from the other-ground (see the beginning of the punk movement and anarcho-feminists in Romania) either from within the same social sciences schools that have been penetrated by feminist ideas (meaning from within the ivory tower), the critique of liberal feminism, of the elitist, academic, mainstream feminism and the birth of

[34] The Fanzine of Fanzines TM. 20 years of fanzines and otherground publications in Timisoara) (1994 - 2014), pp. 5.

[35] "*Anul acesta împlinesc douăzeci de ani de donquijotism*", (This year marks my twentieth year of donquijotism), Mihaela Miroiu in dialogue with Daniel Cristea-Enache, accessible at http://atelier.liternet.ro/articol/13213/Mihaela-Miroiu-Daniel-Cristea-Enache/Anul-acesta-implinesc-douazeci-de-ani-de-donquijotism.html

feminismS in Romania marks in fact the birth of what could have been the natural continuity and diversity of a movement, if we could have taken out of the equation the context variable, concentrated in this case in the formula – transition and post communism.

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BUSINESS SUCCESS IN TODAY'S ROMANIA: OPINIONS EXPRESSED BY STUDENTS AND ENTREPRENEURS

Elena NEDELCU[*]

Abstract

We consider that a study - which contributes to the further knowledge of the entrepreneurial spirit of the Romanian students (to what extent and in what manner this spirit manifests itself), the students' and entrepreneurs' relation to the business environment and the "nowadays" challenges of the workforce - is both necessary and useful. Moreover, the present study aims at identifying the existence of possible differences between the way in which students evolve and the way in which entrepreneurs assess certain elements that make up the Romanian business environment and that might contribute to their business success. Which are "the keys to success" in business - according to students? What about the entrepreneurs? What would be more useful for business success: the knowledge of success patterns, training and qualification, access to information, to financial resources, competence (knowing what to do) or a friendly business environment?

The research method that we have used is the social inquiry based on surveys. The survey was applied to 1,500 students from Universities within Bucharest.

The analysis of data has surprised because "coping personal abilities" have turned out to be "the keys of success" in business in Romania - according to students (67%) and entrepreneurs (86%).

The significant differences between the students' and entrepreneurs' answers have been included within the "professional competence" criterion and the "rules observance" criterion. In comparison with entrepreneurs, students appreciate these criteria to a larger extent.

Keywords: *opinions, students, entrepreneurs, business success.*

1. Introduction

First of all, I would like to underline the fact that the present study has been accomplished within the project entitled: 'Succes: Supporting Young Undergraduates by Counselling Them for a Successful Professional Career and for Progress' ; the project was financed by EFEY Foundation.

We have appreciated that a study - which brings more knowledge on the entrepreneurial spirit of Romanian young people (the extent to which we can identify it, how it is), on their capacity to relate to the business environment and on the 'present' challenges existing on the labour market - is both welcome and useful. Furthermore, the present study is meant to identify some potential differences between the way in which students and entrepreneurs evaluate the elements that make up the Romanian business environment and the manner in which these can contribute to business success. The study tries to answer a few questions: which is, in the students' opinions, the 'key to success'? What about the 'key to success' in the opinion of entrepreneurs? What would be more useful for achieving success in business: knowing models of success, training and qualification, access to information, financial resources, competence (know-how), a friendly working environment?

The present study has been accomplished on a group of 1,500 students from 'Nicolae Titulescu' University, University of Bucharest, Politechnical University of Bucharest and Dimitrie Cantemir University of Bucharest.

We have used the following research methods: social inquiry based on surveys and focus-group.

The surveys were applied during the counselling sessions and the information sessions that we organized throughout the pursuance of the project. While carrying out our project, we surveyed 50 entrepreneurs that work for different companies in Bucharest and the County of Ilfov.

In order to accomplish this extensive study, we applied two surveys that were meant to record the students' and entrepreneurs' opinions on business success (the necessary qualities and conduct), as well as the premises (socio-economic context, legislative framework, etc.) that would be useful for initiating and developing a business in the present Romanian society.

As a theoretical background – necessary for establishing our research instruments and for interpreting the collected data – we used the paradigmes Shalom Schwartz' theoretical model.

We have chosen the theoretical model of the Israeli psycho-sociologist because we aprreciated that it appropriately serves the purpose of the present study, i.e. identifying valuable perspectives, including opposing or congruent ones, which finally would reveal the entrepreneurial spirit and the dynamics of 'successful' values.

The graphics below illustrate the distribution of the investigated subjects according to their gender, age, envornment and residence.

[*] Associate professor, PhD, "Nicolae Titulescu" University (e-mail: **doina.nedelcu@yahoo.com**).

STUDENTS

ENTREPRENEURS

2. Content

2.1 The students' perspective on the elements, contexts and qualities that are necessary for being successful in business

The elements (qualities, conduct) that ensure business success

The statistical processing of data obtained after applying the surveys reveals the students' perspective over the Romanian business environment, over the behaviour patterns that tend to ensure success in business activities.

Thus, we have noticed that most of the surveyed students, 60.4%, consider that professional competence plays a key role in busienss success. 28.2% of them appreciate that professional competence plays a moderate role in ensuring business success, while 11% of them consider that professional competence has a minor or even no role in ensuring business success.

Symptomatically, most of the students, 66.6%, appreciate that business success is largely due to 'one's personal abilities to manage' in a specific situation. In other words, you are successful if you can manage a situation and if you are able to adapt yourself to the given context and to the situations and "requirements" imposed by the business environment. 26.5% of the students regard these abilities as being important but only to a moderate extent.

Students are more reluctant as to how "useful" it is to abide by rules for achieving success in business. A percentage of only 37.3% of the students believe in the positive effects of abiding by rules for being successful in business. 38.9% appreciate in a moderate manner the advantage of rule respect, while 23.7%, of them, i.e. almost a quarter, do not trust this criterion at all.

The economic and legislative context is perceived, by most of the students, as having a "moderate" importance (50.5%) for supporting and promoting one's business. About 22% of the interviewees do not trust this criterion or regard it as having little importance.

As with the above-mentioned criterion, i.e. the one referring to "one's ability to manage in a given situation", 63.1% of the students perceive "relationships and acquaintances" as 'fundamental' criteria for ensuring success in business; 25.8% of the students appreciate that these criteria are important to a moderate extent, while about 10% do not appreciate that these criteria are important at all.

According to students, "effort and personal work" are positively valued when it comes to ensuring business success. About 60% of the students consider that these criteria are highly important, while 31.1% of them appreciate these criteria in a moderate manner.

What would be useful to initiate and develop a successful business

Students suggest that most often a friendly economic environment is useful for running a business: 68.9% of them trust this criterion to a large extent, while 28.4% of them appreciate this criterion in a moderate way.

Lacking the experience of running a business, most of the students, 54.6% of them, consider that awareness of succesful examples could be very helpful for their business success; 35.1% of the value this criterion in a moderate manner.

One of the most important factors for developing a personal business is "access to useful information" (81.2% of the interviewees share this opinion).

When evaluating answers in relation to a scalar scale, "much" and "moderate", 97% of the students trust the usefulness of training and qualification criterion.

Access to financial resources is valued to a large extent by 65.4% of the interviewees and to a medium extent by 27.58% of those interviewed ones.

Most of those who took part in focus groups underlined the fact that:

'Initiating and developing a business means having the courage to assume risks. However, the major obstacle in developing a business in Romania is represented by the lack of financial resources and not by the young people's capacity to assume risks.'

According to students, the most important factors for developing a business are, besides access to 'useful' information, 'gaining competence' (79.5%).

2.2 The entrepreneurs' perspective over the elements, contexts and qualities that are necessary for business success

The elements (qualities, conduct) that ensure business success

To entrepreneurs, the most important factor that ensures business success is represented by 'one's ability to manage in a given situation'. The high percentage recorded for this criterion probably reflects personal experience gained in trying to set up a business and the manner in which young people felt forced to get over obstacles.

Only about a third of the entrepreneurs appreciate professional competence to a maximum extent. Most of them (62%) appreciate it in a 'moderate' way. Thus, according to them, it is not highly important to be a specialist in the domain in which you intend to set up your business.

Keeping the same contexct, in another study it is emphasized that ,,only a little bit more than a half of the entrepreneurs are interested to a large or significantly large extent in preserving competent employees. Collected data point out that more than 20% of the entrepreneurs manifest a little or little

interest and about 27% medium interest in preserving competent employees."

The observance of rules for being successful in business seems to be perceived as an unimportant criterion. Only 14% value this criterion to a high extent, while 36% regard it as haing a minor importance. The previous explanation can be also applied in this case.

The economic and legislative context is regarded by entrepreneurs as having a relative importance in supporting and promoting businesses: 36% of the entrepreneurs regard it as being highly important and 46% value it in a moderate manner.

Relationships and acquaintances in the business environment are an important criterion which ensures success in business, according to 68% of the interviewees, who appreciate it to the highest extent.

Personal effort and work, though important (for 60% of the interviewees), are not as much valued as 'one's ability to manage in a given situation''(86%) and 'relationships and acquaintances.' (68%).

What would be useful for starting and developing a successful business

Most entrepreneurs consider that in setting up and developing a business a friendly economic environment plays a major role (according to 62% of the interviewees) or a moderate role (according to 36% of the entrepreneurs).

To entrepreneurs, awareness of successful examples is less relevant in comparison with other studied criteria: only 36% value it to a large extent, while 54% value it in a moderate manner.

Access to useful information is a relevant criterion for developing a business by entrepreneurs (according to 80% of those interviewed). Only 20% appreciate that this criterion has a moderate significance.

Training and qualification are highly important for a successful business – according to 60% of those interviewed, while 38% of those interviewed value training to a moderate extent, and only 2% regard training as unimportant for a successful business.

Access to financial resources, as access to useful information, is highly appreciated (80%), being regarded as a fundamental factor for supporting and developing businesses; 20% of those interivewed appreciate this factor in a moderate manner.

The gaining of competence (knowing what and how to do) is regarded by entrepreneurs as being important to a large extent (according to 76% of the interviewed subjects) or to a moderate extent (according to 24% of those interviewed) for ensuring business success.

Comparative data presentation, students versus entrepreneurs (elements which ensure success)

Comparative data presentation, students versus entrepreneurs (what would be useful for success)

3. Conclusions as to the evaluation made by students and entrepreneurs for some business environment components that could contribute to business success in today's Romania

There is an age gap between the interrogated groups, 83% of the students are 24 or less than 24, while most of the entrepreneurs, about 60%, are 30 or above 30.

As the collected and analysed data reveal,"one's ability to manage in a given situation" is among the "keys" to business success in Romania, according to students (67%) and to entrepreneurs (86%).

The "professional competence'' criterion recorded significant differences as to the answers given by students and entrepreneurs. Students value it much more (60% of them) than entrepreneurs (32%). We have also recorded significant differences as to "the observance of rules", which for students (37% of them) is important "to a high extent", while only 14% of the entrepreneurs value them to a high extent, and 36% of the latter appreciate that their importance is minimum. The experience gained by entrepreners in the present business environment is illustrative for their answers as regards the importance of these criterion for business success.

According to students, the most useful means that ensure business success are: "access to information" (82%), "acquiring competence" (80%),"training and qualification" (77%), whereas, the most appreciated means, according to entrepreneurs, are: "access to useful information" (80%) and "access to financial resources" (80%; while, to students, 'access to financial resources' is valued by only 65% them).

'Awareness of successful models' criterion has recorded a significant difference in the answers given by students and entrepreneurs; logically, students appreciated this criterion in a larger number (55%), in comparison with 36% of the entrepreneurs. Lacking experience in running a business, most of the students (54, 6%) uphold that 'awareness of successful models' is useful in achieving business success.

Entrepreneurs, and to a less extent students, recognize that in the Romanian business environment criterion such as: 'one's ability to manage in a given situation' and 'one's relationships and acquaintances' are still more operational and, consequently, more important than, e.g. 'observance of rules' or 'professional competence'.

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THE STUDENTS' VALUE-BASED CHOICES AND ATTITUDES - A SUPPORT FOR THEIR SOCIAL AND PROFESSIONAL INVOLVEMENT?

Elena NEDELCU[*]
Mihai NEDELCU[**]

Abstract

In social sciences, values are used to define individuals, smaller or larger groups and societies. Values directly hint at what we are and they determine our action.

The first part of the paper defines the basic concepts we use in the paper. There is a brief presentation of the polemics regarding the definition of values, norms and attitudes, as well as of the outcome of the research work carried out for identifying the young people's value-based choices in the present Romanian society.

In the second part of the paper we analyze the main data resulted from the social inquiry that we pursued on the basis of the survey that we applied and of the focus-group that we considered. The survey was meant to draw up a hierarchy of the students' values, see "the 21 values list". The focus-group had the role of debating certain preliminary outcomes of the research, and later on, of indicating analysis directions for interpreting the collected data.

The present study is the first stage of a larger research work that aims at identifying the extent to which students are oriented towards values which support social and professional success in the present Romanian society.

Keywords: *values,attitudes, Romanian students, professional involvement.*

Study regarding the attitudes and value-based choices that support the Romanian students' social and professional involvement

In social sciences, values are used to characterize individuals, smaller or larger groups and societies. They directly hint at what we are and they also guide our actions.

The study with the above mentioned title consisted in a social inquiry based on a survey, interpreted by focus-groups students who were meant to bring more depth in analyzing the collected data. One of the methodological elements and maybe the most important one, which gives distinctiveness to this study, is that the students could differentiate between the "appreciated" behavior patterns and the ones that bring "success" in society.

Referring to the polarized axes of the value orientations (Sh. S. Schwartz), and using the results of our research work, we have noticed that the young people's choices reflect, both extensively and intensively, two directions. On one hand, students are especially inclined towards "altruism", manifesting the tendency towards overcoming the limits of individualism by valuing other people and the world in general (friendship, mutual help, civic spirit, care for the environment, love and harmony). On the other hand, we have recorded indicators that describe the young people's availability or openness to change (freedom, independence, interest, mobility, involvement), which are also highly valued.

1. Introduction

1.1. VALUES, NORMS, ATTITUDES

When we refer to values, we think of what is important in our life. A certain value may be important to a person and, at the same time, unimportant to another one. Thus, in social sciences, values are used to define individuals, smaller or larger groups and societies. Values directly hint at what we are and determine "the selection of the ways, means and aims that are specific to an action." (Kluckhom).

Ever since 1993 studies have been made in Romania which were meant to identify the population's value-based choices. First of all, we would like to refer to the studies pursued by Malina and Bogdan Voicu and by Ipsos Research and Şcoala de Valori [The School of Values].

The studied quoted in the below footnotes, as many other ones, refer to the polemics generated by the analysis of the following concepts: value, value-based orientation and attitude. One of the causes is represented by the different meanings given to the notion of value in social sciences. In aesthetics and philosophy, the concept of value has a normative connotation; thus, values are criteria according to which one distinguishes between good and bad, ugly and beautiful (Ester, Halman, de Moor, 1994). The normative connotation is also preserved when the term "value" is used in everyday language. The

[*] Associate professor, PhD "Nicolae Titulescu" University (e-mail: **doina.nedelcu@yahoo.com**).
[**] Sociologist, Researcher at Romanian Institute for Medical Expertise and Recovery of Working Capacity.

concept of "value" makes us think of criteria that help us find a direction and of borders between what is socially allowed or desirable and what is not.

One of the most used definitions in sociology is the one given by Kluckhohn, according to whom value is an explicit or implicit concept, which is distinctive to each individual or group and which reflects what is desirable to be done, thus influencing the selection of means and goals in action.

According to Schwartz, values are beliefs that are indissolubly linked to one's feelings and that reflect what one aims to do. Values go beyond actions and specific situations and, thus, they are different from norms and attitudes.

Values determine the manner in which we select and assess actions, tactics, people and events. People decide what is good and what is right, what is legal and illegal, what is worth being done or what should be avoided while relying on the consequences generated by the values that they praise. Values are organized according to their importance, which is different for every individual. People's values are an ordered system of priorities that characterize themselves as individuals. Do people consider more important their own personal achievements or justice? Do they value more the new or tradition? The hierarchical nature of values distinguishes them from norms and attitudes.

The present study differentiates values and attitudes from a conceptual point of view. Thus, Fishbein and Ajzen (1975) define attitude as a learned predisposition to answer as regards a certain object in a consistent, favorable or unfavorable manner. Although attitudes are elements that are subordinated to values within the personality system, a certain attitude is not necessarily linked to a certain value (Rokeach ,1973). For example, a favorable attitude towards gypsies can be linked to the concept of equality or to the feeling of mercy. However,there is a logical relationship between certain values and attitudes because the values from a certain domain are directly linked to the attitudes and behaviors included in that sphere. For example, democratic values explain civic behavior in the best way.

This link between attitudes and values has an increasing importance because values can be conceptualized separately but they cannot be studied separately. Actually, values represent a "latent form of reality", which lies behind the directly noticeable deeds and which cannot be studied outside direct attitudes or behaviors (Malina and Bogdan Voicu , 2007).

The system of values impregnates the culture of any society. It gives sense to human action and it legitimates norms. Values have an abstract nature, while norms have a concrete nature. One and the same valus (politeness) can be expressed through a whole set of norms (such as: handshake, granting priority, etc.).

Norms, alongside with values and closely linked to values, are important elements our society's culture. Human behavior is structured according to a set of rules and conduct norms that prescribe a behavior which is adequately adapted to certain situations. In their turn, attitudes and behaviors typically have implications over values. For example, going to the church could signify the promotion of tradition and conformity to the detriment of hedonism and stimulative values.

1.2. Perspectives on the present perspectives regarding the Romanian young people's value-based choices

Sorin Mitulescu's and Marius Lazar's studies bring into evidence the existence of significantly different value-based choices from one region to another. Thus, it has been found that in Bucharest-Ilfov region and in the western part of the country young people's values are predominantly modern; importance is given to the entourage, friends and the use of spare time. On the other hand, less importance is given to religion, work or family. In the South-East region, value-based choices have a certainly modern dimension but rather by rejecting religion, work and family and their importance, and less by valuing friends and free time.

In Muntenia, the above-quoted authors, value-based choices are rather anti-modern than traditional. The research work pursued by C. Craitoiu takes as a starting point one of the conclusions drawn by Ronald Inglehart and th post-materialist theory, i.e. the "hypothesis of rareness". According to this theory, the importance that people give to things depends on their social and economic background. Moreover, people tend to grant precedence in their choices to things that are rare (i.e. hard to be obtained). Individuals try to achieve certain goals in a hierarchical order. Even if people can aim at achieving freedom and autonomy, material needs – such as hunger, thirst and physical security – must be satisfied first because they are very pressing and they refer to survival. Inglehart considers that if these primary needs are hard to satisfy, their rareness being predominant, it results that materialist goals will have priority in comparison with post-materialist goals, like belonging to a group, respect, fasting and intellectual satisfaction. However, once survival needs are ensured, attention will be focused on non-material goods.

Considering the economic difficulties that have constantly affected Romanian society, Crăiţoiu Constantin presumes that basic needs are pressing for Romanians, while survival-based values are dominant.

"The position that Romania occupies on the cultural map of the world illustrates the opposition of survival-based values and the expression of one's own self; thus, Romania is one of the countries in the

world that appreciate family/security and work-based values to a great extent.

The main value-based choices of Romanians – according to Crăiţoiu Constantin – reveal the traditional dimension of Romanian culture. These choices are different from post-modern values that are characteristic to most Western countries. In the hierarchy of the Romanians' values we find: family, work, religion, friendship, free time and politics; what individualizes us at European level is the fact that the religious nature and the process of religious revitalization represent some of the most important values on the continent."

Contents: are value-based choices and the attitudes of Bucharest students helpful in their social and professional involvement? (empirical research)

2.1. Research theory and method

The research aimed at identifying the students' value-based choices and attitudes, as well as the evaluation of the supportive/non-supportive consequences generated by these values in the students' involvement in the social and professional environment. The research theory and method were applied on a group of 361 students from Bucharest, as well as other 140 students who took part in the focus-groups organized for debating the preliminary outcomes of the research and for a deeper analysis of the collected answers. Within the focus-groups, students tried to argue their choices (answers). The focus-groups were constituted of students from "Nicolae Titulescu" University of Bucharest.

All the four surveys applied in the present study are original: *survey for comparing pairs of values, survey for the hierarchy of values, short survey for generic values, survey for the value-based criteria in the choice of a friend*. One and maybe the most important methodological element, which particularizes this study, is the fact that students could differentiate the "appreciated behavior" patterns and the "social success" patterns. To achieve this goal, subjects were asked to compare and evaluate series of intuitive behavior models (values can be recognized in their own manifestation through attitudes and behavior and also directly).

The theoretical background used for the research instruments and the interpretation of the collected data – which were more extensively used for the first survey – were the paradigms of the theoretical model created by Shalom Schwartz. We have embraced the model of the Israeli psycho-sociologist because we have appreciated that it is proper and applicable for this study, i.e. because it reveals opposite or converging value-based choices, which might be linked to the entrepreneurial spirit and the dynamic of values considered to be "values of success".

Given the complexity of the study, the present paper will make reference and analyze the data collected after applying *the survey for the hierarchy of values*; as regards the analysis of the other data, we are going to publish them in our next scientific study. The above mentioned survey comes up with a list of 21 value-loaded words. The subjects were asked to put in order the items in the list, according to their importance, from 1 (the most important) to 21 (the least important). What is it really important, what does it mostly matter to them?

2.2.THE ANALYSIS OF THE STUDENTS' ANSWERS TO SURVEY No. ll :

"Survey for the hierarchy of values (list 1 – 21)''

The importance of business to students

After the statistical processing of the answers given by the interviewed subjects, in conformity with the above graphics, "**business**" occupies an average-peripherical position in the "21 list" comprising the hierarchy of values. In most cases, business occupies the 10-15 positions; the highest position, for boys, is 8 (9.52%), while the highest position for both genders is 13 (8.54%). The outcomes obtained within focus-groups could be explained as follows:

- "Young people are not very much inclined towards assuming risks."
- "It is preferable to be healthy and live comfortably than having a stressful job."
- "Young people would rather specialize themselves in a domain and receive a salary instead of developing a business".
- "In order to have a business, you need experience and you need to know that area of activity well; therefore, what you need first is work in a company/firm."

The importance of the computer to students

"The computer" represents the biggest surprise. As value significance, in "list 21", " the computer" is valued to a low extent": about 35% of the students place it on the last position in the list: 16-21; the highest position is 20 (11,7%), without notable differences between genders.

The main explanations given by the focus-groups are the following ones:

"The computer creates the illusion of communication. Actually, the excessive usage of the computer generates difficult interpersonal relationships and it leads to isolation and loneliness".

"We have unlimited access to the computer and we cannot appreciate it to its fair value; it has become an ordinary thing in our lives".

"The phone is more used than the computer, it is more practical and it accompanies you everywhere!"

The importance of competence to students (according to their gender)

"Competence" is an important value in the young people's choices. Over 50% of their answers place competence on 6-10 positions, the highest percentage being 17.14% for boys, i.e. position 10. For girls, the highest positions are 9 and 10, which represents about 25% of all given answers.

Focus-groups have revealed why this value is so important to young people:

- "Professional competence gives you material, financial and psychological safety."
- "Competence is necessary for achieving professional goals and your career."
- "Competence brings respect for your own person, more self-respect and the appreciation of your peers".

The importance of culture to young people

To the interviewed subjects, "**culture** is also an important value; over 44% place it on positions 6-10 and 26% on positions 1-5. The highest position is 6 (12.03%).

According to focus-groups, culture is appreciated by young people because:

- "It facilitates inter-human relationships, it helps to build a rich vocabulary, it is a source of subjects for dialogue and for interrelations with the others."
- "Culture helps you feel well when you interrelate with your peers."
- "When we have a general culture, we are more interested in the others, we can tackle different subjects and we can socialize more easily."
- "Culture gives us the necessary knowledge that we need for our personal development."

To the interviewed subjects, "culture" is also important since more than 44% place it on positions 6-10 and 26% of them on positions 1-5. The highest rank is 6 (12.03%).

The importance of entertainment to students

"Entertainment" is a central value to young people; about 38% of them place it on positions 6-10, the highest position being 8 (10.79%). A significant percentage, above 21 % of the students place it on positions 15-21. They argue their choice stating that:

- "You need money to entertain yourself. Entertainment is not a priority".
- "Nowadays, we strive to survive, there is not too much time for entertainment."

The importance of love to students

Of all presented graphics, it is obvious that "love" occupies a central position since it is placed on the first three positions in the hierarchy (i.e., 60% as a whole). "Love" occupies the highest position of the first 3 ones, respectively 23.25% of the whole recorded percentages. There are no significant differences depending on gender. The value granted to love, according to the focus-group, is explained as follows:

-"Love gives you the courage to go on and it gives you a feeling of safety."
-"We need love to compensate all shortcomings and the inherent discontents of life."
-"We feel indulged by the ones who love us."
-"It brings you peace and harmony.""It offers you a feeling of fulfillment."

The importance of family to students

"Family" is the most appreciated of all values by students. It occupies the 1st position in the top of their choices (47.7% - total, 43.3% - for boys, 50% - for girls) and it records the highest percentage of all positions (27.4%).

Positions 1-3 represent about 82% of all the students' choices.

According to the focus-group, family is ranked the first in the young people's lives because:

- "It offers safety, unconditioned love, psychological and material comfort."
- "In our families we find the ones that brought us in this world and created us".
- "The family supports you in anything you do, you can count on its help."
- "The family gives stability in a person's life."
- "In our families we find our own identity, and it is the first group identity that we get."

The importance of nature to students

"Nature" is a central-peripheral value in the "list 21" of choices; 27% of the interrogated young people place it on 6-10 positions, about 32% of them on 11-15 positions, and 8.92% of them place it on position 10.

The focus group has explained this state of facts in the following way:

- "There is ecological culture in Romania".
- "Students are too young to think of the future that they are going to leave behind them".
- "The young people's tendency towards individualism places nature on an unimportant position to them. Young people are more concerned about their own well-being rather than the nature's well-being."
- "Young people don't know the beauty of nature, the wonderful places that Romania has and that's why they don't value them".

The importance of honesty to students

Honesty is a very important moral value in the choices made by students and it occupies the first positions in the hierarchy of values, especially positions 3-10; the maximum is located at position 6 (10,.9%) of the total.

The high positions occupied by honesty are explained by the focus-group students as follows:

- "Honesty helps you get the respect and the appreciation of the other ones."
- "In an honest world, you feel yourself safer."

- "You are content with yourself if you are honest."

- "In life it is important to be honest not only with yourself, but also with the other ones."

- "Honesty is a missing value in Romania and this thing must be modified."

The importance of peace

"Even if we live in **peace**, this value if appreciated by students and it occupies positions comprised between 4-13 (this segment encompasses most of the students); the highest positions are: 5-7.

Most of the interviewed students of the focus-group consider that:

- "Peace is the mother of all values. It absence endangers all values."

- "Peace is necessary in our life and for the harmony of our lives."

- "The more its vulnerability increases, the more important peace becomes."

The importance of the country

"The country" is a peripheral value; less than 6% of the young people place it on the first 5 places, more than 40% place the country on the last positions; the highest recorded percentage is 11.5%, for position 20.

The students in the focus-group have given the following explanations:

- "Young people do not feel themselves stimulated and supported; they do not find a reason to hope in their own country."

- "Patriotism is no longer promoted and broadcast in mass-media."

- "Globalization diminishes the patriotic feeling."

- "Disappointment with one's own country, i.e. with its leaders , the way in which Romania presents itself undermine the patriotic feeling."

- "People are no longer educated in a patriotic manner."

- "From an early age children are encouraged (by parents and school) to think of leaving Romania, going to schools and universities abroad and then work in a foreign country to be able to be a self-made person."

The importance of religion

"Religion" does not occupy any of the 10 positions in the hierarchy. About 70% of the young people place it on positions 10-21.

In the focus-group students' opinion, the low positions occupied by religion are mainly due to the following factors:

- "Religion has generated conflicts, wars."

- "Priests are often interested in money and are not models of spirituality."

- "Faith and religion are mistakenly taken to be one and the same thing with the church (the institution)."

- "Religion can be used to manipulate people."

- "Religion is an old practice and is no longer in trend."

- "Young people are disappointed because the church does not get involved enough in settling social problems; hence their distrust in the institution of the church."

- "The present social contexts seem to rather favor a person's materialist, money-oriented life-style than spiritual matters."

- "The trend is: ripping off the spiritual dimension of the world."

The importance of health

Health is a top value for young people and it occupies the 2nd position, after family. Positions 1-4 gather a percentage of 70%; the highest recorded percentage is 21.7% for the 2nd position in the hierarchy.

Students in the focus-group appreciate that:

- "Success in life and workforce depend on the degree of health that a person has."

- "In a society where there are many ill persons, we want to be healthy first of all."

- "You need health more than money; an illness costs you money to cure."

- "Fear of an illness, of physical or mental incapacity make you appreciate health so much the more."

The importance of sex

"Sex" is a relatively constant and less appreciated value, positions 5 – 20; the highest recorded percentage is for position 21, namely 10.83%. According to students, "sex" is not the most important value in "list 21". Boys place sex on the first 10 positions in the hierarchy, about 45% of them, while girls have the same perception in a lower percentage, about 30%.

The focus-group has given the following explanations:

- "Sex without love is simply a sport-like activity."

- "Sex is a taboo subject to some people."

- "There are many prejudices relating to sex and that's why it is uncomfortable for some people to discuss about this topic."

- "Sex is not unimportant, but there are other priorities in life."

The importance of science

"Science" records positions between 9-15, with a maximum for position 10 (9.87%).

Girls, with a higher percentage than boys, place science on the first 10 positions. For the 1-10 positions, 6.67% of the girls place science on position 4 and 9.52% on position 10.

The importance of stars

"Stars" (seen as a value) occupy position no. 1 in the top of rejections, about 50% of the interviewed students place them on the last position, 21.

The focus- group students give the following explanations:

- "In mass-media, not real values but rather non-values are promoted''.
- "You cannot learn anything from a star because it doesn't inspire you anything."
- "Stars are regarded are valueless."
- "False stars have a negative influence, they put off and mislead young people."

The importance of the car

The importance that students grant to cars ("personal car") – it can seen surprising – is not high; thus, young people place cars on positions 14-20.

Students seem to regard cars as a luxury and not as a necessary object.

The focus-group students have come up with the following explanations:

- "Students have more important needs than a car."
- "The car is too expensive for most students for it requires money that students don't have."
- "Traffic is awful, you can better travel by using means of transport of by walking."

The importance of money

Money is an important value for young people (26.51% place money on 1-5 positions and about 56% of them place money on positions 1-10). Positions 3-4 have recorded interesting results expressed as a percentage.

The focus-group students commented on this outcome as follows:

- "Money satisfies the primary and stringent needs of the man."
- "Without money you cannot do anything."
- "We waste our youth trying to make money."
- "Money gives us power."

The importance of colleagues

"Colleagues" occupy a central-peripheral position in the hierarchy of the values grouped in list 1-21, with 50% of the answers being given for positions 11-16; the outcome is interpreted by the focus-group students in the following way:

- "Young people no longer have time to spend with their colleagues."
- "Individualism hinders the development of solid relationships with one's colleagues."
- "Relationships with colleagues are nurtured on Facebook."
- "The feeling that one is part of a community is not so strong any longer; family is an exception."
- "Students do not know each other sufficiently, their attendance in courses and seminars has dropped. Many students have to work to pay their tuition fees."
- "The young people's sociability has also become less stronger. Young people mainly try to fulfill their personal interests."

The importance of school

School is an important value for young people. About 58% of the students place if on positions 1-10; position 4 has gathered most of the answers, representing 11.2% of all the given answers.

The focus-group students have given the following explanations for this outcome:

- "School ensures your professional success."
- "School plays an important role in building and developing one's own personality and character."
- "School helps us communicate better and get to know persons who are the same age as we are and integrate into society."
- "School trains us for a profession, and gives us a certain level of general knowledge."
- "We can build a career thanks to school."

3. Conclusions

A first conclusion we can draw after applying the survey on the hierarchy of values, we are going to present a classification of the first three chosen values, i.e the values that occupied positions 1 – 5 in "list 21". Thus, 60% - 80% of those interviewed choose family, health and love as the first three main values in the hierarchy of "list 21"; 31.22% of those interviewed place school, health and money on the first three positions in the hierarchy.

Classification	Value	Total	Males	Females
1	Family	47.77%	43.27%	50.00%
	Health	18.53%	17.31%	19.14%
	Love	13.38%	13.38%	13.81%
2	Family	27.39%	30.77%	25.71%
	Love	23.25%	22.12%	23.81%
	Health	21.73%	20.19%	22.49%
3	Love	23.57%	21.15%	24.76%
	Health	18.85%	13.46%	21.53%
	Family	7.01%	6.73%	7.14%
4	School	11.18%	11.54%	11.00%
	Health	10.54%	14.42%	8.61%
	Money	9.50%	7.69%	10.53%
5	Schoola	9.90%	10.58%	9.67%
	Peace	8.92%	10.58%	8.10%
	Honesty	8.65%	8.65%	8.65%

Besides this classification, the analysis of the whole set of collected data reveals that the most importante values for young people are:

- family, love, health (the first three positions);
- school **(**58% place school on position 1-10, with a highest percentage on position 4);
- money (26.51% place money on positions 1-5 and about 56% on positions: 1-10);

- honesty occupies positions 3-10 with significantly high percentages;

- peace has recorded significant percentages especially for positions 4-13, while the highest percentages were recorded for positions 5-7;

- "competence" - over 50% place it on positions 6-10, whereas the highest percentage has been recorded for position 9-10;

- "entertainment" - occupies a relatively central position, about 38% of those interviewed place it on positions 6-10, while 62% of them place it on positions 11-21.

For the interviewed subjects, "nature", "business", "religion", "colleague relationships" are central-peripheral values in "list 21". Thus:

- "nature" (27% of them place it on positions 6-10, about 32% of them place it on positions 11-15), position 10.

- "business" (most of the students place it on positions 10-15; position 8 has recorded the highest score);

- "colleagues" (50% place colleague relationships on positions 11-16);

- "religion" is not one of the 10 values. About 70% of the young people place it on positions 10-21.

The values that occupy the lowest positions in the hierarchy of "list 21" are: stars, sex, country and the car.

"Sex" has recorded low and relatively low values, occupying positions 5-20; the highest percentage has been recorded by position 21 (10.83%).

"The country" is a peripheral value, less than 6% of the students place it on the first 5 positions, more than 40% of them place it on the last positions; the maximum percentage of 11.5% has been recorded by position 20.

"Stars" (as a value significance) occupy position 1 in the top of rejections; about 50% of the interviewed students place it on the last position, 21.

"The car (personal car)" – surprisingly – occupies a peripheral position: 14-20.

Although students regard the car as a luxury rather than necessary object, they appreciate that they have more stringent needs than owning a car, whose maintenance costs a lot of money for a student's budget; on the other hand, traffic in Bucharest is terrible and discouraging.

Gender-based differences recorded in the ranking of the values encompassed by "list 21" were insignificant for most of the items and this is the reason why they were not dealt with in the present research paper.

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THE ELITES AND THE MASSES IN 2016

Mirela Cristiana NILĂ-STRATONE*

Abstract

The dichotomy elite / non-elite has determined the segmentation of the romanian population in groups centered on competence, talent and excellence - at the qualitatively (positive) pole - on the one hand and vanity, fight for power, incompetence - at the opposite pole of the quality - on the other hand. The discrepancy between the two categories has led to the necessity of studying the causes that sustain each cluster.

The separation of popular elite mass is an unquestionable cause of a form of aversion from the masses against the elite. Based on this harmful and so-called democratic attitude, the elite has became a suspect notion, with a pronounced negative connotation, marked by doubts.

Considering the socio-political events occurring at global level, but especially in Europe in years 2015-2016, feels definitely a need for a ruling class with high moral character, coming from among the meritocratic elite.

Keywords: *dichotomy elite/non-elite,competence, excellence, preeminence, fox elites, lions elites.*

1. Introduction

We consider that any discussion of elite-elites implies above all a more complete understanding of this notion.

That respectively concept may be understood by reference to the two dimensions:

- the first dimension relate on the inherent upper characteristics owned by one thing, action or person which is appreciated in an activity as best objects or individuals whose performance is considered above average at the class or group to which they belong;
- the second dimension relate to a social group and its members, who succed to make use of the powers acquired through various means, to administer and manage the structures of society; these social groups which have monopolized in one way or another authority and power, they exerted these, through various forms of domination (economic, social, political, cultural, ideological, etc.).[1]

The inheritance of social positions as basic of the preeminence, the favorable circumstances as factors that give rise to foxes elites and lions elites alike, external factors they are the main causes that led to the monopolization of power and authority in the host societies of the elites.

We have to do with two aspects from which we can start an analysis of the emergence and evolution of elites in society:

- the qualitative aspect, based on the axiological size; this is manifested in the spiritual plan and he presents the elites as social categories who supporting and promoting values (Edward Shils).

- the quantitative aspect, with important results so ,,the elite who occupy the command posts may be seen as the possessors of power and wealth and celebrity; they may be seen as members of the upper stratum of a capitalistic society. They also may be defined, in term of psychological and moral criteria, as certain kinds of selected individuals,,[2].

In trying to explain the elitist phenomenon, it was certainly referred to the weight of each of the two aspects, qualitatively and quantitatively. On this occasion it was analyzed the emergence and evolution of the elite in society (Pareto, Mills, Mosca, Michels).

2. Content

The dichotomy elite/non elite has determined the segmentation of the Romanian population in groups centered on competence, talent and excellence - to the qualitative pole - on the one hand and vanity, chasing after power and incompetent, completed in certain circumstances given by preeminence – to the opposite qualitative pole - on the other side.

Gradually, these poles of society were removed from each other, leaving room between them to an educational vacuum. It is the reason why the citizens who get in responsible positions (to family, friends or community), are forced to choose to head to the pole of the power elite, in pursuit of solving social problems. This happens either fr om a personal level or at the community level.

The strength available to each elitist pole varies depending on its nature.

* Mirela Cristiana Nilă-Stratone, PhD, Faculty of Administrative and Social Science, "Nicolae Titulescu" University of Bucharest (e-mail: **mrl_cristiana@yahoo.com**).

[1] http://www.revistadesociologie.ro/nr1-2-2008, p. 164.

[2] *Ibidem,* p. 167.

The assimilated elite of a social class gathers around it citizens ranked by the influence available from the social and political power. From this point of view, we find the population divided into two layers: the lower nonelitist, different from elite and the upper - the elite, namely the governmental elite[3].

It is necessary here to clarify the two meanings of the elite term:

- the first meaning refers to the specific of the membership group of the people that make up the elite (they are recognized as representative to the group);

- the second meaning refers to the ability of people to hold the first place in a given set, so we stop talking about a specific group.

In each case, the reference is made to a certain category of individuals restricted from some points of view. It is situated in a different position, in a way opposite to those who do not belong and which constitutes the social mass, the masses, the great mass, etc. This is the simplest plan of social delimitation: the elites and the masses.

The two elite categories are in opposition or juxtaposition report. In both cases, filling a place in the elite is determined theoretically by excellence.

In practice though, the reality compels us to recognize that the first ranked is not always related with the excellence.

This doesn't mean that the excellence and the preeminence are permanently excluded each other.

If we are dealing with the meritocratic criteria, it is clear that includes that we equally accept the pre-eminence and excellence, both portraying the best in a field or another of social life.

The elite separation of the mass represents an indisputable cause to a form of aversion from the masses towards the elite. In this context, elites and especially *the elitism*[4] are loaded with negative connotations. Logic, the elitism serves to favor and select the elite. But we should not neglect one important aspect: this is done at the expense of the majority. This kind of aversion is sociologically normal. It is the result of lack of concordance between social equality promoted by democratic societies and by the specific detachment of the elite masses.

It's no secret that *the social leveling logic* born from a misunderstanding of opportunity equality in democracy was built in social consciousness as the great wall of China. As he marks the pedestrian path in the heart of China, so social equality is designed monotonous and constant. This equality which takes the form of social leveling, is closely guarded by solidarity. In this context we can say that solidarity appears as a guard defending democratic society of remarkable inequality against its destabilization.

Based on this harmful attitudes and so called democratic the elite has become a suspect notion, with a pronounced negative connotation, marked by doubts.

The parallel elite- elites involves an analysis of the ratio between the "elite of the nation" and "elites who govern us." The relationship between singular and plural in the elite-elites case involves the relationship between pre-eminence and excellence.

Regarding the singular "elite" the reference system is the "ruling elite - governmental".

The plural of "elites" is aimed at small groups typical to different fields , in which case the excellence constitutes the basis.

Elite -the leading elite

With the insistence of the masses to fight for equality in democracy (that social leveling that actually wants in this form until each individual feels the need to rise above the imaginary democratic threshold) appeared a relationship between the concepts of *ruling elite , ruling class, elite-social class*.

Once published this construction elite social class, it was inevitable the appointment of governors as social class.

From here, the parallel elite-nonelite, which is exactly the difference between the elite - as a superior group, and the masses - as the nonelite, emerged as segregation between upper-lower. So it came to an overlap period with the *elite phrase government class (ruling class).*

No matter how much they would dislike the elite term, elitism, it appears in all societies as a necessary evil, referring, of course, to the elite ruling class. There is nothing new in the fact that this class is based on the *preeminence* and especially on the ability of individuals to stand out and to hold functions, which gives them advantages. Precisely these advantages represent the quintessence of the discontent of the masses, the primary reason for which everything that has tangent with the elite, elitism, is in disgrace, though this is not a purely objective attitude of the masses.

The sociologists have shown that in human history there are some constants that dominate the elites. These constants have evolved, but basically they act with force of law. Is the case of *"bronze law of oligarchy"*. This law is based on self-governance masses. However it has proved that in terms of mechanical and ethnic the self-government of the masses remains a matter purely theoretical. The fact that it takes the responsibilities to be delegated to an enable minority because of the inability of the masses to participate *in corpore* in managing and regulating social issues compel them to trust that

[3] Jacques Coenen Huther, *Sociologia elitelor*, Ed. Polirom, Iasi, 2007, p. 19.

[4] The concept who support the decisive role of the elite in the historical movement and in management of the society.

minority (governmental elite). The minority, in return, automatically detaches gradually from the community that it organizes and leads. At baseline, the leader is the one who serves the masses. In time the organization grows quantitatively, and then to quality diversify, engaging relationships between members. Qualitative diversification is materialized by increasing of the organizational complexity. Those who are in close proximity to the leader separates increasingly more from the ruled ones and end up forming the oligarchic group. This group will be increasingly less controlled by the ruled ones and the oligarchic members will create a circle of their own, with strict rules, the group becoming - in terms of maintaining capacity in function – exclusivist.

In one way or another, this scheme is characteristic of every form of social organization.

We can talk in this context about a form of violence that is vested with legitimacy. So we are dealing with a legitimate violence, that exactly the ruling elite legalize it soon it gets power . We are in the situation of monopoly of legitimate violence, the recognized weberian notion.

Last but not least, it should be noted that the oligarchy exists in all social orders, even if it is not officially recognized. The higher the group comes to power is quantitatively increased and gets organization, the more it emphasizes its stratification. Here appears by default the ranking. The ranking can not work (and with it, neither the organization) than by differentiation of the organs and the amplifier of functions. Any established solid organization, whether it's about a democratic state or a league of proletarian resistance, is eminently a favorable ground for differentiation of organs and functions[5].

Another aspect that needs to be said on this occasion is that between the classical doctrine of democracy and social behavior of the ruling elites but also populations (exactly the empirical reality of regimes considered to be democratic), there is a gap that we can't neglect. The delegation of powers of leadership, organization and planning of community life by the masses (to obtain their own welfare and happiness) by elites is absolutely normal. This leads directly to the control levers (tools and methods) for controlling the social life of communities. On this occasion it is necessary to fulfill a condition: the elites in possession (holding) of the control to give an account of the receiving power, specifically to justify every action than what they invested with this capability (voter).

Such a normality can not be recovered in all cases of existence and action of elites. The reason is that the process of devolution of power is not met at all kinds of elites.

In the human history, depending on the type of society, the elites have been selected in accordance with certain criteria, which over time have been classified as principles:

- in the aristocratic society we have to do with the principle of kinship; based on this principle are selected and recognized the elites; thus, they become specific elite of the aristocratic society;
- in the bourgeois societies, the principle on which are selected the elites is that of property or richness; these elites become emblematic, representative, for the bourgeois society;
- in case of societies who are classified as democratic societies, we have, at least theoretically, declarative, selected and recognized elites on the basis of performance or merit; therefore the meritocracy becomes a marker of democracy.

In empirical plan is necessary to mention that in a modern democratic society, the elites selection process undergoes reconstruction. This is achieved by combining the three principles.

This matter is explained in detail by Karl Mannheim[6] in mid-twentieth century: he examines the impact of social reconstruction over the individual and society as a result of human evolution.

From the mixing of the principles of selection of elites, results a domination of the performance criterion. On this occasion we relate to intellectual elites. The major objective of the intellectual elites is the imposing and maintaining the social balance. The essential condition for achieving this is to overcome the categorical interests. It is a fact that the elites of the different fields have specific interests: economists will focus on economic activity, which it considers as the most important; lawyers will grant exclusive legal issues and legal importance, etc. Equally important is the interest of the elites belonging to different interest groups and here enroll the political elites here and governmental . Speaking of intellectual elites, we can say that there is necessary capacity to excess the categorical interests. This constitute on the other hand in the duty of these elites to society.

Also, the power elite it is based on institutional positions and decisional capacities.

It's about ,,those political, economic and military circles, who in a complex set of cross clans they share the decisions of national importance''[7]. We are witnessing of a certain intersection of ruling circles.

This became possible through a process of psycho-social homogeneity. This homogeneity boils down to the idea that whatever their sector of activity or area of competence, the individuals in leadership position have the same social origin and the same

[5] Michels, Robert, *Les Partis politiques, Essai sur le tendance oligarchique des démocraties,* Paris, 1971, p. 33.
[6] Mannheim Karl, 1940, *Man and Society in an Age of Reconstruction,* Kegan Paul, Trench, Trubner, Londra, p.90.
[7] Mills, C. Wright, *L'élite au pouvoir*, Éditions Agone, Paris, 2012 , p. 41.

level of education. The result of the psychosocial homogeneity process it was materialized in what we might call similar lifestyle. A similar lifestyle has as main effect facilitating the social contacts. This leads directly to the awareness of the existence a situation which is based on a particular type of solidarity. It's about social class solidarity.

She acts as an effect of social class consciousness.

In its turn the social class consciousness does not manifest itself nowhere stronger than circles of the power elite.

In the postmodern period we encounter a elitist category that is formed through filters as: material resurces, power relationship, information, increased capacity to obedience, etc. It is about the *foxes elites.* In this case, the struggle for acknowledgement manifests itself surreptitiously, resort to opportunism, cunning, manipulation, blackmail, etc., to the detriment of honest struggle based on competence, honesty, fair play, which would lead to the formation of the *lions elites*. In Romania, the contemporary political elites undoubtedly are part into the category of *foxes elites*. They have the ability to be transmitted themselves in the future with a exponentially force, which is given by their own diversification.

A social system, the more complex, the more contain regimes or elites competing for power. That is why we can say that any large system is not fully democratized. Such a system encourages competition between social privileged categories. This is achieved through by the winners capacity and trough they impose their values. On this occasion, one can see that the privileged social segment have a clear index of identity.

Using this index will occupy a dominant position in all fields of social life. This aspect can be observed both with regard to the power elite and also in concerning the elite of notoriety.

In the attempt to study their formation, manifestations and evolution, it must start from the selection criteria of elites, or more precisely to each elite that interests us. These selection criteria lead us inevitably to the need hierarchy to the of elites. But the selection criteria are flawed, and this is unquestionably because of the formation of the foxes elites, far more numerous today than the lions elites. In other words, elites of notoriety that would normally be at the top of the pyramid are shadowed, and what it is stated are pseudo-elites of notoriety. Of great importance is that these *pseudo-elites* have moral legitimacy, by the fact that they are accepted by the public opinion like models. Of course, here the undeniable merit belongs to the audiovisual media, who it fulfills its public education function, appealing to the size of notoriety. Of course, it is much easier to capture public attention by abnormal, deviant, offering shocks than promoting positive aspects of social life.

The restructuring of traditional elites

The growing influence of audiovisual media is the most important element that led to the overthrow of traditional values stairs on the selection and promotion of elites. The social change both in political plan, especially economic, the cultural transformations, the grassroots sports amplitude, were presented amplified, by manipulative power of the media, which led to the new values scales. As a result of these actions, have appeared new elite, whose selection criterion is limited to notoriety. In this case we are talking about elite of notoriety. They require techniques that are more or less of counterculture.They require by techniques which belong more or less of *counterculture.*

The counterculture is the process where models, values, axiologic hierarchies are dislocated, in purpose to counterfeiting the relief of a culture and of manipulation of consciences in accordance with the ordered of spiritual aggression processes[8].

We can see the effort to block social evolution to the original meaning and also its deviation by means of counterculture. It works in order to minimize, or even moving in the pejorative section of values, attitudes and aspirations, that is considered normal in a society.

This process manifests itself differently from one culture to another, but, globally presents itself as a general trend, a action-oriented to overthrow desirable values of any society. Thus were labeled and stigmatized philosophical and theological works, inventions and innovations have been overshadowed by such that the benefits that could be obtained from them and which might contribute massively to progress, almost no are not publicly known.

Also, the idea of using alternative textbooks distorting for historical truths and identity size are part of the neokominternist program of counterculture[9].

Definitely there are other ways of transmission and manifestation of methods and techniques used in the process who is included in the concept of counterculture. However, of the reference remain media, the most powerful way of transmitting information to the masses. We can brings into discussion literature, art, different cultural events that promote traditional values, authentic identity for each social culture, but how the masses are connected to information remains the strongest TV, press, radio. Of these, the TV is the instrument which transmits behavioral patterns, values etc. with the greatest degree of success. This instrument, emitter,

[8] http://www.etnosfera.ro/pdf/2009/4/01.pdf
[9] *Ibidem.*

terminal, indispensable object, is the most accessible, the most widespread among the masses, so is the middle that attempts the imposition of pseudo-values, ultimately of the notoriety elites. The exponents of this concept are individuals known to the public. What characterize them is the fact that they succeed without notable efforts to solve personal problems. These problems are related to material wealth - illegal actions such as thefts of public funds, illegal trafficking, marriages of interest, obtaining positions in the state apparatus by illicit ways or related to physical beauty - cosmetic surgery, starvation, etc.

The notoriety promoted in the detriment of excellence, lead to a derisory dimension, hence the moral decay of the individual person and more, to macro-level, of the peoples. The values that is based the notoriety elites are in fact non-values. The effort of replacing the traditional values of each culture and ultimately the social culture at large, determine categorically the overthrow of axiological pyramid. The changing the place of the excellence elites - meritocracy, with the place of the notoriety elites, lead inevitably to spoilage of national identity. We find a strong engaging member force regarding the repose of romanian national popular mind, by strong attempts to divert the national interest by the real issues to those of gossip, subculture. We have mentioned here only in passing some anti-cultural issues in Romania. In the future we will analyze extensively this issue.

3. Conclusions

After the above mentioned, we think that the parallel of elite-elites will remain a subject of analysis. The fact that the masses are eager for knowledge means that excellence has a future.

Of course, the ways located outside the fight with the unknown, non - meritocratic methods will proliferate. But the most important fact remains that the masses need intelligence, professionalism and morality. Preeminence can not substitute all this, than in certain situations. These situations are limited. They do not solve social need for knowledge of the masses.

On the other hand we need to mention that excellence remains a dream for people, no matter if is doubled or not by the meritocratic side. This is the reason owing to which we assist and we will also assist in the future, at the unequal competition between the exponents of excellence and those of preeminence.

Nevertheless, each of us, individually or all alike we waiting and we need a results based on merit.

Meritocracy is in shadow, but its power exist there like a point of light in the dark.

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PAST AND PRESENT IN THE ROMANIAN PRIMARY EDUCATION CURRICULUM

Oana RICA POPA[*]
Norica Felicia BUCUR[**]

Abstract

The paper aims at analysing the changes that marked the evolution of both the curriculum frameworks and the syllabi for primary education in Romanian post-communist era, considering the stages of the education reforms started in 1990 and continuing at present. Thus, by closely examining the curricular documents for primary education issued during the given period, we will try to identify the strengths and the weaknesses characterising each phase, so that a global perspective of the primary education reform in Romania in the recent past could be provided. Therefore, our paper is an invitation addressed to all stakeholders to reflect on the past, the present and, notably, on the future of primary education in Romania.

Keywords: *curriculum, framework curriculum, syllabi, primary education, curricular reform.*

1. Introduction

The endeavour to improve education has always focused on reforming the curriculum. Gradually, the curriculum concept has become more and more comprehensive, and at present both specialists and lay persons use it to cover many issues related to education as such. Therefore, education theorists and practitioners find it more and more difficult to identify the features of a good curiculum, a curriculum that should not only meet the current needs of the society, but also please its beneficiaries. Since 1990, the Romanian educational system has constantly faced this dillema and more or less successful solutions have been provided and implemented so far. The consequences are yet to be assessed.

Regardless of its strengths, a curriculum could easily turn into a useless tool, unless teachers succeed in coming up with a form well tailored to their students' needs. To obtain the intended curriculum, a teacher is supposed to interpret, adapt and select the content of the formal curriculum. This complex task is considerably made easier provided that a high level of compatibility exists between the teacher and the curriculum.

Our analysis focuses on only one of the two key elements in the equation mentioned above, i.e. the curriculum. More precisely, we exclusively aim to scrutinize the official curricular documents that guide teachers in their teaching activity, as we consider that the quality of these documents might positively or negatively influence teachers' activity. Therefore we closely examine the main curricular documents regulating Romanian primary education in the last 25 years, as this educational stage forms an essential basis for subsequent successful development in any individual's life. Even if we limit our research to curriculum frameworks and syllabi that were or have been in force in Romanian primary education, we do not disconsider the importance assigned to other curricular documents (textbooks or other resources) or educational stages.

Using the periodization provided by various Romanian education researchers and/or specialists (see Bîrzea, 1996; Crișan, 2002, 2005; Singer, 2002; Georgescu, Palade, 2003; Potolea, Toma, Borzea, 2012), this paper aims at pointing to the new elements characterising each phase. Thus, we attempt to identify the weaknesses and the strengths associated with reform stages in Romanian primary education, keeping in mind that both lower and upper secondary education went through extensive reforms along the period we indicated. Hopefully, this wider perspective will provide valuable insight into the evolution of primary education curriculum and practitioners will be able to better understand why the path taken by Romanian educational reform has not always been the shortest. Moreover, we expect these primary education practitioners to become aware of their extremely important role in interpreting and implementing the formal curriculum.

2. Phases of Curriculum Reform in Romanian Primary Education

Considering 'the specificity of the conceptual approaches' and 'the general context of changes which were implemented in the Romanian educational system' (Potolea *et al.*, 2012, p. 17), researchers generally divide the post communist curriculum reform into three main phases. Each phase marked primary education, as revised and/or newly-designed official curricular documents (curriculum frameworks and syllabi) accompanied reform strategies. Nevertheless, as far as the period

[*] PhD, Prahova County Center for Psychopedagogical Assistance (e-mail: **oanaionescupopa@gmail.com**).
[**] PhD, "Nicolae Titulescu" University of Bucharest (e-mail: **norica.bucur@gmail.com**).

2010-present is concerned, one can talk about the fourth phase of curriculum reform in Romania, the so called *advanced reform* (Potolea *et al*., 2012), which started with the extension of primary education[1] and which, at present, is still very much in progress[2].

Briefly, these three main phases could be described as follows (Potolea *et al.*, 2012):

- Phase I (1990-1997) was marked by several attempts to restructure precise aspects and to provide a general conceptual framework for the Romanian educational system.
- Phase II (1997-2000) is the stage when a new National Curriculum was drawn up and, subsequently, implemented in a coherent manner.
- Phase III (2000-2010) covered numerous and essential changes divided along curricular elements, as structural adjustments permeated the Romanian educational system.

3. Research Methodology

Our research aims at pointing to the strenghths and weaknesses of the official curricular documents for primary education (curriculum framework and syllabi), covering the period 1990-present. We attempt to analyse the general features of the targeted documents, so as to spot out any possible correlations with the particularities of the Romanian educational reform phases (with a special focus on what represented absolute or relative novelty in each stage that we identified). Moreover, by comparatively analysing the documents specific to the four phases, we hope to get a fairly comprehensive picture of the evolution of the Romanian primary education in the last 25 years.

4. Landmarks in the evolution of the primary school curriculum in Romania

4.1. 1993

It is in 1993 when a completely new set of syllabi for primary education[3] came out. One cannot perform a fair analysis of these documents unless a broad view of the social realities characterizing Romania at that time is kept in mind. Thus, in 1993, Romania was in transition, and this situation was permeating all the domains, education, included. Therefore, in 1993, the main objectives of the syllabi for primary education were:

a) to change the number of hours in the curriculum framework and to divide the disciplines into four educational areas (humanities and social sciences, science, art and physical education);

b) to eliminate obsolete, redundant or less accessible content (Romanian Ministry of Education, 1993, p. 4).

The introduction to the new set of syllabi for primary education could be interpreted as a powerful mission statement, as the drawing up of the syllabi stemmed from the following body of principles:

- improving formative assessment;
- fostering harmonious child development;
- better preparation for subsequent education stages, by capitalizing not only on the domestic educational traditions and experiences, but also on the modern teaching trends and educational research;
- balancing the ratio between the amount of knowledge and the time needed to acquire it (Romanian Ministry of Education, 1993, p. 4).

In our view, the strengths of the syllabi for primary education, issued in 1993 were as follows:

- they set out **future directions**[4] for the forthcoming syllabi for primary education, exhibiting the policy makers' awareness of the inherent drawbacks of these documents, as well as its limited validity, i.e. to be used only during the transition period;
- they provide **methodological suggestions** for practitioners;
- they are attuned to **modern pedagogical principles**, emphasizing the pupil's active role in the learning process (acquiring skills in Romanian, as well as in one's mother tongue and a modern foreign language[5]; developing basic skills in science and Romanian history; fostering prosocial behavior and environmental action);
- they give details about **the coherence of the disciplines** in the curriculum, by mentioning their aims;
- they are **more flexible**: alternative syllabi are designed (for the discipline called *Developing Speaking and Thinking*); recommendations for supplementary reading have an orientative character; in *Romanian* and *Maths* objectives are clearly marked as either compulsory or non compulsory; the possibility of organizing special clubs to capitalize on the pupils' skills and interests and to integrate extracurricular education; a number of class hours are at teacher's disposal;
- they attempt to provide a curricular

[1] In 2012 the preparatory grade became part of this educational stage.

[2] A new curriculum framework for lower secondary education has just come in force.

[3] Romanian Ministry of Education (1993). *Syllabi for primary education. Grades 1-4. To be applied during the transition period. (*Nr. 32655/1993)

[4] Among these we could mention: a more rigorous selection of the content in line with the objectives of primary education; better division of the content between grades and activities; more natural integration of knowledge from an interdisciplinary perspective.

[5] Starting with the 2nd grade. Formerly, a foreign language could only be studied from the 5th grade.

reorganization in terms of integrated modules, by introducing disciplines such as *Environmental Knowledge, Applicative Compositions, Art*, accompanied by suggestions for content topics;

- they put forward the competence concept, defined as sets of capacities , as well as the transversal competence concept[6].

As for weaknesses, we identified the following:

- no matter the intentions, the syllabi for primary education focus on content (there is a big amount of information, which, to a great extent, is not attuned to pupils' comprehension abilities, specific to their development stage);
- textbooks drafted before 1990 are still very much in use (the changes in the syllabi are not easy to grasp by practitioners if they have to rely on obsolete textbooks);
- the integration and interdisciplinary scope of the primary education curriculum is not correlated with the curriculum framework (e.g. the discipline *Romanian* is strictly divided into *Reading-Writing, Developing Speaking and Thinking, Reading Comprehension, Composition- Presentation*, each being associated a fixed number of class hours);
- there is a large total number of class hours (from 20 for the 1st grade to 23 for the 4th grade), which has a negative impact on the pupils (the amount of information to be delivered remains the same although there are only five school days, as compared to 6 before 1990-1991 school year);
- the ratio between the number of class hours per discipline and the information content is unbalanced (e.g. *Maths* is allotted 4 hours per grade, but in the 2nd grade the amount of content to be covered is double as compared to the 1st grade; *Romanian History* is allotted 1.5 hours – a 0.5 hour rise as compared to previous situation, but the complexity of the content units makes it impossible for the teacher to meet the demands);
- the intended flexibility, described in the introduction to the primary education curriculum, is dramatically reduced, since a strict number of class hours is allotted to the content topics listed in each sylabus;
- compulsory objectives are marked, which means ranking them in terms of importance – hence, the possibility to differentiate considering the concrete specificity of any given teaching activity is highly disregarded; moreover, the number of compulsory objectives is too large, their correlation with the development stages is low, which definitely causes discontinuities;
- little information is given about assessment, except for vague suggestions (e.g. challenging assessment; assessment integrated in the teaching-learning activity).

To sum up, considering the features of the reform covering this period, the curriculum frameworks and the sylabi for primary education approved in 1993 represent a major step for the advancement of Romanian education, mainly at the level of intent. These new curricular documents attempt to do away with communist ideology and to evince modern pedagogical principles (Cristea, 1992, p. 33).

4.2. 1995

Based on the 1995 curriculum frameworks and syllabi (named 'analitycal'), alternative textsbooks were drafted and gradually introduced (first for the 1st grade in 1995-1996 school year). This is a direct consequence of the new National Education Act (no. 84/1995), which laid down the aims of education in Romania for the years to come. The syllabi are meant to be 'analytical syllabi drafted from the perspective of the curriculum movement' (Ministry of Education, 1995, p.6).

The components of the framework curriculum are integrated into the concept of 'school culture', which comprises:

- scientific knowledge about the world and mankind, about the environment and environmental protection;
- communication skills in *Romanian* and a modern foreign language (starting with the 2nd grade);
- math knowledge;
- technological skills;
- history knowledge and civic skills ;
- artistic and musical skills;
- physical education skills and health education

(Ministry of Education, 1995, p. 3).

The guiding principles for the new curriculum frameworks are: (1) the compliance with the physical and mental particularities for each age group; (2) a unitary and global organization for the whole education system, in close relation with the main aims of school education; (3) an adequate ratio between humanities and science, with the former being given priority, as, previously, it had been disfavoured (Ministry of Education, 1995, p. 3-4). The disciplines to be studied are divided into five areas, as compared to only four in 1993, and this is the result of excluding *Religion* from the *Humanities*. Thus, they are ranked as follows: *Humanities* (on the rise fom the 1st to the 4th grade – 12/13/14/14.5); *Science* (4/5/5/6,5); *Art, Craft and Music* (the same number of class hours for the four grades comprising primary education – 3), *Physical Education* (3/2/2/2) and *Religion* (one class hour per each grade). The total number of class hours per grade is on the rise: 20 class hours – 1st grade; 21 class hours – 2nd grade; 22 class hours – 3rd grade; 24 class hours – 4th grade.

[6] e.g. the competence of *learning to learn* = 'initiation into acquiring techniques required for brainwork and learning activities', Romanian Ministry of Education, 1993, p. 4.

- Both the syllabi and the curriculum frameworks stem from the seven aims of primary education (put forward in the introduction to the curricular documents). The information included in these documents comprises: a strict number of the class hours that teachers are allotted for teaching-learning, revision, assessment, sometimes per term; general objectives for disciplines and grades; content and skills; specific objectives for each discipline; types of learning activities and extensions.

We consider that the strengths of the curricular documents issued in 1995 were:

- introducing a new component for *Romanian – Communication*, which was to be studied along primary education and which was accompanied by topics meant to facilitate integration;
- introducing *Science*, as from the 2nd grade, a discipline which comprised concepts from biology, physics, chemistry, ecology and which represented a real progress as compared with the 1993 discipline *Romanian Geography and Environmental Awareness;*
- introducing *Civic Education* (as from the 3rd grade) correlated with the aims of primary education;
- attempting to correlate the content with the objectives and to go along the lines already drawn, i.e. the formative purpose should take precedence over the informative purpose;
- introducing the concept of school culture, which aims at globally developing personalities;
- providing extensions, which partially offer certain flexibility;
- introducing various types of learning activities.

As for weaknesses, we would like to point to:

- low correlation between the principles considered to form the basis for developing the curriculum frameworks and the general and specific objectives;
- some of the general and specific objectives are difficult to operationalise and assess, which might be due to their wording (too general in some cases or overlapping with learning activities[7]);
- learning activities give no concrete indication as to how the pupils should behave or act;
- the number of objectives listed in the syllabi is unreasonably high[8];
- the integrating intention is not really transposed into the curricular documents[9];
- extensions (which are optional) are aimed at above average students;
- the total number of class hours is still high, even if one of the aims of primary curriculum developers was to reduce it as much as possible;
- there are almost no methodological suggestions, except for some simple notes in the syllabi;
- the amount of information is very large, in some situations surpassing the 1993 situation[10];
- the emphasis is predominantly on information, despite declared intentions (four out of the seven aims of primary education focus on *acquiring* or *becoming familiar with*);
- part of the content included in the syllabi is highly complex and abstract[11], considering students' age, and it seems that the wished-for vertical correlation with the lower-secondary education is achieved by overloading the syllabi for primary education (continuing the 1993 trend);
- there is no correlation between syllabi components, and the name given to these documents[12] proves to be realistic, pointing to lack of coherence and systematization.

By analyzing the impact and the complexity of the strengths and weaknesses listed above, we consider that 1995 is not a big step in the evolution of the Romanian primary education curriculum. On the contrary, it could be viewed as a period of stagnation, as, unfortunately, the intention to develop new syllabi, based on modern curriculum theory, could not be materialized.

4.3. 1998

1998 represents a crucial moment in Romanian curricular reform. Amid the major changes characterizing this period, the primary education curriculum was completely redesigned.

4.3.1. The **characteristics** of the **curriculum framework for primary education** are also valid for subsequent education stages. The main strengths of this curricular document are:

- its structure: it is developed along curricular areas, with common objectives for all the disciplines included in the respective curricular areas;
- its flexibility: a lower, as well as an upper limit of class hours per week are provided for each curricular area, which result in a minimum and maximum total number of class hours per week, for every grade;
- the introduction of school-based curriculum:

[7] e.g. the objective *to group the words according to the number of syllables they are made up of* is accompanied by the learning activity *grouping the the words according to the number of syllables they are made up of* – Reading, 1st grade.

[8] e.g. only one of the components of *Romanian – Reading* (the other components are *Writing and Communication, Reading Comprehension* and *Calligraphy*) – includes 45 objectives to be reached along a school year, which is quite impossible to do.

[9] e.g. the former 1993 *Reading-Writing* is actually divided into *Reading* and *Writing*, each of them having their own objectives and content – two completely different syllabi.

[10] e.g. the grammar notions for the 4th grade, listed under *Communication.*

[11] e.g. in *Romanian*, the nominal predicate is kept in the 1995 sylllabus.

[12] *analytical syllabi.*

optional disciplines[13] can be proposed at school level, within a curricular area – the number of hours allocated to the optional discipline is part of the total number of hours allocated to the respective curricular area;

- its focus on ensuring equal educational opportunities: one important curricular provision mentions that the objectives, content and learning activities included in the syllabi are to comply with the minimum number of hours for each discipline (more exactly with the core curriculum);
- the high degree of freedom granted to schools and teachers.
- As for weaknesses, we could mention the following:
- postponing the study of modern foreign languages: pupils start learning their first foreign language in the 3rd grade, as compared to the period before 1998, when the first foreign language was included in the 2nd grade pupils' timetable[14];
- imposing restrictions on the proposal of optional disciplines: optional disciplines are allocated class hours per week within a certain curricular area, so they can be either monodisciplinary or strictly related to the respective curricular area.
- including provisions that limit the introduction of optional disciplines, e.g. 'optional disciplines may be accomplished with whole classes or with groups of 10-15 pupils, *depending on the school's possibilities'* (Ministry of Education, 1998, p. 13); or when including optional disciplines, 'timetables are to be drawn up without affecting the school staff's teaching loads';
- keeping a high number for the maximum amount of total class hours per week, very much in line with the 1995 curriculum framework.

4.3.2. 1998 primary education syllabi directly stemmed from the aims of primary education, which closely followed the goal and the genral aims of education in Romania. In addition to that, these curricular documents complied with the objectives of the curricular key stages comprising primary education: *the basic acquisions key stage* (1st and 2nd grades) and *the development key stage* (3rd and 4th grades). The primary education syllabi observed the new curriculum framework, as well as the principles that lay behind it: decentralizing the school system, making it more flexible and less congested. Each curricular area was carefully outlined, and, accordingly, each discipline was massively reconsidered so that the basic objectives of both primary education and key stages could be achieved.

In our opinion, the strengths of the 1998 syllabi for primary education were as follows:

- using framework objectives and synthetic reference objectives, focused on building skills, in order to structure the content;
- stemming from competences and attitudes essential in building up one's personality;
- orienting educational aims towards the harmonious development of the students' personality;
- correlating and integrating disciplines within the curricular area;
- providing indicative content;
- complementing the curriculum by learning activities meant to develop various skills (observing, measuring and using information); moreover, these activities are accompanied by examples generated by objectives not by content and they are to be accomplished not only in class, but also directly, by means of experiments;
- emphasizing procedural learning, by (1) encouraging the development of personal strategies necessary for solving problems or exploring-investigating new facts, to the detriment of memorizing rules; (2) using teaching activities centred on active learning; (3) using and integrating new information into what the student already knows from personal experience, which should be turned to good account and not neglected; (4) reconsidering assessment and self assessment, as means of improving students' performance;
- allowing for easy adjustment to students' acquiring abilities, by considering the age characteristics of the students;
- being derived from a curriculum attuned to specific conditions and local traditions (Ministry of Education, 1998).

As for weaknesses, we identified the following: (1) some of the provisions included in the syllabi remained declared intentions, as they did not reflect in accompanying textbooks; (2) although content was better structured and anchored in students' real life as compared to previous situations, the syllabi were still overloaded, making it impossible for the objectives to be reached within the time allotted to this purpose.

4.4. 2001, 2003 and 2004 Revisions

4.4.1. The 2001, 2003 and 2004 revisions of the curriculum frameworks did not overcome the weaknesses of the 1998 curriculum frameworks. Nevertheless, each phase brought about some changes for primary education, except for 2001.

In 2003, new curriculum frameworks for 1st and 2nd grades are approved (Ministry of Education

[13] At primary school level, at least one optional discipline is to be included, according to 1998 curricular provisions.

[14] Nevertheless, compensatory measures are provided: (1) 2 or 3 class hours per week can be dedicated to studying the first foreign language; (2) 'intensive teaching classes' can be created – 3-4 class hours per week.

4686/2003). These two documents are identical, aspect which can be easily explained if we consider that grases 1 and 2 make up the basic acquisitions key stage. According to new provisions, class hours for optional disciplines are no longer included in the class hours for a certain curricular area, but they are distinctively marked. Thus, although transdisciplinary optional subjects are more likely to come into existence, no more than one optional subject could be included in students' timetable (one class hour per week) for obvious reasons, related to the teaching load and the total number of class hours per week. Moreover, very similar to 1998/2001 curriculum framework, in 2003, no class hours are allotted to the curricular area *Mankind and Society* and the discipline *Religion* is maintained in the core curriculum, students having the possibility not to attend this class by requesting it in writing. On the other hand, one class hour for *Science* is included in the curricular area *Maths and Natural Sciences*, which means that: (1) the number of class hours for the core curriculum increases – 16 class hours in 2001 vs. 17 class hours in 2003: (2) the number of class hours allotted to optional subjects decreases – 1-4 in 2001 vs. 1-3 in 2003. These changes or lack of changes do not comply with the arguments given for revising the new curriculum frameworks and syllabi, as they do not provide real solutions for decongesting the curriculum, in general.

The curricular documents approved in 2004 continued the revisions started in 2003, as they refer to the 3rd and 4th grades (Ministry of Education 5198/2004). Curriculum frameworks issued in 2004 are identical for the 3rd and 4th grades (as both these grades belong to the development key stage), except for two disciplines, *History* and *Geography*, which are to be taught in the 4th grade. Consequently, the total number of class hours per week are different: 19-22 for the 3rd grade vs. 21-24 for the 4th grade.

In comparison with 1998/2001, the ratio between the class hours for the core curriculum and class hours for school-based curriculum, as well as the ratio between the minimum and the maximum number of class hours per week changed: (1) for the 4th grade, the number of class hours allotted to the core curriculum increases by one hour, hence the larger number of maximum class hours per week; (2) for the 3rd grade, the minimum number of class hours per week decreases by one hour. As for the number of class hours allotted to optional subjects, there are no changes: 1-4 class hours per week for both grades (the 3rd and the 4th) and it is mandatory that at least one optional subject would be included in the timetable.

By comparatively analyzing the curriculum frameworks for primary education issued between 1998 and 2004, it is worth mentioning the following conclusions:

- curriculum frameworks were flexible, as minimum and maximum numbers of class hours were suggested for all curricular areas (except for *Mankind and Society* for the 1st and 2nd grades) and as school-based curriculum was allotted 1-4 class hours a week;
- the ratio between the curricular areas / disciplines did not suffer any changes: *Language and Communication* weighs the most, which was very much commonsensical if we consider the main objective of primary education, i.e. to develop oral and written communication skills;
- the way curriculum frameworks were drawn up did not eliminate the pressure related to the calculation of teaching loads, especially when considering optional subjects[15]

Accordingly, one could state that, as compared to 2001, 2003 and 2004, the curriculum frameworks for primary education approved in 1998 had the widest scope, as they provided a new path for the advancement of this curricular stage.

4.4.2. Primary education syllabi were also revised in **2001, 2003, 2004** and **2005.** The official documents issued in 2001 (Ministry of Education, 2001; Ministry of Education 3915/2001), were aimed to improve the syllabi, by eliminating, redrafting or introducing contents and objectives. Methodological guides for each discipline in the curriculum were also drawn up and distributed nationwide. The revisions did not result in new syllabi for primary education, they rather provided clarifications and were mainly focused on contents, as very few objectives were modified. Nevertheless, in our opinion, the amount of content is still impressive, the syllabi being overloaded, comprising topics irrelevant for the intended objectives. On the other hand, in 2001, a new syllabus for *Science* was drawn up. It was definitely an improved syllabus for this discipline as it displayed an integrated approach for natural sciences, in comparison with the 1998 document.

The syllabi approved in 2003 for the 1st and 2nd grades, in 2004 for the 3rd grade and in 2005 for the 4th grade continued the descongestive process initiated in 2001. However, not all the obstacles were overcome (Crişan, 2002, p. 128): excessive contents, low correlation of the syllabi with one another, mismatch between students' age / skills and the contents / objectives, low representation of some disciplines in the curriculum framework still remained as important drawbaks.

[15] Schools were unable to provide interesting and varied optional subjects and choosing an optional subject was a mere formality because of the schools' wish to conform to the general trend of proposing 'safe' optional subjects, similar with those oferred by other schools. Therefore, instead of contributing to the development of each school based on its specificity, to a certain extent, the introduction of optional subjects had quite the opposite effect.

Although in 2009 the lower secondary syllabi were redrafted to comply with the competence-based model, the syllabi for primary education remained the same, following the restructuring proposals included in the report put forth by the National Institute of Education in Romania. The Institute comparatively analysed European and Romanian documents focusing on educational issues, with a special emphasis on the European profile for the student graduating from compulsory education and recommended that 'the objective-based curriculum design should be maintained for primary education, so that pre-school and primary school stages could benefit from a similar coherent approach' (I.S.E., 2009, p. 30). On the same line of thought with Căpiţă (2012, pp. 47-88), we consider that keeping the objective-based model for primary education meant postponing the achievement of vertical coherence for Romanian compulsory education, as a whole. This coherence was badly needed, if we are to examine the results primary school students achieved in national and international assessments. Thus, according to Neacşu (2012, p. 198), Romanian 'primary education needs a new structure for the syllabi, based on what lies behind competence: knowledge, abilities or capacities, values and attitudes,' which could give teachers the appropriate teaching and assessing directions and which could open the road for inter- and trasdisciplinary approaches, as well as for integrating non-formal education.

4.5. 2011-present

2011 is the year when a new National Education Act (no. 1/2011) came into force. According to its provisions, the preparatory grade becomes part of primary education and is no longer included in pre-school education. New curriculum frameworks were issued in 2012 and 2013 (Ministry of Education, 2012) for the basic acquisitions key stage and in 2014 (Ministry of Education, 2014) for the 3rd and 4th grades, and they stemmed from the key competences for lifelong learning put forth by the European Reference Framework (2007), thus aiming to achieve coherence along the curricular stages that make up primary education. Moreover, although curricular areas were redefined, the new curriculum frameworks were still made up of the core curriculum and the school-based curriculum, just like in the 1998 version. It was still compulsory that one class hour per week be allotted to an optional subject (it was recommended that the optional subject be a modern foreign language, comprised by the curricular area *Language and Communication*).

Syllabi for the preparatory grade were first drafted and issued in 2012 (Ministry of Education 3656/29.03.2012) and then, in 2013, they were revised, coming out together with the syllabi for the 1st and 2nd grade (Ministry of Education 3418/2013). In comparison to the documents in force before 2012, the new syllabi have a completely new structure: general competences of the discipline, including here the attitudes to be achieved along the basic acquisitions key stage; specific competences; learning activities; methodological suggestions. It is also worth mentioning that the contents in the syllabi were significantly reduced (finally accomplishing one of the goals of the reform started in 1990). In addition to this, the contents changed their status, becoming valuable resources which could be reused to develop specific competences. The syllabi for the 3rd and 4th grades (Ministry of Education 5003/2014), issued in 2014, followed the 2012/2013 curricular model.

The 2012 curriculum framework for primary education is more flexible, as compared to the previous ones. The disciplines that make up the curricular areas are integrated and organized around topics – the names of the disciplines are suggestive: *Maths and Environment Exploration*, *Physical Education, Sports and Heatlthcare*, *Visual Arts and Crafts*, *Music and Movement*. Moreover, two new disciplines were introduced – *Personal Development* and *ICT (Playing with the Computer)*, so that key competences could be more easily attained.

The main strengths of the 2012 curricular documents are:

- there are plenty of examples for designing timetables, as well as examples describing integrated approaches for topics that pupils aged 6-11 are usually interested in;
- they provide a syncretic and integrated approach for the discipline *Communication in Romanian*[16];
- although *Communication in a Foreign Language* is still an optional subject[17] for preparatory, 1st and 2nd grades, a centrally designed syllabus is provided, comprising general guidelines, suitable for studying any modern foreign language and focusing on developing foreign language communication skills in close conection with the self assessment grids in the European Language Portfolio;
- there is an integrated approach for maths and some aspects belonging to natural sciences, contained in a single syllabus, named *Maths and Environment Exploration*, aiming at a holistic and contextualized learning, which not only favours developing in-depth conceptual comprehension and procedural facilitators but also leads to the harmonization of the two fields;

[16] As compared to previous stages when artificial approaches were generally used, now the focus is on communication that stems from real, everyday stituations.

[17] In the past, the syllabi for foreign languages as optional subjects were designed by the class teacher and approved by a foreign language inspector.

- the scope of artistic education[18] was widened towards visual arts, in order to incorporate children's interests, as well as towards crafts, in order to focus on character building, very much in line with the active and cooperative learning trend, and the result was an integrated syllabus, *Visual Arts and Crafts*;
- music and movement were put together in a discipline called *Music and Movement*, which aims at: stimulating children's personality in an expressive manner; reducing the gap between school and everyday life; laying the foundations for learning basic musical concepts intuitively;
- the discipline *ICT* (*Playing with the Computer)* focuses on developing digital competences, which have a high degree of transferability, and also on identifying potential risks when using computer technologies;
- the discipline *Physical Education and Sports* aims at: developing the young learners' motricity; making them familiar with the rules of a healthy lifestyle; achieving harmonious physical development;
- the discipline *Personal Development*[19] is introduced to provide a sequential program for developing and training pupils for their future life.

In 2013, the curriculum framework for the basic acquisitions key stage was revised as a new curriculum framework, comprising primary education in its entirety, was devised, taking into consideration the general profile of the Romanian primary school graduate (Ministry of Education, 2013). As compared to the 2012 curriculum framework, the study of a modern foreign language is no longer optional, but compulsory, starting with the preparatory grade. It is the first time ever in Romanian primary education when the foreign language is included in the core curriculum.

The weaknesses of the 2013 curriculum framework are:

- some 2012 disciplines, highly correlated with the domains of the key competences, disappear, situation which contradicts some of the characteristics of the Romanian primary school graduate profile, and, up to a certain extent, even the provisions of the National Education Act 2011 (the discipline *Education for Society* is wiped out from the curriculum framework for primary education and it is replaced, starting with the 3rd grade, by *Civic Education*, similar with the 1995 / 1998 situation; *ICT (Playing with the Computer)* is also eliminated, which could be explained if we consider its uncertain status in the 2012 curriculum framework – 0-1 class hours per week);
- there are no minimum or maximum class hours per week, as disciplines are allotted a fixed number of class hours;
- the number of class hours allotted to school-based curriculum is reduced to 0-1 class hours per week;
- there was no official curricular document providing the necessary guidelines for compulsory education as a whole the moment the preparatory grade became an integrating part of primary education[20].

5. Conclusions

After 1990, the formal curriculum for primary education has been repeatedly revised in close connection with the curriculum reform stages characterizing Romanian education. Consequently, even if its path has been full of difficulties and obstacles, sometimes there have also been good moments, as the reform of Romanian education has meant 'a continuous source of reflections, debates, proposals and contradictions (…) and, at the same time, a highly relevant source for building up beneficial and constructive educational experiences, which created the conditions for continuing the innovations within the educational system' (Crețu, Iucu, 2012, p. 41). Thus, although the journey taken by the Romanian primary education curriculum has had some detours and pit stops, it has continued and now, in our opinion, it has reached a high point, which should be turned to good account by correlating and by maintaining the correlation between the reforming elements.

The syllabi and the curriculum framework for primary education, included in our analysis, have had both strengths and weaknesses. We divided the period 1990-present into four main phases, considering the curricular developments within the Romanian primary education. Nevertheless, there have also been intermediary steps, which mainly consisted of curricular revisions.

The first two phases represent the most difficult moments in Romanian curricular reform: 1993 = finding the identity of education in Romania, after the communist era; 1995 = clarifying the defining contexts for this identity. The year 1998 is a significant landmark in Romanian curricular reform, as it coherently and systematically drew the main directions of the curricular philosophy, which are still in use at present. After, being modified, remodified, revised and decongested in 2001, 2003, 2004, 2005, at this very moment, curricular reform has reached an advanced stage, in which the formal curriculum for primary education is circumscribed to the competence-based model, a model which is

[18] The former name of the discipline dealing with art was *Artistic Education.*

[19] This discipline is brand new. No other curriculum framework for primary education has ever comprised such a discipline.

[20] In contrast, in 1998, when the main reform of the Romanian educational system was initiated, the Ministry of Education issued a document, named *The New Romanian National Curriculum*, which provided a valuable reference point for all the stakeholders.

better attuned to the pupils' needs. Moreover, this new curriculum for primary education goes along the same lines with the secondary education curriculum, which was redesigned in 2009, and thus we can talk, to a certain extent[21], about a unitary National Curriculum that complies with European recommendations.

The recent primary education curriculum could not be labelled rigid, as, at times, it is really flexible and generous. Besides the obvious limitations, mentioned in our analysis, the current formal curriculum for primary education gives practitioners enough leeway to play their role and to prove their competences, to competently act in order to perform their daily tasks[22], so that objectives could be met: endowing students with the key competences for longlife learning.

Some of the weaknesses[23] that we pointed out to along our research have been partially overcome:

(1) The amount of **content**, too large in 1993, has been gradually reduced, as a direct consequence of the reforming measures taken to improve curricular documents. At present, the content included in the syllabi is more in the form of general guidelines, allowing teachers to come up with planning well attuned to the specific needs of pupils, classes, schools, local communities.

(2) The **rigid division into disciplines** has been gradually done away with. Currently, the integrated, interdisciplinary approach dominates the primary education curriculum.

(3) The lack, and sometimes the low quality of **methodological suggestions** have been overcome over time. At present, the official curricular documents comprise various examples, which prove useful in planning teaching activities.

(4) The **goals of education**, at first too general and difficult to pursue, are now translated into profiles for each type of possible graduates: the pupil at the end of primary school and even at the end of the curricular key stages making up primary school (the basic acquisitions key stage and the development key stage respectively).

If primary school teachers were given more curricular freedom, i.e. more class hours to be left at teacher's disposal and more guaranteed flexibility to organize the timetables, than limitations present in the primary education framework curriculum in force might be easily overcome. According to current curricular provisions, no optional subject might exist in the pupils' timetable, which seriously contradicts the official intentions – the curriculum aims at meeting the pupils' needs and complying with their interests and skills. Nevertheless, one should not forget that one optional subject can be included and we suggest that it could be designed so as to partially overcome this limitation.

Furthermore, the total number of class hours per week is still large. Even if, starting with 1998, the idea of reducing the number of class hours per week has been recurrent, a viable solution is yet to be found.

The meteoric existence of some disciplines in the 2012 curriculum framework (*ICT – Playing with the Computer, Education for Society* disappeared in 2013) is difficult to account for, as they had an important part to play in developing the intended key competences. Teachers have now to do their best to approach content in such a manner so that they could make up for the loss.

In our opinion, the strengths of the new curriculum framework and the new syllabi for primary education should reverberate through the official curricular documents for the lower and upper secondary education. Moreover, a New Romanian National Curriculum, regulating the activity of both primary and secondary education, is badly needed, as this document could provide a comprehensive perspective for all education stakeholders. By taking a close look into the recent past, we could avoid past mistakes, we could capitalize on 'the history of the Romanian curricular reform which could serve as a useful reference point for future changes' (Potolea *et al.*, 2012, p. 21).

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[21] So far, there is not a single document regulating both primary and secondary education in Romania as it was in 1998, but several documents that came into force between 2009 and 2014.

[22] i.e. planning, teaching, assessing.

[23] We assume that well trained, experienced and competent teachers were able to overcome any of the limitations mentioned along this paper, as they could easily spot out, for example, if methodological suggestions were irrelevant or non-existent and successfully deal with it.

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THE ACTUALITY OF NIETZSCHE'S CRITICISM OF EDUCATIONAL SYSTEM REGARDING MODERN KNOWLEDGE SOCIETY

Andreas SCHREIBER*

Abstract

„Thus, my friends do not confound this education, this delicately footed, spoiled, ethereal goddess, with that usable maid which occasionally also is called 'education', but which is merely the intellectual maid and counselor for distress of life, for earnings, for neediness."[1]

In his five lectures on the "future of educational system" Nietzsche thoroughly criticized the German educational system of his time and the decay of education in general. Although he was very sharp in accusation and pessimistic about his contemporary situation, he nevertheless cherished some hopes regarding some profound and revolutionary changes in the near future that might take place and rescue the classical concept of education.

Looking back from today to Nietzsche's assertions – like the quote above – we can recognize that his critical sketch of former deficiencies of educational system has lost none of its actuality and truth. We rather notice that some of his points just have been actualized only in modern knowledge society than in his time – or at least they have aggravated. Nowadays, knowledge is considered as an economical factor of production, and education is the fundamental precondition for employability. On the way to neoliberal, capitalistic system we have started with exploitation of the knower and have come to reach a status of voluntary self-exploitation of the educated one. Knowledge and education, and the notion of lifelong learning as well as self-actualization and personality growth have become efficient and perfect instruments of neoliberal systems, as they use the freedom and free volition of the individual to enforce their self-exploitation in order to become high-potential consumers.

This contribution points out the still existing actuality of Nietzsche's critical arguments regarding the decay of the concept of education. Moreover, it is to be shown that in the age of the so called knowledge society in neoliberal systems we somehow are on the peak of the era of nihilism, as it was predicted by Nietzsche almost hundred fifty years before.

Keywords: *Nietzsche, knowledge society, education, educational system, employability, neoliberal system, self-exploitation, lifelong learning.*

1. Nietzsche's criticism of educational system in his days

The German poet-philosopher Friedrich Nietzsche (1844 – 1900) lived in a highly changeable time, which can be considered as the threshold period of industrialization, modernization, capitalistic economization, colonialization, and nationalization, namely as the transition from modern to postmodern society. Hence the philosophical thoughts of Nietzsche have sharply and critically sketched these movements in his criticism of modernity with its terminal points of decadence and nihilism, and he also delineated the necessity of a radical change of the essence of human into the so called super-human (Germ.: Übermensch). In this manner, also Nietzsche can be regarded as a threshold philosopher who thoroughly criticized the weakness and decay of culture and education in his time, but hopefully sketched out the possibility of changes into a new and stronger mankind.

Before drawing the characteristics of and naming it the super-human, Nietzsche was taken in by the concept of genius as idealization of man. Therefore his critiques against the educational system and culture at then operated with the concept of genius. But for Nietzsche it seems like such a genius unfortunately hasn't been actualized for long, or – taking into account that Schopenhauer was considered as the last one in occidental history – at least isn't very welcome anymore in modern society and the educational system then, so that, according to Nietzsche, the type of genius should be re-aspired by a radical change of that system.

These critiques, an output of his early period of thinking, have been published in 1872 in form of five public lectures, were not conceptualized as a treatise or essay, but in a literarily highly felicitous narration of a fictive (or non-fictive, as this is not to be figured out) acquaintance of the first-person narrator and his friend as students with a philosopher and his scholar at a place far away from town in the forest. We don't need to recall the setting in detail here, but just

* PhD in philosophy. Head of Cura Vitae – Philosophical Counceling (e-mail: **mail@curavitae.derr**).

[1] Translated by the author. Original quote and source: „Also, meine Freunde, verwechselt mir diese Bildung, diese zartfüßige, verwöhnte, ätherische Göttin nicht mit jener nutzbaren Magd, die sich mitunter auch die ‚Bildung' nennt, aber nur die intellektuelle Dienerin und Beraterin der Lebensnot, des Erwerbs, der Bedürftigkeit ist." (Nietzsche, Friedrich: *Ueber die Zukunft unserer Bildungsanstalten. Sechs öffentliche Vorträge,* in: Nietzsche, Friedrich: Kritische Studienausgabe in 15 Bänden (KSA), ed. by Giorgio Colli & Mazzino Montinari, Vol. 1, pp. 641 – 753, Berlin: de Gruyter, 1999, here: *Vortrag IV*, pp. 712 – 733, here p. 715.).

describe the content of the mentioned criticism and prospects of the educational system.

He – and for clarity reason we address only to one person, namely Nietzsche as the first-person narrator of all these thoughts – detects two directions of educational development. On one side, education is going to be broadened and extended, in order to produce a higher amount of well-educated people, i.e., a mass of scholars. On the other side, education is going to be reduced and mitigated on a level of mediocrity, in order to reach the first aim of educating the masses; because there never exists a mass of geniuses, hence the level needs to be lowered on the level of the mediocre masses. Therefore the former highest aim of education, namely education itself, is cut off, and is taken into services for other areas of life, e. g. the polity, or economy, or mere survival.

The first line of development follows a dogma of national economics: *as much as possible*; hence to achieve as much knowledge and education as possible, which leads to as much production and needs as possible, which, according to Nietzsche, further results in as much happiness as possible. Utility, more precisely, acquisition or earnings are the new objectives and purposes of education.[1] From this perspective, education is considered as access and sense to keep oneself up-dated, to know the ways of easily earning money, and to handle the means to commerce with other humans and peoples. Thus the actual purpose of education is to build up human beings as "courant" as, as circulating as possible. Nietzsche here alludes to the feature of a coin; a courant coin is one that has a prevailing value and can be commonly used for widespread economical exchange. He states that the more "courant" persons exist, the happier a folk will be. The intention of modern educational institutes should thus be to facilitate each individual to become as "courant" as it is his own inner nature, to educate everyone as much that he/she is able to achieve the utmost profit and happiness out of his own measurement of knowledge and education.[2]

By this Nietzsche means that the objective of the educational system at then will be the provision of as much knowledge and education as possible, in order to give everyone the chance for self-development according to his own height of education or of his ability getting educated, which warrants him as much profit and earnings, considered as happiness, as individually possible. This, so Nietzsche, requires a *rapid* education, in order to become rapidly a *money earning* being, but yet also a *profound* education, in order to be able to become a *very much money earning* being. By this objective of education, the education for building, improving or only enjoying culture, or getting culturally engaged, has somehow fallen by the wayside. But it's not totally neglected or inhibited, because culture is just and exactly as much conceded for the individual, as it is in the interest of acquisition, i.e., earnings. Thus, on the other side, it is also demanded from everyone exactly as much culture, i.e., to be engaged as much in cultural issues, as it is necessary to remain able to follow the aim of acquisition or profit-making.[3]

In summary this means that the individual should be educated to be interested in culture as much as it serves the aim of profit making, but he also shouldn't be more interested in culture as it is needed to follow this objective.

As a consequence of all this results the second line of development as mentioned above, the mitigation of education. The education for the masses, in order to serve one's needs for a wealthy life, leads to the necessity of specialization in a certain, but narrow field of science, in order to remain competitive against others. Such a pundit resembles any factory worker who does nothing else in his whole working life than producing the same kind of screws or handling a type of machine. Sure, he achieved a high virtuosity in his field of specialization, but missed the essence of "true", i.e., classic education.

In respect to this classic education, Nietzsche emphasizes a rather aristocratic, hierarchic order of the nature of mind. He believes in the type of genius who should be the purpose of the true education, and who should guide and lead the masses to a higher culture. All the mediocre people have to serve for, and to accept a subordinate role under the reign of the genius. But the advocates of the ideal of education at Nietzsche's time shout for free and broad education, in order to liberate the masses from the reign of the great, single genius, and to overturn the above mentioned order in the realm of intellect and genius.[4] Hence, with this assessment Nietzsche also criticizes the emphasis of freedom and free self-

[1] Ibid., Vortrag I, p. 667: "Diese Erweiterung gehört unter die beliebten nationalökonomischen Dogmen der Gegenwart. Möglichst viel Erkenntniß und Bildung – daher möglichst viel Produktion und Bedürfniß – daher möglichst viel Glück: – so lautet etwa die Formel. Hier haben wir den Nutzen als Ziel und Zweck der Bildung, noch genauer den Erwerb, den möglichst großen Geldgewinn."

[2] In this critical thought of Nietzsche we already foresee the notion of the postmodern coercion of individual self-actualization – admitted within bounds of economical life.

[3] Nietzsche, Friedrich: *Ueber die Zukunft unserer Bildungsanstalten;* loc. cit., Vortrag I, p. 668: "Nach der hier geltenden Sittlichkeit wird freilich etwas Umgekehrtes verlangt, nämlich eine *rasche* Bildung, um schnell ein geldverdienendes Wesen werden zu können und doch eine so gründliche Bildung, um ein *sehr viel* Geld verdienendes Wesen werden zu können. Dem Menschen wird nur so viel Kultur gestattet als im Interesse des Erwerbs ist, aber so viel wird auch von ihm gefordert." (emphasis in orginial).

[4] Ibid., Vortrag III, p. 698: "… jene lauten Herolde des Bildungsbedürfnisses verwandeln sich plötzlich, bei einer ernsten Besichtigung aus der Nähe, in eifrige, ja fanatische Gegner der wahren Bildung d. h. derjenigen, welche an der aristokratischen Natur des Geistes festhält: denn im Grunde meinen sie, als ihr Ziel, die Emancipation der Massen von der Herrschaft der großen Einzelnen, im Grunde streben sie darnach, die

development in education, especially in the educational system of "gymnasium", i.e., high school. He holds the opinion that students first have to learn how to read and write by thoroughly studying the traditional and ancient literature, as well as languages and its grammar, by following the instructions of teachers who ideally should be geniuses.[5]

Nietzsche doesn't neglect the necessity of learning and knowledge acquisition in general, because he also knows that people do have to know something in order to survive. But this kind of knowledge has nothing to do with education; the latter just starts above the world of distress, struggle for survival, and neediness. It all comes down to leave behind one's neediness, i.e., one's subject or subjectivity. Hence, true education disdains to contaminate itself with a needy and coveting individual; rather she knows how to escape the one who tries to secure her as a means for egoistic intentions.

Here at this point of Nietzsche's critiques it comes to the warning we've quoted already above, that no one should confound this true education with the one, which also often is called education, but which only is considered as the maid and counselor for distress of life, earning and neediness. Every educating, which ends its career with an official position or only with earning a living, cannot be considered as educating for education in the way Nietzsche understands it, but only as instruction for the best way to rescue and secure one's subject or subjectivity in the struggle for life. Consequently the educational system and all its institutions are considered only as institutions to overcome the distress of life, what professions ever they promise to train or educate.[6]

Summarizing, we can state that Nietzsche thoroughly criticized education as untruthful when only being considered as a means for satisfying one's individual, earthly, life concerning needs and wishes, when only being used to survive the struggle for life, when only being taken in its character of usability and applicability for short-sighted and rather egoistic necessities. He also criticized the educational system and institutions which merely serve these purposes. Nietzsche sketched out these features as subdued to the economical premise of "as much as possible", which cuts down man's aspirations and fields of living and experiences into a mere calculation of making benefit and profit. Thereby the glorious height of culture, as preexisting in ancient, pre-Socratic Greece, seems to be dismissed for the sake of an economically functioning society with its own cultural outgrowths under the premise of consuming utility.

We now want to take a look at the modern society, characterized as knowledge society, and its educational system, in order to figure out, if and how Nietzsche's criticism is still valid. Therefore it is necessary as a first step to describe in short the notion knowledge society.

2. Nowadays' society as knowledge society

Looking back on societal development man tends to classify certain historical coherent phenomena into certain epochs. So he did also with Western societies, and differentiated an agricultural from an industrial era, which is succeeded by the post industrial resp. post modernity, classified as information or knowledge society.

These last two terms are rather new and have been invented and established since the sixties of the twentieth century onwards (R. Lane, P. Drucker, D. Bell et al.), when information and communication technology (ICT) has been rapidly developed and swamped the daily life. ICTs have influenced many fields of societal life, such as politics, economy, educational system, health system, right up to the daily life of average persons, at least in the Western industrialized countries. ICTs also have boosted the development of globalization, which, on return, again accelerated the transition from the industrialized production society into information, or knowledge society (with its economical characteristics of service industry). Especially since the late nineties of the last century this at first only theoretically and academically constructed concept got a self-selling item which influenced thoroughly political and economical institutions and their objectives. It got a keyword for political programs, and still is highly valued as an aspired target for the design of modern societies.

In the beginning, information and knowledge society was used quite interchangeable, but over time more and more the term knowledge society was established, because its connotation is much more far-reaching than that of information. The latter was more and more just considered as a mass of data which is the basis for knowledge. Information itself has no value, it is rather neutral, and needs to be interpreted, contextualized, and utilized; hence, it needs to be transformed into knowledge by all this. Knowledge, on the other hand, is the skillful and intelligent handling and processing of information

heiligste Ordnung im Reiche des Intellektes umzustürzen, die Dienstbarkeit der Masse, ihren unterwürfigen Gehorsam, ihren Instinkt der Treue unter dem Scepter des Genius."

[5] Cf., ibid., Vortrag II, pp. 683 – 689.

[6] Ibid., Vortrag IV, pp. 713 – 715.

into life supporting[7] actions or devices. Thus, information is a kind of raw material, a precondition for producing knowledge.

The rise of the term knowledge society was associated with the insight that, besides capital, knowledge also got a more and more important factor of production in modern economy of neo-liberalism. In its objectified form we will find knowledge in every kind of technology. But also the non-objectified knowledge as it is subjectively present in the individuals as "knowing-how", and as it comes into presence only in interactive processes of problem-solving or organizational cooperation, plays a significant role, if not the significant role at all, in modern economy.[8]

These two types of knowledge are defined in the study of the United Nations "Understanding Knowledge Societies" from 2005, as follows:

"Explicit knowledge (information) refers to 'justified (true) belief' that is codified in formal, systemic language. It can be combined, stored, retrieved and transmitted with relative ease and through various means, including modern ICT.

Tacit knowledge is a fluid mix of framed experience, values, contextual information and expert insights that provides an individual with a framework for evaluating and incorporating new experiences and information. Tacit knowledge is information combined with experience, context, interpretation and judgment. It is acquired through one's own experience or reflections on the experiences of others. It is intangible, without boundaries and dynamic. It is highly personal and hard to formalize, making it difficult to communicate or share with others. Subjective insights, intuitions and hunches all fall into the category of tacit knowledge."[9]

What the UN calls "explicit knowledge" or "information", Poltermann names as "objectified knowledge", and UN's "tacit knowledge" is called "lively" or "active knowledge". Poltermann states that due to its feature as highly personal tacit knowledge is hardly controllable on behalf of the employer, so that employers need to count on the gratuitousness of the employee to serve them with their incorporated, individual knowledge.

Because of nowadays economical organization in the highly knowledgeable production industries as well as in service industries all market players – employers, employees, customers, etc. – are bound to the above mentioned willingness of voluntarily sharing one's personal tacit knowledge with each other. This, on the other hand, implies that the level of knowing how to access, acquire, and process knowledge must be significantly higher than in former industrial society. Thus, the overall and average education also needs to be higher and democratically widespread. In order to meet and match the market's demands, which is the availability of an army of "high-potentials", of well educated and well trained, also voluntary obedient, freely self-offering workers, people have to assure that they got educated as much as possible. Also the state's interest lies in the higher and job focused education for the market, so that national programs were established to form an educational system, accessible for the masses, and which trains the students in fitness for the job market.

It can be observed that in the last two decades the education policy in almost all industrialized countries of Western hemisphere seek to raise the quota of high-school graduates and academics, and to establish more and new disciplines in colleges and universities, which are designed to meet the more practical and specialized needs of new jobs and branches in the modern fields of ICT and service industries. A lot of these new jobs, hence, are only accessible with an academic degree or supplemental certifications. Also, the jobs and their occupational profiles change quickly, because especially in knowledge based branches like the ITC information rapidly gets obsolete, and on the contrary knowledge globally doubles almost every 15 years, as de Solla Price once claimed.[10] This requires from the employee to seek for continuing education. Even when de Solla Price is not right in his assumptions and information knowledge grows much slower than predicted, it is still increasing fast and in such a quantity that keeps people extremely busy to catch-up, especially those who work in technical and natural science fields.

But due to nowadays high demand for so called soft or social skills, encompassing communicative, rhetoric, meditative skills, capacity for teamwork, flexibility, capability for cooperation, compromising, self-organizing, leading etc., the continuing education not only comprises specialized knowledge and information, but also courses for self-development and personality growth. Hence, to remain employable the employee not only has to be well educated, best with an academic degree, highly specialized in the narrow field for actual application of work requirements, but also well developed in his/her personality, which means highly engaged, target focused, sociable, loyal, morally upright, committed, social competent etc.

[7] It's clear that knowledge also can be used in life destroying actions, but it's not the place here for discussing ethical issues of the application of knowledge and information.

[8] Poltermann, Andreas: *Wissensgesellschaft*; Heinrich-Böll-Stiftung; online publication: https://www.boell.de/sites/default/files/uploads/2013/09/ausfuehrliche_fassung_des_textes_wissensgesellschaft.pdf , p. 1.

[9] United Nations: *Understanding Knowledge Societies*; UN Publ., New York 2005, p. 32.

[10] Extracts of Derek J. de Solla-Price, *Little Science, Big Science* (Frankfurt: Suhrkamp, 1974), accessed April, 2, 2016, http://www.ib.hu-berlin.de/~wumsta/infopub/price/price14.html

This development of educational demands in modern knowledge society leads to the requirement of so called "lifelong learning", where people are invisibly forced by the market's demands to bother themselves with constant education of oneself from the very beginning of one's career in primary school (in some countries – like Hong Kong or Singapore, and for sure many others – already in kindergarten) till the end of working life when getting retired, if so at all.[11]

This evolution in knowledge society sets people under massive stress from the very first beginning of education. The pressure of being successful at any price, in order to reach a certain comfortable social position by achieving a certain job position with appropriate income, forms an attitude and mind-set which only focuses on competition and the aim to "win the race".

In my opinion the demand for life-long learning under these harsh and speedy conditions, which keeps the individual busy from the beginning of its learning career until it will exit or retire this racetrack, is not only a by-product of the evolution of modernity and postmodernism, but has an inner intention, inherent to the system, that keeps the ordinary living people in their status of "worker bees", or in other and harsher words, of capitalistic slavery. This will be exemplified in some more details in the next chapter.

There are many more examples which could be consulted for describing the nowadays situation in the so called and yet still aspired knowledge society. But in my opinion the afore mentioned depictions are sufficient enough to conclude with the assertion that actual educational systems in Western industrialized knowledge societies have transformed into highly efficient and specialized institutions with the essential target to educate as many people as possible and making them as much employable as possible. To summarize, the contemporary educational systems aim at the highest possible amount of employable people, aim at the employability of as many people as possible. Hence, *employability* can be considered as the only target of education in general.

2. Actuality of Nietzsche's criticisms in modern knowledge society

As we have summarized in chapter one, Nietzsche's ideal of education is based on his understanding of classic Greek education which has its target in itself, i.e., education educates people merely for being educated. This interpretation is repeated by Nietzsche in one of his last texts (1889), *Götzen-Dämmerung* (*Twilight of the Idols*), when he again criticized the higher educational system of Germany in his days as having lost its main issue, namely being purpose as well as means for the purpose, it forgot that education is purpose in itself.[12]

For Nietzsche the criteria to distinguish the ones being worth for aspiring the ideal of a genius and, hence, following his ideal of classic education, from the others who don't value this ideal, are their inner disposition of *craving for philosophy*, their *instinct for* and *sense of art*, especially music, and their *appreciation of classic Greco-Roman antiquity*.[13] If students have these dispositions and attitudes, they follow Nietzsche's ideal of education. All the others just run after the criticized aim of education and educational system, which is, in summary, fulfilling the individual needs of making a good living, and/or mere surviving.

As we could have seen in chapter two, modern knowledge society seems to have merely this criticized aim which was summarized in the concept of *employability*. In sum, we can assert that Nietzsche's criticisms still apply for modern educational systems – at least in Western industrialized countries – which emphasize the higher education as a necessity for making a socially reasonable living, and which addresses itself not to a kind of elite, who aspires the ideal of a genius and who additionally has the capacity for it, but rather to the masses.[14]

This resume not only allows to ascertain the yet actuality of Nietzsche's critiques, but also to claim that these critiques apply only now, in modern knowledge society, in their full weight. But what's the problem with education, which aims at preparation the masses of people for their employability, or for its improvement? What's wrong with the demand for "lifelong learning" and voluntarily working on higher education and personality development?

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[11] This afterthought is mentioned here, because in modern economy of neo-liberalism more and more people are forced to take the status of being freelancer, and hence being an isolated competitor against all the others. As a result, this direction undermines the social welfare and pension system, thus many of these freelancers are not able to touch pension and retire in an appropriate age.

[12] Nietzsche, Friedrich: *Götzen-Dämmerung. Oder: Wie man mit dem Hammer philosophiert*, loc. cit., Vol. 6, pp. 55 – 163, here p. 107: „Dem ganzen höheren Erziehungswesen in Deutschland ist die Hauptsache abhanden gekommen: *Zweck* sowohl als *Mittel* zum Zweck. Dass Erziehung, *Bildung* selbst Zweck ist – und *nicht* ‚das Reich'". (emphasis in original).

[13] Id.: *Ueber die Zukunft unserer Bildungsanstalten*, loc. cit., Vortrag V, p. 741: „Was dünkt euch über seine [the student's; A.S.] Bildung, wenn ihr diese an drei Gradmessern zu messen wißt, einmal an seinem Bedürfniß zur Philosophie, sodann an seinem Instinkte für die Kunst und endlich an dem griechischen und römischen Alterthum als an dem leibhaften kategorischen Imperativ aller Kultur."

[14] That we need to educate masses, and not only elites, will be clear after deliberating about capitalistic system without any delusion: the system necessarily needs an overproduction of any of its traded goods, may these be technical products, daily stuff, or just knowledge or educated workers.

For Nietzsche it's clear, this purpose of education and educational system doesn't lead to the modest aspiration of classic education for having its purpose merely in itself, namely being educated. Nietzsche wasn't generally against certain purpose oriented trainings or school education, but this one, who leads to mere employability, was placed in the institutions of middle school and professional trainings. The concept "education" in its full sense for Nietzsche was reserved for higher education, provided in high school and university curriculum. Only satisfying daily needs and providing an economically good living wasn't a defined aim of classic education, on which Nietzsche targeted at, rather it should educate with the mere purpose of education, as mentioned above.

What he rejected is the instrumental access to education as education for something, hence for an individually better life. For Nietzsche the purpose of education as education lies in the cultivation of the type of a genius. And he was convinced that these geniuses only could be a certain, but little amount of people, not the masses. In *Twilight of the Idols* he again and sharply makes clear that the higher education is not compatible with the myriads; that this is self-contradicting as every higher education is an exception for which one needs to be privileged. He emphasizes that all great and beautiful goods never could serve as a common good.[15]

It's not clearly mentioned what the purpose of the genius would be, but we may conclude that the genius finally serves for the good of society in general. The task of the genius is to elevate society onto a higher level which step by step helps developing the concept of super-human.

We may draw the conclusion that Nietzsche's worries about the deterioration of educational systems to mere training institutions must be seen as fulfilled today, as we have seen in the analysis above. Nevertheless – like Nietzsche's aim of classic education – also the modern educational systems in knowledge societies claim to work on society's improvement, although under the reign of individual freedom and responsibility. But this kind of education and its claim, that it also looks for the overall good of society, is to be noticed only as chimera.

Taking into consideration Byung-Chul Han's analyses of modern capitalistic system, we notice that freedom and individuality are only instruments for the actual reign of neo-liberalism.[16] And this leads only to a deeper entrapment of individuals in the economical paradigm of "as much as possible", and "fulfillment of needs", i.e., making a good living.

Han analyses our contemporary society of 21st century as a *performance society*, whose characteristics, besides a high degree of individuality and a seeming freedom, are also a high grade of *fatigue*. Knowledge and education, as well as freedom and individuality, are mere instruments for achieving high performance in order to survive. In nowadays performing knowledge society its members are no longer suppressed from exterior subjects, and don't need to follow the societal and economical demands by discipline, i.e., they don't need to be held under the reign of the modal verb "have to"; rather the claim of individual freedom and the demand for personality development and self-actualization are under the aegis of the verb "to be able to". The dictum "yes, we can" is symptomatic for our times. It is an expression of this new aegis, of the change from disciplinary to performance society with the radical use of individual freedom. But the latter is not only a positive fact of now; it is simultaneously a force which demands the use of this freedom from all individuals in order to attempt to achieve a performance as high as possible.

In general, freedom is a positively connoted value which everyone normally tends to actualize. Denying freedom seems to be ridiculous and inhuman. Hence, if freedom and even more freedom are possible to achieve, it is assumed to attempt to actualize it. But if freedom gets an instrument of controlling power, as it is like in neo-liberal systems, people are forced to act out their free willing. Unfortunately this willing isn't that free as it seems to or as it was promised to be like. The individuals are free to choose, yes, but the selection to choose from is systematically restricted to – not only some few goods, like in former communist countries, but – consumption. And for consuming properly according to the neo-liberal system people need to earn means for consumption, i.e., money. Hence, people in modern capitalistic knowledge societies are forced to enter the highly competitive "rat race" of voluntarily learning more and more, and being active as an all around competitor against every other, in order to further consume and hence stay alive (survive) in the system.

The flipside of this freedom is the so called responsibility. But in this case it is a "lethal" weapon of neo-liberalism. Each individual in modern knowledge society, as mentioned just above, is coerced to use his freedom for his own education in order to achieve employability, which means he is forced to be in competition with each other individual. Modern meritocratic knowledge society under the aegis of neo-liberalism compels each person to compete against all others, to run a race

[15] Id.: *Götzen-Dämmerung. Oder: Wie man mit dem Hammer philosophiert*, loc. cit., p. 107: „'Höhere Erziehung' und *Unzahl* – das widerspricht sich von vornherein. Jede höhere Erziehung gehört nur der Ausnahme: man muss privilegirt sein, um ein Recht auf ein so hohes Privilegium zu haben. Alle grossen, alle schönen Dine können nie Gemeingut sein". (emphasis in original).

[16] Han, Byung-Chul: Psychopolitik. Neoliberalismus und die neuen Machttechniken; Frankfurt/M. 2014, p. 12f.

which he necessarily has to win (, but systematically is condemned to lose). If he nevertheless loses, the failure will be blamed on him. The loser of the game will be accused for his failure by his own responsibility. Hence, the one, who cannot fit the demands of modern knowledge society by his own responsibility of taking care of his own education from the beginning, naturally will get tired about his fruitless efforts, which will lead to despondency, desperation, frustration, burn-out, and finally depression. And that's why, according to Han, one of the main symptoms of contemporary society is fatigue on the one side, and the mode of being as an "animal laborans", as working humans, i.e., of activity, rushing, and haste on the other side.

Although, as Han detects, the subject of performance society is free of any externally dominating authority, which is able to coerce to work and to exploit it, and the performing subject is the sovereign of itself, and is subjected to nobody, this subject leaves itself to the coercing freedom – or the free coercion – for maximizing its performance. This leads to a highly efficient form of *self-exploitation*, based on the free will to "win the race" of employability.[17]

What is getting lost in this state of hyperactivity and working attitude, which also applies to the attitude of education, for sure, is the ability for contemplation, for slowing down, for looking at things and situations without immediate reactions, i.e., training the contemplative attentiveness.

4. Conclusion: Prospects regarding the preceding analysis

In *Menschliches, Allzumenschliches* (1878) (Engl.: *Human, All Too Human*) Nietzsche criticizes already in his time, that the velocity of living has enormously accelerated, and that those, who are obviously restless and busy, are worth more than people, who are able for contemplation. Thus he proclaims the necessity of a correction of human's character by strengthening his ability for contemplation.[18]

Still in his late text *Twilight of the Idols* he complains an overall obscene hurry, so as if something is omitted or missed when a young man in his early twenty isn't "ready" yet and still has no answer to the main question of what profession he wants to exert.[19]

Against this hurry and bustle he detects three tasks for which we would need educators in the sense of Nietzsche's higher education: People, before entering the curriculum of higher education, need to learn how to *look*, to *think*, and to *speak* and *write*, in order to develop a noble culture.

It is highly interesting, how Nietzsche describes these competencies, especially the first one: how to *look*. We need to learn a certain patience of the eye, letting things approaching us, to delay the judgment, and to comprise each individual case from all sides and perspectives. Knowing to look in Nietzsche's interpretation means to be able not to will, not to decide, to inhibit rapid reactions. In contrast, all common, unspiritual people are unable to resist a stimulus or attraction; they necessarily need to react and follow their inner impulses. Regarding how to *think*, Nietzsche compares it with dancing, even as a kind of dance, which inevitably has to be learned. And if someone has learned thinking, i.e., logical thinking, like dancing, he also has to have learned to "dance" with the words in his *writing* and *speaking*.[20]

If we thoroughly consider all above what was said by Nietzsche and hold it against our style of life in modern knowledge society, we can conclude with the assertion that Nietzsche's critiques and advices for changes are still valid, or are even more valid in our times than when he announced it. Learning being more attentive, not so hasty in our judgments, decisions, actions and reactions, and more contemplative would save us from being trapped in the neo-liberal instruments of freedom and lifelong learning. It will slow down our pace of living and transform us into a society not of fatigue, but of a contemplative sleepiness, which acknowledges all fellow human beings and all situations by attentively looking at and thinking about them. And this is it, what Han meant by his little essay of *Society of Sleepiness* (*Müdigkeitsgesellschaft*). We all should learn to get a bit more tired, more sleepy, and abstain from fast reactions and actions as they are necessary when "running in the rat-race" and following the demands of modern knowledge society.

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[17] Han, Byung-Chul: *Müdigkeitsgesellschaft,* Berlin 2010, p. 22: „Das Leistungssubjekt ist frei von äußerer Herrschaftsinstanz, die es zur Arbeit zwingen oder gar ausbeuten würde. Es ist der Herr und Souverän seiner selbst. So ist es niemandem bzw. nur sich selbst unterworfen. Darin unterscheidet es sich vom Gehorsamssubjekt. Der Wegfall der Herrschaftsinstanz führt nicht zur Freiheit. Er lässt vielmehr Freiheit und Zwang zusammenfallen. So überlässt sich das Leistungssubjekt der *zwingenden Freiheit* oder dem *freien Zwang* zur Maximierung der Leistung." (emphasis in original).

[18] Nietzsche, Friedrich: *Menschliches, Allzumenschliches I*, loc. cit., vol. 2, pp. 9 – 367, here p. 232: „Zu keiner Zeit haben die Thätigen, das heisst die Ruhelosen, mehr gegolten. Es gehört desshalb zu den nothwendigen Correcturen, welche man am Charakter der Menschheit vornehmen muss, das beschauliche Element in grossem Maasse zu verstärken."

[19] Id.: Götzen-Dämmerung, loc. cit., p 108: „Und überall herrscht eine unanständige Hast, wie als ob Etwas versäumt wäre, wenn der junge Mann mit 23 Jahren noch nicht ‚fertig' ist, noch nicht Antwort weiss auf die ‚Hauptfrage': *welchen* Beruf?" (emphasis in original).

[20] Ibid., pp. 108 – 110.

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OUTCOMES OF ALTERNATIVE ASSESSMENT IN ADULT LANGUAGE TRAINING

Brândușa Elena Octavia ȚEICAN*

Abstract

The purpose of this article is to highlight the switch from traditional assessment to alternative, formative assessment, in other words assessment for learning, in adult language training. We focused on two aspects of formative assessment: self-assessment and peer-assessment, methods that can be used as teaching tools in communicative language teaching in adult English classes. Reportedly, these methods lead to improved results in language learning and production, as well as in motivation and self-esteem. Based on previous studies, our aim is to present how frequent employment of formative feedback based on adult opinions and perceptions – obtained via informal interviews – and tailored to their needs, result in improved learner outcome.

Keywords: *formative assessment, self-assessment, peer-assessment, adult training, feedback, learner autonomy.*

Introduction

The present study covers the topic of alternative assessment in adult education. Within this category, we tackled upon alternative assessment as formative assessment or assessment *for* learning, i.e. assessment meant not to rank students or find out about the amount of knowledge absorbed and reproduced by learners, but assessment meant to help learners become better at learning. Assessment for learning is based on the belief that the right kind of classroom assessment has a crucial role in effective learning and teaching. (Little: 2009). This kind of assessment is, in fact, a metacognitive means that learners need to achieve for themselves in order to reach better outcomes. The main forms of assessment *for* learning employed in this analysis are self-assessment and peer-assessment. These methods seem to lead to better results in adult language learners in Romania – in terms of language competence, self-esteem or self-responsibility – who seem to still be needing guidance to properly understand and embark upon life long learning and metacognitive skills.

The aim of the present paper is to combine prior research in the field of alternative assessment methods and the results the application of such methods in adult language classes have triggered. The methods are applied only after informal interviews are held in order to find out what prior experience learners have in alternative assessment. The theoretical and practical approaches are meant to facilitate an understanding of the current situation of alternative assessment in adult language learning and to highlight the idea that feedback, under the form of self-assessment and peer-assessment, leads to improved learning under the form of applied metacognitive strategies.

Feedback is one of the most influential elements upon student outcome in the entire educational process. Within Romanian education and elsewhere, feedback is mainly given by the teacher and it has absolute value, thus limiting the student's potential for development; nevertheless, modern tendencies put an accent on other types of feedback that are equally valuable: self-feedback based on self reflection and peer review. This accent is driven by the changes that also appeared in the process of teaching and learning concretized in collaborative approaches in teaching, learner responsibility, face-to-face dialogue between teacher and student, etc. Falchikov and Boud (2006) saw this kind of active student participation in classroom environment as a more suitable preparation for subsequent working life. The same approaches to both teaching and assessing apply to adult language learning. In this case, learning a language is supposed to cover one of the key competences established by specialists at the European Union level: communicating in foreign languages. To this we might add learning to learn when assessment is put to good use, such as is the case with self-assessment or peer-assessment.

The Canadian Literacy and Learning Network outlines seven key principles of adult learning, i.e. the principles that distinguish adult learners from children and youth.

46. Adults cannot be made to learn. They will only learn when they are internally motivated to do so.
47. Adults will only learn what they feel they need to learn. In other words, they are practical.
48. Adults learn by doing. Active participation is especially important to adult learners in comparison to children.
49. Adult learning is problem-based and these problems must be realistic. Adult learners like finding solutions to problems.

* Assistant, "Mihai Viteazul" National Intelligence Academy (e-mail: **brrandusa@gmail.com**).

50.Adult learning is affected by the experience each adult brings.

51.Adults learn best informally. Adults learn what they feel they need to know whereas children learn from a curriculum.

52.Children want guidance. Adults want information that will help them improve their situation or that of their children.

With these principles in mind, we need to say that it is difficult to keep adults motivated, to instill in them confidence, reinforcing positive self-esteem for them to turn into lifelong learners. It is especially difficult for today's adult learners in Romania, who are not yet used to the Bologna concept of life long learning, who have not yet developed motivation and will for continuous learning, who still seem to be needing concrete guidance from their instructors.

In order to motivate adult learners, instructors must learn why their students are enrolled (the motivators); also, they have to discover what is keeping them from learning. Typical motivations for adults include a requirement for competence, an expected promotion, job improvement, a need to maintain old skills or learn new ones, a need to adapt to job changes, or the need to learn in order to comply with company directives. According to Smith and Strong (2009), adults usually require immediate value and relevance from their studies, and they will learn best when they are engaged in developing their own learning objectives. It is crucial for teachers to be aware of the characteristics of their learners and that they develop lessons and assessment strategies that address both the strengths and the needs of their individual students. In the case of assessing adults, the main issue we have encountered so far is that most of the times assessment is traditional, it is a matter of formality, and there is no time for real feedback. When alternative assessment methods are employed, learners react more positively and tend to become more involved and motivated.

Alternative assessment, with its component relevant for our study, self-assessment and peer-assessment, can only be part of formative assessment. To this field of formative assessment belongs assessment *for* learning. The Assessment Reform Group in Cambridge University coined this term in 1999 and spelled out ten principal characteristics:

- should be part of effective planning of teaching and learning;
- should focus on how students learn;
- should be recognized as central to classroom practice;
- should be regarded as a key professional skill for teachers;
- should be sensitive and constructive because any assessment has an emotional impact;
- should take account of the importance of learner motivation;
- should promote commitment to learning goals and a shared understanding of the criteria by which they are assessed;
- learners should receive constructive guidance about how to improve;
- should develop learners' capacity for self-assessment so that they can become reflective and self-managing;
- should recognize the full range of achievements of all learners.

A few years before their proposal, in 1994, Kulm had found five principles of formative assessment that overlap those proposed by the Cambridge group: improving instruction and learning, evaluating learner progress, providing feedback for learners to understand their own thinking, communicating expectations, and improving attitudes toward the subject matter (mathematics in his case). Together with the principles of the assessment *for* learning, adult learning includes the following academic behaviors: speaking and writing skills, flexible, critical thinking, trust in their own learning mechanisms, responsible self-directed learning, autonomy, accountability.

When assessment for learning is implemented, it fosters learner autonomy, thus students "are not merely the objects of their teacher's behavior, they are the animators of their own effective teaching and learning process." (James and Pedder, 2006). As mentioned above, one of the purposes of assessment *for* learning in our case is to turn adult language learners into autonomous, self-directed learners. For this purpose, they need to acquire a certain learning strategy that should be tailored according to their personality, motivation, and level of training. Learning strategies are based on cognitive learning theories that interpret them as abilities and knowledge of the learner, which can be used for later remedies (Scheid, 1995, apud Andreson).

Assessment for learning is best illustrated in the processes of peer-assessment and self-assessment. James and Pedder (2006) argue that in these cases, students develop the motivation to reflect on their previous learning and identify objectives for new learning, structure a way forward, and act to bring about improvement. "In other words, they become autonomous, independent and active learners. When this happens, teaching is no longer the sole preserve of the adult teacher; learners are brought into the heart of teaching and learning processes and decision making."

Specialists in the Assessment Reform Group draw upon Black & Wiliam (1998) findings and state that effective assessment that leads to improved learning is based on five key factors: effective feedback to learners, active involvement of learners

in their own learning, adjusting teaching to take account of the results of assessment, recognizing how much influence assessment can have on motivation and self-esteem, and the need for learners to assess themselves and understand how to improve. Keeping these factors in mind, we might add that adult learners can easily become self-taught or self-regulated learners if they learn how to do this by proper support and guidance. This supposes getting learners familiar with cognitive and motivational competences and establishing a instruction environment that might offer self-instruction possibilities. In 2000, Pintrich defined self-regulated learning (SRL) as strategies used by learners in the process of learning that put an accent on the motivational and cognitive component. The SRL model advanced by the author includes cognitive strategies, metacognitive and self-regulated strategies, and resources management strategies. Of interest to our analysis is the metacognitive aspect, which we consider that can be obtained via alternative assessment, i.e. self-assessment and peer-assessment. Metacognitive strategies include: planning, monitoring, and regulating. Weinstein and Mayer (1986) consider all metacognitive strategies as part of monitoring understanding, when learners simply check what they learnt as compared to the objectives they established for themselves.

To understand how concepts are linked and to what results they can lead, we need to establish further helpful conceptual framework of self-assessment and peer-assessment. An all-encompassing definition of self-assessment was given by Andrade and Du (2007), definition which says that it is a process of formative assessment during which "students reflect on and evaluate the quality of their work and their learning, judge the degree to which they reflect explicitly stated goals or criteria, identifying strengths and weaknesses in their work, and revise accordingly." Using self-assessment helps learners develop an overview of their work, "so that they can manage and control it; in other words, they develop their capacity for metacognitive thinking." (Black & William, 2006:15). The informal interviews we held with EFL adult students led to establishing a few traits of self-assessment: only after recognizing what needs to be learnt can learners go on with their learning, this encouraging learner responsibility and ownership of learning; clear-cut learning objectives need to be drawn from the very beginning; alternative assessment works better than traditional assessment; learning how to self-assess improves learners' future attitudes towards learning; self-assessment and peer-assessment (to a lesser degree) increase self-esteem. Another aspect worth mentioning is that self-assessment was closer to reality in the case of better skilled learners, that is teacher and student opinions overlapped, and more biased – in terms of negative image of their own learning and low self esteem – in the case of less skilled learners.

In the case of peer-assessment, Falchicov, as early as 1995, defined it as the process whereby groups of individuals rate their peers, based or not on previous discussion or agreement over criteria. The most important feature of peer-assessment we consider to be the fact that it serves to inform self-assessment.

We applied peer-assessment techniques in EFL classes on writing assessments. We also need to mention that communicative approach was employed in teaching English, with the accent put on "real" communication (Harmer: 2004) and with the teacher being both a facilitator and a partner in learner activities. It was interesting to find out that, in general, opinions were more neutral with respect to other people's works, as opposed to a rather high degree of criticism with respect to their own papers. As observed from applying peer-assessment in classroom, on the one hand, this method can be a useful tool for making adult learners more self-aware of their learning. On the other hand, it requires a lot of training beforehand, otherwise learners tend to be either biased in terms of not offending their peers, not feeling properly prepared for the job, or not being aware of the criteria involved in the process. Since this activity was met with a lot of enthusiasm and indulgence, learners quickly realized the biases that might distort their judgments, therefore anonymity was a method preferred by students in giving peer-assessment, at least during their first attempts. This activity also meant a lot of extra work on the part of the instructor, who had to rewrite in printed form the hand written assignments and to prepare 10-minute sessions for instruction in assessing. And another aspect observed both by teacher and the learners was that applying self-assessment teaches learners how to identify and/or apply common standards and criteria.

A common issue in applying peer-assessment and self-assessment techniques in adult training is that, most commonly, courses for adults are short-term rather than long-term, therefore there is not enough time to dedicate to training learners in assessment. As such, the best instances of alternative assessments took place towards the end of the courses, when learners had already gained self-confidence with respect to learning, and established better inter-relations.

At the beginning of the courses, short informal interviews that focused on learners' previous encounters with alternative assessment and their opinions on the topic reflected a mainly traditional type of assessment both in pre-university and university years. Only isolated cases of alternative assessment were reported, luckily, in most cases in EFL (English as a Foreign Language) classes. This

partly explains the difficulties met by learners in engaging in self-assessment and peer-assessment.

For the two methods to become metacognitive strategies there is need for frequency. Not until they are over and over used until learners get comfortable with them, can they become truly aware of and good at applying them in a conscious, useful manner. The limited number of classes dedicated to adult learning in general may prevent optimal results of alternative assessment. Nevertheless, its usage triggers better learning outcomes – in terms of results, motivation, and accountability. And, keeping in mind that assessment comes from the Latin *assidere*, i.e. sitting next to somebody in order to help, we can say that alternative assessment's principal aim should always be to help students become better learners.

In our attempt to choose a definition fit for our purposes, we need to mention that scholars and practitioners have not yet reached consensus with respect to metacognition. Shawn Taylor's 1999 definition is often cited; it reads that metacognition is an appreciation of what one already knows, together with a correct apprehension of the learning task, which will in time lead to correct, efficient and reliable application of one's strategic knowledge to a particular situation. In other words, it is a skill that makes students active learners. Guiding learners into co-responsibility via metacognitive skills is considered a "Copernican revolution" for education (Manolescu, 2004:11) and requires training of teachers and learners alike. If learners admitted to not being accustomed to alternative assessment techniques, it is nevertheless true that neither are teachers and currently there are developed guides and training courses for teachers in this field.

Metacognition techniques are based on asking questions (e.g. What is the problem here? What resources should I use? What should come first? How should I pace myself?), but the challenge lies in finding the right moment and context for raising the questions, and more importantly in responding to these questions promptly and effectively. Therefore, we consider that first it is the teacher's role to get the process going by modeling questions, setting clear-cut criteria, thus helping students become aware of themselves as language learners. Then an important role in acquiring metacognitive skills is played by self-assessment and peer-assessment, which get learners closer to finding out about their own strengths and weaknesses, about what motivates them, and about the best strategies to tackle in various contexts. With respect to assessment, a change of focus from quantity to quality, from summative to formative, based on alternative methods is necessary, even if so far alternative assessment is not fully understood or completely analyzed via validated and acknowledged empirical research (Neacșu, 2006).

Conclusion

The role of the professor in metacognition is to acquaint adult students with what each metacognitive strategy is called, what purpose it serves, and which of the questions modeled to them it relates to. According to researchers in the field (Conti, 2015), all strategies involved should be named, presented, modeled, and practiced, thus settling a common language. Or, in the words of Wittgenstein, "the limits of my language are the limits of my world."

We should follow the line that connects feedback under the form of self-assessment and peer-assessment with metacognitive strategies; if this feedback is practiced constantly, it becomes metacognition. The main issue in adult learning is the length of the courses. In our cases, adult language courses do not last enough so as to allow the teacher and learners alike to deeply engage in assessment for learning strategies. The first outcomes resulting from using metacognitive strategies in classroom – even if with time limits – were, as far as we could notice, an increased self-confidence, self-responsibility, and motivation. But there is still a lot of exercise and interpretation in store before reaching relevant conclusions.

In conclusion, we can say that using self-assessment and peer-assessment as metacognitive methods for improved learning outcomes can lead to development in competences, that is knowledge as a tool, rather than to development in knowledge itself, as a goal. With the help of self-assessment and peer-assessment, the learner will eventually build their own knowledge (Cucoș: 2002). Feedback is a powerful tool, a tool for learning, that should help learners learn better and not obtain better grades, and it reflects the belief that all students can improve their learning. Assessment is a two-sided concept according to Boud (1995): making decisions about the standards of performance expected and then making judgments about the quality of the performance in relation to these standards. Or, as Andrade writes in her 2007 study, "if students produce it, they can assess it; and if they can assess it, they can improve it."

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THE GLOBAL MARKET OF SMALL BUSINESSES BY E-COMMERCE PLATFORMS

Domenico CONSOLI*

Abstract

Nowadays we live in a global market era. For small businesses (SBs), that do not have financial and human resources, to sell in a big market by an e-commerce platform can be a competitive strategy. The electronic platform can reinforce the weaknesses of an absence of a commercial network to interact with end customers, especially if they live in another country.

The platform allows small businesses to operate on the long tail. In fact they can sell also few specific products /services to a large number of people in a global context. Obviously, in economic terms, Small Businesses cannot compete with the big ones that can have most advanced technology and software for information processing. However, for SBs the reduced availability of resources is not an impediment to sell in a global market. Owners of SBs can directley spend and devote part of their free time to support the online sale. Being lean and flexible enterprises they can execute more quickly orders, collected by the website, and therefore the distribution process is more fast. In the paper we describe a research on e-commerce in a small companies sample and in particular an analisys of websites and interviews, in dept, to entrepreneurs.

Keywords: *Small Business, e-commerce, ICT, social media, web 2.0, global market.*

1. Introduction

In recent years the use of Internet has grown, especially with the explosion of mobile devices. More companies have understood the importance of this contact channel with customers to be more competitive.

Small and medium businesses by Internet can develop an e-commerce section inside the company website. The online sale can be execute in parallel with the sale of physical store and then traditional and modern modalities can be integrated. By e-commerce it is possible to enlarge the target market.

There are companies that decide to sell their products only through e-commerce platforms and others that integrate e-commerce with a traditional physical channel.

It must also distinguish between e-store generalist who sell any kind of product and niche store focused on particular products that customers can scarcely find in traditional shops.

For big brands, the electronic commerce is focused on the loyalty of existing customers, while for small companies it means to know and achieve new customers and sell in large areas.

Many surveys have shown that, even in times of crisis, there is always a growth of online sales. Until a few years ago, the creation and costs of an e-commerce website was supported only by large companies, but nowadays, thanks to the evolution of technology and open platforms, costs have drastically reduced.

The main drivers of e-commerce for the customer are: saving time, economic benefits and the variety of assortment. The e-commerce offers a wide range of products and consumers have more information and details on products.

It is easy to find online products at lower prices and it is possible to compare more products. Users before buying can read opinions and reviews: recommendations and experiences of other people are always important for the choice.

For small and medium enterprises it is convenient to operate online to expand the sales area in a global market.

Sometimes there are online sellers incorrect and not serious. People have fear to provide credit card and information online. Customers may be skeptical in buying at little-known e-commerce website that does not transmit safety. Therefore a good number of online customers are available to buy only in the most popular platform, which have invested heavily to protect customer privacy and to make secure their purchases.

The quality of the web page and the safety offered to customers allow contribution margins and higher prices for big players thus putting “out game" many small sellers.

Surely the e-commerce is a tool of a multi-channel system to support the enterprise-customer relationship.

There are various options to buy that guarantee the interaction between the traditional channel (store) with new online channels by smartphones and social networks.

It is important the use of social media in the e-commerce platform to listen customer opinions.

The structure of this paper is the following: in the next session we show a literature review. In the third section a SWOT analysis of e-commerce is described. In ther fourth section we analyse some

* Adjunct Professor, PhD, School of Economics, Management and Statistics, University of Bologna (e-mail: **domenico.consoli@unibo.it**).

results of e-commerce researchs. The successive section illustrates some cheap platforms that Small Business could use to sell their products/services in Internet. Then we describe, in detail, our research on a sample of small companies. At the end some conclusions are drawn.

2. Literature review

Over the years the web has evolved. Ellion (2007) identifies three different web phases: information/communication (data pubblication), commercial activities (focus on e-commerce) and networking phase (social interactions). The web has become a platform where we can implement different value-added services (O'Reilly, 2005; 2007).

In the current economic situation, Internet is increasingly trasforming the evolution of social and business dynamics. It revolutiones the approach by which companies offer in the market and the new sales method. Customers intend carry out activities such as the development of networks of people with the same interests who post reviews, share experiences and purchase online products/services.

The website becomes particularly innovative with e-commerce platform (Golden, 1996; Sieber, 1996; Golden et. al, 2004). Thanks to this new modality of sale it is possible to sell in a global market also for B2B companies (Elia et al., 2007; Quaddus and Hofmeyer, 2007).

Recently customer can buy online products/services in mobility by smastphone/tablet (m-commerce) (Tiwari et al., 2011).

If companies have a clear strategic project of e-commerce (Fisher et. al, 2007) in the long term can increase sales and profits (Balasubramanian and Mahajan, 2001; Bagozzi and Dholakia, 2002).

The e-commerce can have different impacts on customers (Moe and Fader, 2004; Van Baal and Dach, 2005). The customer can visit many time the website to acquire additional information and then conclude the online transaction or buy in a physical store. Several studies have been conducted on the factors that stimulate consumers to use online business applications (e-banking, e-commerce). Chen et al. (2002) examined consumer attitudes towards shopping in virtual stores and Tan and Teo (2000) user characteristics for the adoption of Internet Banking. Both are agree that young people are favored to execute online transactions.

By the e-commerce we can eliminate intermediaries with a reduction in transaction costs (Butera, 2001). In real time we can have the availability of goods and satisfy requirements of customers (Chaffey et al., 2000).

The implications of an e-commerce project is not only technological. It requires, inside the organization a cultural transformation and a reorganization of management processes, working procedures and also the update of the Information System.

In the case of e-commerce, the resistance to change is more significant by the cultural gap between the generations: young people are more familiar with web technologies and use them every day (Parolini, 2003).

By e-commerce, the company can get benefits such as the reduction of costs, the increase of the potential market and opportunities for the new business (Beck, Wigand, and Konig, 2005; Fink and Disterer, 2006; Grandon & Pearson, 2004).

Mertens et al (2001) argue that drivers for e-commerce investments are the perceived benefits (Daniel and Wilson, 2002) and the organization's readiness to satisfy external requests. Currently e-commerce is more pervasive in large and small companies (Burke, 2005; Sharma, Ahmed, & Wickramasinghe, 2004). Small businesses are not willing to make high investments and change their business model (Keindl 2000) because they do not fully understand the potentiality of e-commerce for their resistance to change, the adaptation to specific contractual rules, the uncertainty about payments and the fear about the safety of online banking transactions.

We believe that e-commerce can be an opportunity for small businesses devoid of sale networks (Ching and Ellis, 2004; Al-Qirim, 2005; Cioppi and Savelli, 2006; Van den Berg, 2008). In fact the "global paradox" of John Naisbitt can occur: more the global economy becomes big and more strong are small operators.

The website, and in particular e-commerce, allows small businesses to operate on a large area and on the long tail (Anderson, 2006). SBs can sell few specific products /services to a large number of people on a global market.

Small businesses, more lean and flexibles, can manage, in a quickly modality, orders collected by the website, the production process and the distribution to end users.

In an e-commerce platform it is important also the use of social media (Facebook, Twitter, YouTube, etc…) (Mathew et al., 2016) to collect customer opinions for improving the product/service and also for advertising (Lu et al., 2016) and promoting products/services (Ching and Ellis, 2004; Zhao, 2016).

3. SWAT Analysis of e-commerce

3.1 Strenghts

1. *Short distances*. With an e-commerce platform and especially with the advent of m-commerce (mobile commerce), it will be possible to sell in the World.

2. *New customers by search engines*. A virtual store will be disCovered by search engines.

3. *Lower costs*. Discounted prices for customers. In particular the reduction of costs covers the following sectors:

- Advertising & Marketing: the virtual store can be achieved thanks to the traffic generated by search engines and social media;
- Labor costs: the automatic cash processes, billing, payment reduce the number of employees required to manage an e-commerce store;
- Real Estate: An e-commerce seller does not require a large investment in real estate.

4. *Fast Identification of the product*. Through an intuitive navigation by search box it is easy to individuate the product. Some websites remind to customers the list of preferences and facilitate the repetitive purchase.

5. *Save cost and time for mobility*. A platform of e-commerce allows customers to visit virtually the shop, with a few click of the mouse without transfer by car and without long and boring queues in the city.

6. *Compare shops*. There are several websites that allow customers to browse many online sellers and find the best price.

7. *Wide range of offers and coupons*. In the virtual store will be possible to find coupons and best prices.

8. *Additional information*. Additional information about the entire line of products respect to physical store.

9. *Personalized communication*. Send to customer personalized email taking into consideration previous purchase or previous interests.

10. *Always open shop*. The virtual store is always open, 365 days for year.

11. *Offer of niche products*. In the virtual world it easy to sell niche products. It depends on the Search Engine Optimization (SEO) strategy to fast find products on search engines.

3.2 Weakness

1. *Untouchable product*. The lack of touch of products and of human contact with the sale staff, from many potential customers can be an obstacle for purchasing.

2. *Delay in the delivery of products*. If a customer needs a gift for the same day, or need urgently a product, the online purchase may not be possible except, for example, an e-book or a specific software.

3. *Not all products may be sold*. This is true for perishable products or for those particularly delicate.

4. *Do not try a product*. Many customers have the need to touch the product, to try a pair of shoes or test a perfume before buying.

3.3 Opportunities

1. *The growth of online market*. For the new generation is more comfortable buying online. The e-commerce will be a great opportunity for all those who wish to develop a new business.

2. *Global Opening of the business*. Owners of a physical store through an e-commerce platform can sell in a wide area more interesting of a local market.

3. *Strong business to business connections*. Companies have more chances to cooperate and collaborate such as to expand the supply chain.

3.4 Threats

*1. Identity theft***.** The safety is a very sensitive issue especially for the external threat from possible fraud on credit card and for the identity theft and the protection of personal data in the login phase.

2. Competition. The entry barriers for developing an e-commerce platform are very low and therefore there are a lot of competition and a reduction of product prices with lower contribution margin for online companies. Furthermore will be possible to find online players unserious and inappropriate.

4. Some researchs on e-commerce

4.1 TNS research

In this sub-section, a quantitative survey of TNS (tns-global.it) on a sample of 202 Italian SMEs that do not make online business is described. This survey was done by telephone with the C.A.T.I. (Computer Aided Telephone Interviewing) technique. The sectors in which companies operate are the following: Food, Health and beauty, House, Furniture, Garden and DIY (do-it-yourself), Car, Motorcycles, Accessories, Fashion, Clothing, Electronics.

The geographical origin of the companies are: NorthWest, North East, Center and South Italy.

Regarding the digital equipment of the companies: the 95% has an Internet connection, the 80% of employees has a computer or mobile device and the 52% has a website but does not use it for the sale.

The results of the perception of e-commerce among SMEs analysed have been as follow:

- 92% said that they never have considered to use e-commerce platforms
- 88% of respondents believe the e-commerce is not useful
- 26% has fear that the electronic commerce can be risky for the traditional commerce
- 69% is convinced that the e-commerce does not increase sales volumes
- 72% thinks that e-commerce is a complex channel
- 56% believes that an e-shop section requires

high investments

- 43% believes that e-commerce is only suitable for large companies
- 21% believes that their products are not suitable for online sales. The peak of this perception is reached between companies of the food sector (44%).

Therefore there is still some resistance from the Italian SMEs to the e-commerce strategy. While in Italy the e-commerce phenomenon is growing and there are more people who buy online, on the other hand, there is a huge number of companies, small and medium, who does not believe that online trading can be a growth factor. In Italy the e-commerce has a penetration of 4% while in other countries like France, Germany and the UK the percentages increase from 12% to 16%. It is need a cultural change in digital business. The change is a major factor in the growth of a company, especially for small-medium businesses. The change involves a renewal of the way of doing business.

4.2 Milan Polytechnic Observatory

In Italy for the Milan Polytechnic Observatory (osservatori.net) the e-commerce penetration in main European markets (UK, Germany, France and Spain), US and Asian markets (South Korea and Japan) is higher than the Italian market (4% in 2015).

In particular, in a first group of countries where the e-commerce is more mature like Korea, Japan, UK and US, the rate is between 13 and 17%, about 4 times the Italian, and the annual growth rate in 2014 was between 10 and 15%. Instead, in the same year, in emerging markets - Brazil, India and Russia - the e-commerce penetration ranging from 0.5% to 2%.

The composition of the sample of online shopping is an indicator of the maturity of the sector. The analysis shows that in almost all the major international markets, the e-commerce purchases of products exceeds the services, while in Italy and Spain, the services still have a high incidence.

4.3 Assinform report

In 2014, for Assinform (assinform.it), the value of the e-commerce market in Italy (sales of products and services from Italian websites) reached 13.2 billion euro, an increase of 17% on 2013, and a percentage of retail sales, over the past, from 2.6 to 3.5%.

In 2014 there was an increase from 40% to 45% of the weight of online purchases of products. It should therefore reduce the gap with other European countries and the United States, where the product segments have a greater weight. Products with the most increase were consumer electronics, publishing and clothing. Italians online shoppers, on average in 2014, have made more than one purchase per month with a frequency that has generated more than 200 million transactions for the full year.

5. E-commerce platforms for SBs

The traffic of an online store depends on its position on search engines. The websites of sellers must be continually updated on the basis of algorithms that perform the rankings of search engines. The seller must uses different tools:

- Search Engine Marketing (SEM) to generate quality traffic to a particular website;
- Search Engine Optimization (SEO) to optimize the top results of searches;
- Social Media marketing (SMM) to increase, in website, the traffic through social networks
- E-mail marketing and newsletters to allow an exclusive and customized relationship with consumers and so the customer loyalty increases.

5.1 Blomming

Blomming (blomming.com) is a platform that allows anyone, individuals or companies, to sell through its own website, blog, Facebook page and directly on the same platform. The promotion is "Three Shop in one" through a centralized platform easy to use. Now it supports more than 22,000 online shops of which 60% Italian with 50,000 registered users and a catalog of over 260,000 products for the sale.

There is also a mobile application (http://j.mp/blommingmobile) that allows buy products on Blomming. The next version will allow not only to buy but also to sell in online modality with the system "Shop Three in one". Blomming is therefore a useful tool to enhance online presence, so that everyone can expand the business on Internet. The Blomming proposal contributes to the personal development of the entrepreneurship.

Blomming has recently introduced a new model of Social Affiliation, Social Share, which allows any Internet user, with an online presence on social media to earn not only selling products of others but also simply recommending, with posts or tweets, friends, parents and colleagues.

All people give opinions to buy products and tips to friends and family. In this way it is possible to influence acquaintances via blogs or social networks like Facebook, Instagram and Pinterest.

5.2 Netberg

The Netberg platform (netberg.com) has already connected in Internet fifteen thousand small and medium enterprises. These companies can exploit the potential of selling on Internet.

The platform is simple to use like a Facebook page: in five minutes and few clicks, the company is online in the global market with a predefined layout. It is enough indicate the geolocation information, choose photos to put on, contents of the enterprise communication and then upload the products to sell. Any change is made directly by the entrepreneur.

Netberg works with two partners PayPal and UBS. When an order comes in, the company prints the label with the customer's address and prepares the package. When the payment, by the end customer, is made, Netberg holds 7% and turns the rest to the enterprise. Netberg earns also fees (about € 60) on the additional services such as the translation of the website in multiple languages or a complete version of the online showcase.

Netberg seeks to involve professional associations like Confcommercio which has about 700 thousand companies that might be interested.

For this reason Netberg has launched a campaign on Facebook *#salviamolapmi* involving a testimonial as Oscar Farinetti, owner of Eataly. The idea of Netberg has aroused the interest of the European Parliament. The company has reached the final in Innopitch, an international competition within Unconventional EU Forum.

Now entrepreneur of Netberg are doing a Crowdfunding campaign to receive a funding to invest in sales and marketing development.

5.3 Poste e-commerce

Poste e-commerce (poste.it/impresepa/e-commerce/) is the new solution for e-commerce offer by the Italian Post. A solution "turnkey" complete and efficient, which really includes all necessary tools to make successful an e-commerce platform: development and customization of the website, the catalog configuration, integration with shipping and logistics, safe payment systems. The target is Small Businesses that have understood the importance of this channel and want to pursue the road of e-commerce with an appropriate tool and a good partner.

Poste e-commerce is a solution aligned to the highest standards of the sector. It use an open source platform, leaders of the world market, that meets all the requirements of flexibility and simplicity required by customers. Customers can easily update the library, implement marketing campaigns by setting discounts and loyalty programs, verify sales performance thanks to the statistical report, update the virtual store with tools provided by the platform.

Shipments are made with the service "Paccocelere Impresa", which allows the delivery in 1-2 working days (in Italy), online tracking and the management of returns. As payment tools, the Virtual Pos of Poste Italian, linked to the account InProprioPOS, allows entrepreneurs to receive payments with all Poste Italian channels (PostePay, BancoPosta, crediting account BancoPosta) but also with cards Visa, Visa Electron and Mastercard.

The Italian Post Office offer is designed to meet the needs of companies at different levels of maturity: companies that want to start online sales and companies that have already an e-commerce platform but they want expand sales and the positioning on search engines.

Small Businesses also have the ability to manage by themselves their own online store and the e-commerce processes (shipping, payments, returns, logistics, customer relations, web marketing and promotion) or to entrust these activities to the Italian Post Office.

In particular there are different packages:

- *Leader Offer*: the solution for companies who want to maintain their positioning online and require an offer comprehensive and personalized of e-commerce platform to support the management of their own online store.
- *Full Outsourcing Offer*: for companies that want to sell online by their e-commerce website, but not manage the sale processes. The company entrust to *Poste e-Commerce* the management of the online store, payment processes, shipping, logistics and customer communications. The company is limited to provide the products and Poste sells on its behalf.
- *Custom Offer*: for companies that have business structured processes and require to Poste to create timely solutions for the platform.

6. Some researchs on e-commerce

6.1 Research metodology

From the methodological point of view, this paper uses a qualitative case study research to understand how Small Businesses use e-commerce platforms. The aim of this analysis is to explore the object of study in depth. We opted for a multiple case study, in order to analyse firms with different characteristics in terms of industry, size, technologies used, entrepreneur's profile and so on. Thanks to a local entrepreneurial association, a sample of 48 SBs has been selected.

Companies of the sample operate in various industries: mechanical-electronic (19%), furniture (25%), fashion-art (23%), food and wellness (17%) and services-communication (16%). They belong to different size classes: less than 3 employees (35%); 3 to 10 employees (23%); 11 to 30 employees (25%) and 31 to 50 employees (17%).

Empirical analysis followed two main steps. First of all SBs' website was analysed in order to know if they used e-commerce platforms. The second and main step was depth interviews and informal conversations with owners/managers. Data was collected in the period 2012-2013.

6.2 Websites Analysis

Websites of a sample of 48 companies have been analysed and we considered SBs that, inside their corporate website, have an e-shop section also in an experimental phase. Of these 48 companies only 15 meet this goal and therefore only the 31% of the sample.

Among these companies there are those who are starting now with small experiments, others with

a brief experienxe in online sale and few others who are experts in the sector.

In this section, we refer to analysed websites of case studies. For privacy reasons, we assign to each company a fantasy name that ends with a number, which indicates the number of employees. If the company identifier does not end with a number it means that only the owner work inside the company without any employee.

1. *Lpam20* (Furniture). In the website there is an e-shop section. This section is made in a simple modality from an internal trade manager who assembled different components.

2. *Saab8* (Food). The company hasn't the license to sell to end customers but to retailers and wholesalers. For this reason it use the Italian Food online platform. The company sells to Italian Food (IF) and after IF handles a commission and executes the delivery to the end customer. This platform includes other products: wines, pasta and so on.

3. *Cmme16* (Mechanical/Electronic). Regarding e-commerce the company is beginning an experience sales of certain products, hulls and replacement parts for molding of plastic material. In this way they avoid the cost of the commercial network.

4. *Fbma2* (Fashion/Art). At the moment the company work for other enterprises (Business-to-Business) but in the future the owners think to develop direct market with the end customer by an e-commerce platform.

5. *Mhsc7* (Services/Communication). The firm sells and rents online touristic services (villa, rural houses,…) and collaborates with several travel agencies in Italy and abroad. It think to make even a type of online trading of art craft products, complements and objects. The strength is the computer science experts who work inside the organization.

6. *Dvab1* (Food/Wellness). It is a wine producer that is starting to sell online wine bottles using e-commerce platforms of other companies.

7. *Ptma* (Fashion/Art). The owner when used only the e-commerce platform frequently upgraded the website and the product catalog. Now that he has a commercial agent he makes the update few times for month. Now he directly manages the community on Facebook by answering to customers every night, after the work.

8. *Vaam1* (Fashion/Art). The company receives most orders through the online platform. Inside the organization there is a young woorker who updates the website with text and pictures made by himself.

9. *Alcs5* (Services/Communication). The company makes e-commerce with machines for food. It advertises its own products on price comparators like Find Prices, Kelkoo, Hello, TopNegozi, Shoxshopping, Fandado.com, Last shopping, shopping Boing, Affarando, NexTag. These websites are specialized in this area and make visible a firm to the general public. Certainly, in this way, the company attracts a number of visits per day higher than the enterprise website. Even most customers derive from these comparators.

10. *Brma8* (Fashion/Art). The company has a webmaster who develops and updates the website and interactive channels. The webmaster also interacts with SEO and Google adwords campaigns. The part of e-commerce is integrated with the physical stores. The enterprise is not specialized like Alsc5 company that makes e-commerce as a core business. For the owner the e-commerce is an addition. In fact Brma8 is not present on websites of price comparator.

11. *Elme17* (Mechanical/Electronic)

For its own products the company has an e-commerce web space. For other products it prefers have a sales network. At the moment, the platform is in an experimental phase.

12. *Masc* (Services/Communication). Initially the company had an e-commerce project of make-up and cosmetics on Blomming platform and after it acquired a virtual space on eBay. Now the company has an independent business website. The enterprise sends the customer's order to the supplier and after when it receives the products it sends them to the customer with the invoice. For the deliveries and withdrawals from suppliers *Masc* uses SDA and Bartolini couriers.

13. *Smma* (Fashion/Art). The owner is the only worker inside the organization. She makes many products, statues, jewels, necklaces of different types. The website, initially, was developed by a friend. She has also an e-shop section, although, at present, she hasn't made a lot of sales. People who access to e-shop section must register and to these contacts the owner sends the newsletter.

14. *Phma3* (Fashion/Art). In the core business of the company the user has the possibility to design the cover with his own pictures and share with friends on Facebook starting a process of word of mouth (WoM). The customer actively participates in the production process of Phma3. The customer buys its own customized cover on the e-shop section. He/she becomes prosumers, producers and consumers. This will also implement a mass customization process, since the covers have personalized drawings and images.

15. *Ccma20* (Fashion/Art). This company works in the fashion industry, a sector that stimulates the communication by social media. These tolls help much the online sale on the e-shop platform.

6.3 Analysis of interviews and discussion on results

Results of interviews are discussed to better understand how SBs use and manage e-shop sections and the benefits obtained from the use of these tools.

The analysis of the interviews was very interesting and allowed us to understand certain dynamics and behaviours of SBs.

Most SBs prefer to invest gradually in websites and e-commerce in order to incrementally update technologies and devices. Firms try to found financial resources from domestic or foreign funds (Lpam20). Entrepreneurs of SBs work almost all day. The owner of *Ptma* said "From the downstairs laboratory, in the evening after work, I go upstairs at home and after eating I connect to the Facebook to respond to my customers that buy my products".

Small businesses, which are usually well rooted in the territory, could exploit the web to expand in a global market. Integrating in the website an e-commerce section may be able to expand the geographical boundaries of the market and sell products/services abroad. By social channels the customer can be reached anywhere.

In fact through a good e-commerce website enterprises may facilitate the implementation of an internationalization process and sell around the world. Small Business like *Dvba1*, *Ccma20* and *Brma8* can commercialize wines /clothes in a global context.

The micro *Alsc5* makes business only with e-commerce activities. Now it has specialized and invests heavily on search engines and price comparators. By these websites also receives opinions of customers who have purchased products. Some competitors that sell similar machines in physical stores have tried e-commerce experiments but they have had to close because they do not really believe in this concept.

Some company (Masc) begins selling online through eBay or Blomming and now it has integrated the e-shop section inside the website. Other companies have understood the power of e-commerce and not being licensed to sell to the end customer but only to retailers and wholesalers, in order to overcome this obstacle, they have used external sale platforms (Saab8 and Dvba1). The supplier that manages the platform executes the delivery and the transport and the company will recognize a percentage on sales. If the company had made e-commerce independently it would have higher shipping costs with an impact on the product price.

Other small companies make e-commerce experiments in small steps (Cmme16 cases) and only sell online specific components of their production. Instead a company, rooted in the territory, which does not want to expand on a global market prefers operate in a local context.

Some companies understand the benefits that can be obtained using the e-shop section instead of the commercial sale networks (Smma, Fbma2) and so they can directly contact end customers, especially if they are placed in another part of the world. Through e-commerce sections embedded in their interactive websites they start to sell online in a global market. Surely in terms of financial resources small businesses can not compete with the larger ones, which can afford a Community Manager (Brma8, Ccma20) for the management of these virtual channels or they have advanced platforms or specific software for information processing.

However this reduced availability of resources, does not constitute an impediment for small businesses. Owners of these companies spend part of their free time to coordinate, in a best way, interactive virtual spaces.

It was possible for both individuals and companies to sell products/services to consumers directly through the website. In this way the distribution chain becomes short and so companies can increase their profit margins thanks to a considerable reduction in operating costs.

Web designers, in virtual store, becomes a strategic resource to cure in every detail the design of the website and the e-shop section.

7. Conclusions

Nowadays every small business (SBs), thanks to web technologies and virtual channels can operate and sell in a global market.

To facilitate the online sale in the e-commerce section, in addition to develop an attractive website, it is important to focus on products, quality photos and especially on customer service also in the post-sales phase.

Customers can buy online products/services in mobility by smastphone/tablet (m-commerce). In an e-commerce platform it is important also the use of social media to collect customer opinions for improving the product/service, for the advertising and promotion and for the follow-up during the post-sale period.

Nowadays, in the era of the knowledge and of social media, we must not forget that the customer is the King, a prosumer (producer and consumer), and an active and responsible consumer. Company must meet its own needs to increase the customer satisfaction. Customer opinions in Internet are very important for an enterprise, both for the improvement of products and for the reinforcement of the customer loyalty. Customers' feedback can determine the success or the failure of a company.

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INTELLIGENT MULTI-AGENT PLATFORM WITHIN COLLABORATIVE NETWORKED ENVIRONMENT

Adina-Georgeta CREŢAN[*]

Abstract

This paper proposes an agent-based intelligent 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: *Automated Negotiation, Web Services, Collaborative Networked Environment, computing platform, multi-agent systems.*

1. Introduction

Recent advances in the information technology have made possible the development of a new type of organization, the virtual organization. Taking into account the connection between the new communication technologies and the relationships between the industrial organizations, two main directions are distinguished. The first direction considers the Internet and the Informatics as being the main technologies that facilitate the communication between persons. The second direction, more visionary, is focused not only on the communication but mainly on the modalities that allow the information technologies to coordinate in an efficient fashion and with minimal effort requirements the activities of individuals.

Related to the second direction, 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 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[1]

Given this general context, the objective of the present paper is to develop a conceptual framework and the associated informational infrastructure that are necessary to facilitate the collaboration activities and, in particular, the negotiations between independent organizations that participate in a virtual alliance.

The starting point in the development of this work was the goal to support small and medium enterprises that are not able or are not willing to perform alone a large contract since in this situation the association in a virtual alliance provides the opportunity to subcontract the tasks of the contract to other partners within the alliance. To achieve this goal, research was dedicated to the development of a model to coordinate the negotiations that take place within an inter-organizational alliance. Our research was focused on the topics of virtual alliances, automation of the negotiations and of coordination aimed to provide the mechanisms for coordinating the negotiations that take place among autonomous enterprises that are grouped in a virtual alliance.

Assuming that the nature of the roles that may be played in a negotiation are similar in multiple approaches, the number of participants involved at the same time in the same negotiation is considerably different.

Depending on the number of participants involved in a negotiation, we may distinguish various negotiation types: *bilateral negotiation (one-to-one)*; *one-to-many negotiation; many-to-many negotiation*.

Taking into account the complexity of the negotiations modeled by multi-agent system, we can state that to conduct in an efficient fashion one or many negotiations that involve a large number of participants and to properly account for all negotiation dimensions, it is necessary to develop a coordination process that is defined outside of the specific constraints of a given decision mechanism or communication protocol.

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

[*] PhD, "Nicolae Titulescu" University, Computer Science Department (e-mail: **adinacretan@univnt.ro**).

[1] Camarinha-Matos L.M. and Afsarmanesh H.,(2004), *Collaborative Networked Organizations,* Kluwer Academic Publisher Boston.

cooperate to achieve common tasks. The type of alliance that we use to define their association emphasizes that each participant to this alliance is completely autonomous i.e., it is responsible of its own amount of work and the management of its resources. 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.

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.

We are starting with a presentation in Section 2 of a VE life cycle model. Then, we are briefly describing in Section 3 the architecture of the collaboration system in which the interactions take place.

The main objective of this paper is to propose a collaboration framework in a dynamical system with autonomous organizations. In Section 4 we define the Coordination Components that manage different negotiations which may take place simultaneously.

In Section 5 we present how the structure of the negotiation process can be used by describing a particular case of negotiation. Finally, Section 6 concludes this paper.

2. The main steps of the Virtual Enterprise life cycle

The life cycle of virtual enterprise is classified into six phases. The relevance in different phases is shown in Figure 1 and the statement for each phase is given as follows:

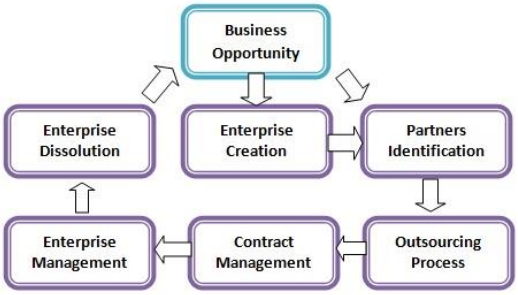

Figure 1. Life-cycle of a virtual enterprise

r) VE creation

When a business opportunity is detected, there is a need to plan and create the VE, identify partners, establish the contract or cooperation agreement among partners, in order to manage the processes of the VE.

s) Partners search and selection

The selection of business partners is a very important and critical activity in the operation of a company. Partners search can be based on a number of different information sources, being private, public, or independent. The enterprise's private suppliers' list is a data repository that contains information about the companies that have had commercial relationships with this enterprise. This information composes an *Internal Suppliers Directory (ISD)*. External sources include directories maintained by industrial associations, commerce chambers, or Internet services. This information composes the *External Suppliers Directory (ESD)*. Another emerging solution is the creation of clusters of enterprises that agreed to cooperate and whose skills and available resources are registered in a common *SME Cluster Directory* (CD).

t) Outsourcing of tasks within a VE

In this stage of a VE life cycle, we can assume that a gas station company receives a customer demand. In this respect, the Manager of this company may negotiate the outsourcing of a schedule tasks that cannot perform locally with multiple partners of selected gas station companies, geographically distributed. The Manager can select the partners of the negotiation among the database possible partners according to their declared resources and the knowledge he has about them.

The outcome of a negotiation can be "success" (the task was fully outsourced), "failure" (no

[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.

outsourcing agreement could be reached) or "partial" (only part of the task could be outsourced).

u) Contract management in the VE

In case the negotiation process ends in a successful, a contract is established between the outsourcing company and the insourcing ones. The contract is a complex object, which is based of trust in this coordination mechanism. Moreover, it contains a set of specific rules, such as penalties, expressing obligation relations between the participants.

In case of failure of a partner, the Manager will have to supervise if the obligations are honored (for example to oblige the partner to finish his work or to set penalties) and to modify the business process renegotiating parts of the work that have not been realized.

v) Management of the VE

A VE is a dynamic entity in which a new company may join or leave it. Members may need to leave for many reasons, when they change their activity or when they don't want any more to collaborate with the partners of the VE. In case of departure from the VE, the leaving partner may either notify all the partners. It also may leave without giving any information. The departure of a partner from the VE will have an important impact on ongoing contracts especially when this partner is an insourcer of an important amount of task.

VE dissolution - after stopping the execution of the business processes.

3. The Collaborative Infrastructure

The main objective of this software infrastructure 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 2 shows the architecture of the collaborative system:

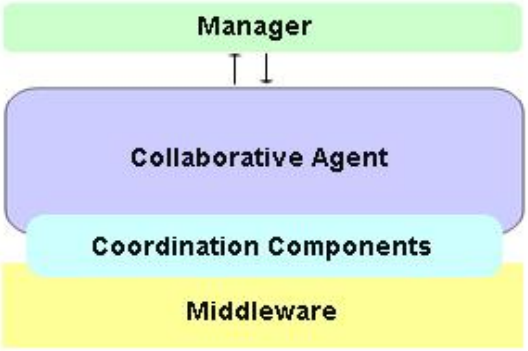

Figure 2. The architecture of the collaborative system

This infrastructure is structured in ***four*** main ***layers***[3]: Manager, Collaborative Agent, Coordination Components and Middleware. A first layer is dedicated to the Manager of each organization of the alliance. A second layer is dedicated to the Collaborative 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 Collaborative Agents of the other partners through the fourth layer, Middleware[4]. The third layer, Coordination Components, manages the coordination constraints among different negotiations which take place ***simultaneously***.

A Collaborative 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[7]. In the refinement step, participants exchange proposals on the negotiation object trying to satisfy their constraints[8]. The manager may participate in the definition and evolution of negotiation frameworks and objects[9]. Decisions are taken by the manager, assisted by his Collaborative Agent[10]. For each negotiation, a Collaborative Agent

[3] Cretan A., Coutinho C., Bratu B. and Jardim-Goncalves R., (2011), *A Framework for Sustainable Interoperability of Negotiation Processes.* Paper submitted to INCOM'12 14th IFAC Symposium on Information Control Problems in Manufacturing.

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[10] Bui V. and Kowalczyk R., *On constraint-based reasoning in e-negotiation agents*. In AMEC III, LNAI 2003, pp. 31-46.

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 [11].

4. Coordination Components

In order to handle the complex types of negotiation scenarios, we propose five different components[12]:

- *Subcontracting* (resp. *Contracting*) for subcontracting jobs by exchanging proposals among participants known from the beginning;
- *Block* component for assuring that a task is entirely subcontracted by the single partner;
- *Divide* component manages the propagation of constraints among several slots, negotiated in parallel and issued from the split of a single job;
- *Broker*: a component automating the process of selection of possible partners to start the negotiation;
- *Transport* component implements a coordination mechanism between two ongoing negotiations in order to find and synchronize on the common transport of both tasks.

These components are able to evaluate the received proposals and, further, if these are valid, the components will be able to reply with new proposals constructed based on their particular coordination constraints[13].

From our point of view the coordination problems managing the constraints between several negotiations can be divided into two distinct classes of components:

- Coordination components in closed environment: components 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, Divide)*;
- Coordination components in opened environment: components 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, Transport)*.

Following the descriptions of these components we can state that unlike the components in closed environment (*Subcontracting, Contracting, Block, Divide)* that manage the coordination constraints of a single negotiation at a time, the components in opened environment (*Broker, Transport)* allow the coordination of constraints among several different negotiations in parallel[14].

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 components level, which allows administrating all simultaneous negotiations in which an alliance partner can be involved.

The coordination components 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 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 components.

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[12] Cretan A., Coutinho C., Bratu B. and Jardim-Goncalves R., (2011), *A Framework for Sustainable Interoperability of Negotiation Processes.* Paper submitted to INCOM'12 14th IFAC Symposium on Information Control Problems in Manufacturing.

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5. The structure of the negotiation process

According to our approach 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 using negotiation and coordination mechanisms that we proposed in this paper.

Negotiation process that we present in Figure 3 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.

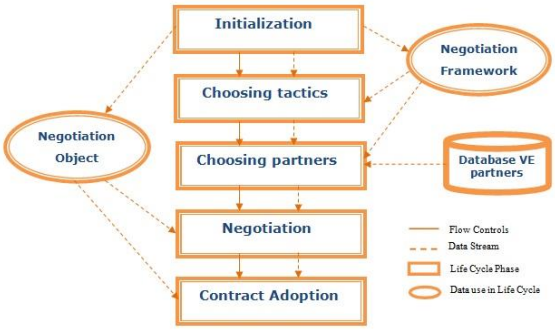

Figure 3 – The structure of the negotiation process

Choosing tactics. Using the tactics of negotiation specified in the negotiation framework, the coordination is decomposed into several coordination schemes. We considered three tactics that correspond to three coordination schemes: Block, Divide and Transport.

Choosing partners. We have two choices of partners:

- among known partners – The Manager who initiating the outsourcing can specify any constraints on the set of possible alliance contractors. To do this, the manager uses the description of the job that follow to be subcontracted and also the database alliance partners and/or the different adhesion contracts which they signed[15];
- among unknown partners - in this case, the entire research activity of the potential partners is managed by the infrastructure through Broker component.

Negotiation. At this stage, during exchanges of proposals, the negotiation object evolves according to the constraints imposed by the manager on negotiated attributes of the subcontracting task. The final objective of the negotiation process is to build an Instantiated Negotiation Object from initial specification of negotiation object[16]. An Instantiated Negotiation Object is a negotiation object whose attributes have been accepted by the all partners. After that, this object will be used to establish a contract.

Contract Adoption. In the final negotiation phase, the negotiation properties are fixed values. In this case, the Collaborative Agent asks Manager to validate the result of negotiation and makes contact with other partners' agents.

Depending on the answers obtained, the Manager may decide to: i) to restart or to suspend negotiations; ii) to enable the contracting phase, which allows reaching an agreement[17].

The negotiation process involves several parties (for several bilateral negotiations), each having different criteria, constraints and preferences that determine their individual areas of interest[18]. 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[19].

In conclusion, the proposed architecture provides the following features:

- to define the negotiation process structure: participants, interaction protocol, negotiation protocol, tactics and coordination components, the negotiation object and the negotiation strategies;
- the modeling all negotiations for a gas station in the form of a set of bilateral negotiations, which the agent can operate independently;
- the modeling of the coordination among the negotiations based on a set of coordination components and the synchronization mechanisms at

[15] Hurwitz, S.M., (1998) *Interoperable Infrastructures for Distributed Electronic Commerce*, http://www.atp.nist.gov/atp/98wpecc.htm

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the middleware level.

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.

6. 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 infrastructure aims to help the different SMEs 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 framework 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.

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MODELING EXCHANGE RATES USING ARCH FAMILY OF MODELS

Ştefan Cristian CIUCU[*]

Abstract

In this study, after a brief literature review, the RON / EURO exchange rate time series over the 03.01.2005 - 05.02.2015 time period is analyzed.

After checking the stationarity of the data - ARCH, GARCH, EGARCH and TARCH models will be developed and compared. Next the best model is chosen and the serial correlation and the Jarque-Bera test are further analyzed with various conclusions being drawn.

Keywords: *ARCH, GARCH, GARCH, exchange rate, RON / EURO.*

Introduction

The analysis of the evolution of exchange rates is an important topic for economic researchers because it affects a whole range of economic actors like banks, governmental agencies, companies and households.

In the first section of the article (the brief literature review) it is shown the usage of ARCH family models in scientific literature and some of these models applications on exchange rate analysis.

Autoregressive conditional heteroskedasticity (ARCH) models are used for modelling observed time series. Also, they are used in order to characterize various observed time series. An ARCH(q) model is estimated using ordinary least squares.

In this study, it is analyzed the evolution of daily RON / EURO exchange rates over the 03.01.2005 - 05.02.2015 time period using specialized IT software for data analysis.

Appling the methodology presented in the second section of this article - ARCH, GARCH, EGARCH and TARCH models are developed for the data chosen for this study.

As in many research studies that use ARCH family models for exchange rate analysis, we test in this article different models in order to find the best one for our data series. After choosing the best model for our data series (by comparing and analyzing the models) different tests are applied on it.

We check the ARCH model for serial correlation, we also check the heteroskedasticity of the model and we check if the residuals are normally distributed or not.

Finally we take a look at the volatility, which is measured by the conditional standard deviation.

Literature review

ARCH family models are frequently used for exchange rate time series. Most of the articles in this area of the literature deal with the analysis of the exchange rate volatility or with the forecast of the exchange rates.

The autoregressive conditional heteroskedasticity (ARCH) method for modeling volatility has been introduced by (Engle, 1982), which modeled the heteroskedasticity by relating the conditional variance of the disturbance term to the linear combination of the squared disturbances in the recent past.

The GARCH model is a generalized ARCH model which was obtained by (Bollerslev, 1986) by modeling the conditional variance to depend on its lagged values as well as squared lagged values of disturbance.

Other models from the ARCH family are: the EGARCH model which was proposed by Nelson (1991) or the TARCH model introduced independently by Glosten, Jaganathan, and Runkle (1993) and Zakoïan (1994).

Various ARCH models have been applied by researchers to analyze the volatility of exchange rates in different countries. For example some studies are: (Benavides, 2006) in which the author analyses the volatility forecast for the Mexican Peso – U.S. Dollar exchange rate, (Trenca et. al., 2011) which analyzes the evolution of the exchange rate for: Euro / RON, dollar / RON, yen / RON, British pound / RON, Swiss franc / RON for a period of five years from 2005 until 2011, (Alam et. al., 2012) in which the authors analyze exchange rates of Bangladeshi Taka (BDT) against the U.S. Dollar (USD) for the period of July 03, 2006 to April 30, 2012, (Musa et. al, 2014) forecast the exchange rate volatility between Naira and US Dollar using GARCH models.

Other interesting articles are:

[*] PhD Candidate, Cybermetics and Statistics Doctoral School, The Bucharest University of Economics Studies (e-mail: **stefanciucu@yahoo.com**).

- (Spulbar et. al., 2012) in which the impact of political news and economic news from euro area on the exchange rate between Romanian currency and EURO is analyzed using a GARCH model,
- (Hartwell, 2014) in which is analyzed the impact of institutional volatility on financial volatility in transition economies using a GARCH family approach (the paper posits that institutional changes, and in particular the volatility of various crucial institutions, have been the major causes of financial volatility in transition and the researcher examines 20 transition economies over various time-frames within the period 1993 - 2012),
- (Teyssiere, 1998), a vast and very good written study, in which two classes of multivariate longmemory ARCH models are considered.

Methodology

First the stationarity of the data will be checked using the ADF test (Augmented Dickey-Fuller test) (Dickey & Fuller, 1981).

The ADF test estimates the equation:

$$\Delta y_t = a_0 + \gamma y_{t-1} + \sum_{i=2}^{p} \beta_i \Delta y_{t-i+1} + \epsilon_t$$

The time series y_t is stationary if for every $h \epsilon Z$, the y_{t+h} series has the same distribution as the y_t series for any *t = 1, 2, …, n* (Enders, 1995).

Then the models:

- ARCH - autoregressive conditional heteroskedastic model,
- GARCH - generalized autoregressive conditional heteroskedastic model,
- EGARCH - exponential generalized autoregressive conditional heteroskedastic model,
- TARCH - threshold GARCH model are developed.

After choosing the best model, serial correlation and heteroscedasticity is checked. Also, by using the Jarque-Bera test it can be stated if the residuals are normally distributed or not. At last the conditional standard deviation is plotted.

Autoregressive conditional heteroskedasticity (ARCH) models are used for modelling observed time series. Also they are used in order to characterize various observed time series. An ARCH(q) model is estimated using ordinary least squares.

Data analysis

For this article, data has been collected from the National Bank of Romania website (http://bnr.ro). The data consists of daily RON / EURO exchange rates over the 03.01.2005 - 05.02.2015 time period.

First we run, in EViews software, a descripting statistics on our data in order to observe the mean, median, maximum, minimum, standard deviation, skewness, kurtosis, Jaque-Bera, Probability, Sum, sum sq. dev. and the number of observations. Interesting to see is that the difference between the minimum and the maximum values is rather significant (from a minimum of 3.111200 to a maximum of 4.648100).

	CURS
Mean	4.020349
Median	4.213900
Maximum	4.648100
Minimum	3.111200
Std. Dev.	0.413540
Skewness	-0.442294
Kurtosis	1.663810
Jarque-Bera	274.4443
Probability	0.000000
Sum	10312.20
Sum Sq. Dev.	438.4839
Observations	2565

Table 1. RON / EURO exchange rates – descriptive statistics

Data plot:

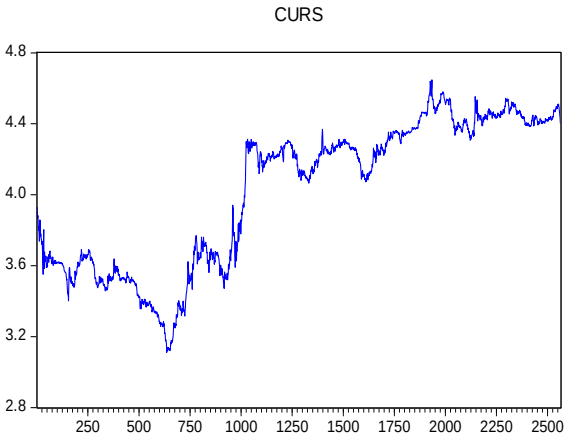


Figure 1. RON / EURO exchange rates over the 03.01.2005 - 05.02.2015 time period

From figure 1 it can be seen that the data is non-stationary, but we will run the Augmented Dickey-Fuller test to make sure. Also, from figure 1, an increasing trend of the time series can be noticed.

Null Hypothesis: CURS has a unit root
Exogenous: Constant, Linear Trend
Lag Length: 3 (Automatic - based on SIC, maxlag=27)

		t - Statistic	Prob.*
Augmented Dickey - Fuller test statistic		-2.591988	0.2841
Test critical values:	1% level	-3.961627	
	5% level	-3.411562	
	10% level	-3.127647	

*MacKinnon (1996) one-sided p-values.

Variable	Coefficient	Std. Error	t - Statistic	Prob.
D(CURS(-1))	-1.025038	0.030925	-33.14621	0.0000
D(CURS(-1),2)	0.217311	0.024944	8.711893	0.0000
D(CURS(-2),2)	0.100922	0.019652	5.135481	0.0000
C	-8.76E-05	0.000619	-0.141621	0.8874
@TREND(1)	2.33E-07	4.18E-07	0.557143	0.5775

Table. 2. Augmented Dickey - Fuller Test – trend and intercept

In table 2 we have the output of the Augmented Dickey - Fuller test. From it, it can be stated that our time series in level is non-stationary (it has a unit root) – the t-stats -2.591988 in absolute value is lower than the critical values.

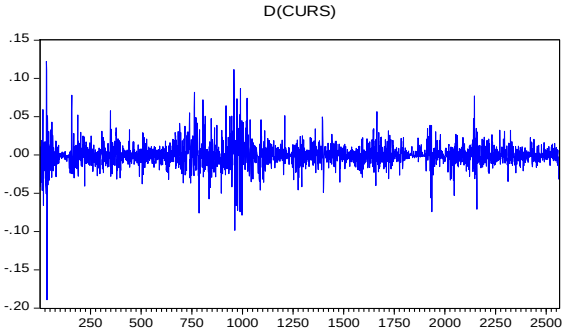


Figure 2. RON / EURO exchange rates over the 03.01.2005 - 05.02.2015 time period in 1st difference

From figure 2 it can be seen that the data is stationary in 1st difference. The 1st difference $(x_t - x_{t-1})$ is generally used in order to transform non-stationary data into stationary data.

Null Hypothesis: D(CURS) has a unit root
Exogenous: Constant, Linear Trend
Lag Length: 2 (Automatic - based on SIC, maxlag=27)

		t - Statistic	Prob.*
Augmented Dickey - Fuller test statistic		-33.14621	0.0000
Test critical values:	1% level	-3.961627	
	5% level	-3.411562	
	10% level	-3.127647	

*MacKinnon (1996) one-sided p-values.

Variable	Coefficient	Std. Error	t - Statistic	Prob.
CURS(-1)	-0.004111	0.001586	-2.591988	0.0096
D(CURS(-1))	0.193646	0.019663	9.847995	0.0000
D(CURS(-2))	-0.114693	0.019895	-5.764962	0.0000
D(CURS(-3))	-0.099430	0.019638	-5.063053	0.0000
C	0.013836	0.005407	2.558782	0.0106
@TREND(1)	2.26E-07	8.87E-07	2.549576	0.0108

Table. 3. Augmented Dickey - Fuller Test – trend and intercept – the 1st difference of the time series

From table 3 it can be observed that in first difference the time series becomes stationary, so further in our analysis we will use the data in 1st difference. We have included in both tests trend and intercept.

ARCH family models analysis and comparison

We shall be developing four types of models (ARCH - autoregressive conditional heteroskedastic model, GARCH - generalized autoregressive conditional heteroskedastic model, EGARCH - exponential generalized autoregressive conditional heteroskedastic model and TARCH - threshold generalized autoregressive conditional heteroskedastic model) and compare them in order to find the best model by looking at the AIC - Akaike information criterion and SIC - Schwarz information criterion. Lower the value of Akaike information criterion and Schwarz information criterion, better fitted is the model.

First we run a model using the least squares method:

Dependent Variable: D(CURS)
Method: Least Squares
Date: 14/02/15 Time: 19:25
Sample (adjusted): 2 2565
Included observations: 2564 after adjustments

Variable	Coefficient	Std. Error	t - Statistic	Prob.
C	0.000186	0.000319	0.584928	0.5586

R - squared	0.000000	Mean dependent var	0.000186
Adjusted R - squared	0.000000	S. D. dependent var	0.016132
S. E. of regression	0.016132	Akaike info criterion	-5.415650
Sum squared resid.	0.666988	Schwarz criterion	-5.413368
Log likelihood	6943.863	Hannan - Quinn criter.	-5.414822
Durbin - Watson stat	1.633308		

Table. 4. Model - least squares method

Next we check the residuals of this model:

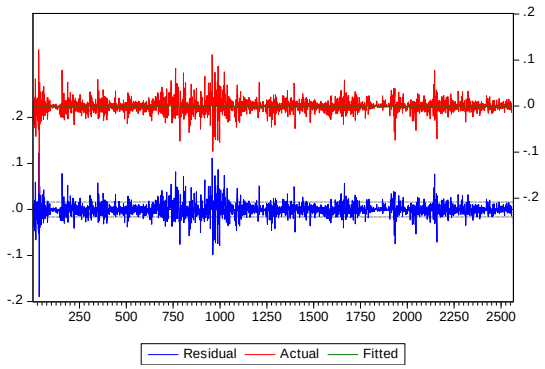


Figure 3. Residuals of the model

Looking at the figure above, at the residuals plot, we can observe that there are **long** periods with low fluctuations and also **long** periods with high fluctuations, meaning that periods of low volatility tend to be followed by periods of low volatility for a prolonged period and periods of high volatility are followed by periods of high volatility for a prolonged period. When these things happen for residuals, we have all justification to run ARCH family models.

In order to be sure, we will run a heteroskedasticity test.

Heteroskedasticity Test: ARCH			p-value
F - statistic	122.8733	Prob. F (1,2561)	0.0000
Obs * R - squared	117.3394	Prob. Chi - Square (1)	0.0000

Table. 5. ARCH test

From the heteroskedasticity test, we can see that the p value is less than 5%, meaning that there is an ARCH effect.

Next we developed the four models. All of them can be seen in the appendix. The Akaike info criterion and the Schwarz criterion for each model:

	ARCH	GARCH	TARCH	EGARCH
AIC	-5.890104	-5.895482	-5.894853	-5.895363
SIC	-5.874134	-5.886357	-5.883446	-5.883957

Table. 6. AIC & SIC values for the four models (ARCH; GARCH; TARCH; EGARCH)

From the values obtained and presented in table 6 it can be stated that the best model is the ARCH model.

ARCH model analysis

Next we will check the ARCH model for serial correlation, we will check if it has an arch effect and if the residuals are normally distributed or not.

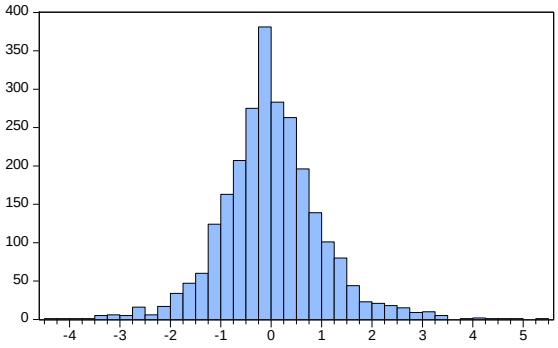
The output for **serial correlation** is also in the appendix. From it, having in mind that almost all the p-values are more than 5%, we can conclude that there is no serials correlation in the residuals.

In order to test the remaining ARCH effect in the residuals we perform a Heteroskedasticity test (table 6).

F - statistic	0.079006	Prob. F (1,2561)	0.7787
Obs * R - squared	0.079065	Prob. Chi - Square (1)	0.7786

Table. 7. Heteroskedasticity Test: ARCH

The test p-values from tables 7 (shown in the second column) are more than 5%, so in this model there is no ARCH effect, meaning that we have a good model.



Series: Standardized Residuals	
Sample 2 2565	
Observations 2564	
Mean	0.001323
Median	-0.035984
Maximum	5.320488
Minimum	-4.499429
Std. Dev.	1.000191
Skewness	0.265227
Kurtosis	5.163102
Jarque-Bera	529.9350
Probability	0.000000

Figure 4. Residuals of the model

From the p-value of the Jarque - Bera test we can state that the residuals are not normally distributed, which is not desirable.

So, the only problem of the model is that the residuals are not normally distributed.

The volatility is measured by the conditional standard deviation and it is presented in figure 5.

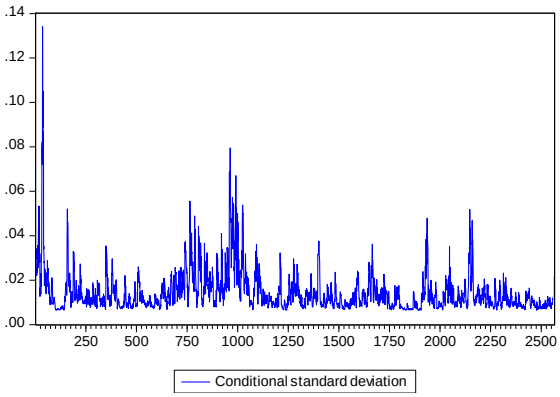


Figure 5. Conditional standard deviation plot

Conclusions

Computer software EViews is a powerful tool for data analysis that can be used on various time series from the social sciences area.

In this paper, using EViews software, ARCH, GARCH, EGARCH and TARCH models are developed and analyzed on the RON / EUR exchange rate time series over the 03.01.2005 - 05.02.2015 time period.

As seen in the data analysis section of the article, the best model is the ARCH (5) model, which has been further analyzed in the article, various results being obtained.

As future development of the paper, the models could be further commented and tested.

Appendix

ARCH model

Dependent Variable: D (CURS)
Method: ML - ARCH (Marquardt) - Normal distribution
Date: 14/02/15 Time: 19:48
Sample (adjusted): 2 2565
Included observations: 2564 after adjustments
Convergence achieved after 15 iterations
Presample variance: backcast (parameter = 0.7)
GARCH = C(2) + C(3)*RESID(-1)^2 + C(4)*RESID(-2)^2 + C(5)*RESID(-3)^2 + C(6)*RESID(-4)^2 + C(7)*RESID(-5)^2

Variable	Coefficient	Std. Error	z - Statistic	Prob.
C	-1.34E-05	0.000205	-0.065120	0.9481
	Variance Equation			
C	4.08E-05	2.49E-06	16.41387	0.0000
RESID(-1)^2	0.353942	0.027159	13.03202	0.0000
RESID(-2)^2	0.088498	0.018935	4.673898	0.0000
RESID(-3)^2	0.219024	0.022003	9.954237	0.0000
RESID(-4)^2	0.142763	0.018895	7.555415	0.0000
RESID(-5)^2	0.171213	0.021143	8.097701	0.0000

R - squared	-0.000153	Mean dependent var	0.000186
Adjusted R - squared	-0.000153	S.D. dependent var	0.016132
S. E. of regression	0.016133	Akaike info criterion	-5.890104
Sum squared resid	0.667090	Schwarz criterion	-5.874134
Log likelihood	7558.113	Hannan - Quinn criter.	-5.884313
Durbin - Watson stat	1.633057		

GARCH model

Dependent Variable: D(CURS)
Method: ML - ARCH (Marquardt) - Normal distribution
Date: 14/02/15 Time: 19:56
Sample (adjusted): 2 2565
Included observations: 2564 after adjustments

Convergence achieved after 14 iterations
Presample variance: backcast (parameter = 0.7)
GARCH = C(2) + C(3)*RESID(-1)^2 + C(4)*GARCH(-1)

Variable	Coefficient	Std. Error	z - Statistic	Prob.
C	-9.62E-05	0.000214	-0.450589	0.6523
	Variance Equation			
C	6.90E-06	6.77E-07	10.18504	0.0000
RESID(-1)^2	0.224656	0.015009	14.96804	0.0000
GARCH(-1)	0.768696	0.012495	61.51978	0.0000

R - squared	-0.000307	Mean dependent var	0.000186
Adjusted R - squared	-0.000307	S.D. dependent var	0.016132
S. E. of regression	0.016134	Akaike info criterion	-5.895482
Sum squared resid	0.667193	Schwarz criterion	-5.886357
Log likelihood	7562.008	Hannan - Quinn criter.	-5.892174
Durbin - Watson stat	1.632807		

TARCH model
Dependent Variable: D(CURS)
Method: ML - ARCH (Marquardt) - Normal distribution
Date: 14/02/15 Time: 20:03
Sample (adjusted): 2 2565
Included observations: 2564 after adjustments
Convergence achieved after 16 iterations
Presample variance: backcast (parameter = 0.7)
GARCH = C(2) + C(3)*RESID(-1)^2 + C(4)*RESID(-1)^2*(RESID(-1)<0) + C(5)*GARCH(-1)

Variable	Coefficient	Std. Error	z - Statistic	Prob.
C	-0.000125	0.000223	-0.561744	0.5743
	Variance Equation			
C	6.78E-06	6.67E-07	10.17308	0.0000
RESID(-1)^2	0.215377	0.016100	13.37758	0.0000
RESID(-1)^2*(RESID(-1)<0)	0.018095	0.020042	0.902829	0.3666
GARCH(-1)	0.769988	0.012544	61.38494	0.0000

R - squared	-0.000373	Mean dependent var	0.000186
Adjusted R - squared	-0.000373	S.D. dependent var	0.016132
S. E. of regression	0.016135	Akaike info criterion	-5.894853
Sum squared resid	0.667237	Schwarz criterion	-5.883446
Log likelihood	7562.202	Hannan - Quinn criter.	-5.890717
Durbin - Watson stat	1.632698		

EGARCH model
Dependent Variable: D(CURS)
Method: ML - ARCH (Marquardt) - Normal distribution
Date: 14/02/15 Time: 20:11
Sample (adjusted): 2 2565
Included observations: 2564 after adjustments
Convergence achieved after 16 iterations
Presample variance: backcast (parameter = 0.7)

LOG(GARCH) = C(2) + C(3)*ABS(RESID(-1) / @SQRT(GARCH(-1))) + C(4)
*RESID(-1) / @SQRT(GARCH(-1)) + C(5)*LOG(GARCH(-1))

Variable	Coefficient	Std. Error	z - Statistic	Prob.
C	-0.000322	0.000141	-2.278700	0.0227
	Variance Equation			
C(2)	-0.947555	0.061312	-15.45464	0.0000
C(3)	0.431769	0.021422	20.15562	0.0000
C(4)	0.013049	0.010643	1.226088	0.2202
C(5)	0.927585	0.005577	166.3138	0.0000

R - squared	-0.000992	Mean dependent var	0.000186
Adjusted R - squared	-0.000992	S.D. dependent var	0.016132
S. E. of regression	0.016140	Akaike info criterion	-5.895363
Sum squared resid	0.667650	Schwarz criterion	-5.883957
Log likelihood	7562.856	Hannan - Quinn criter.	-5.891228
Durbin - Watson stat	1.631690		

ARCH model – checking serial correlation

Date: 15/02/15 Time: 19:14
Sample: 2 2565
Included observations: 2564

	AC	PAC	Q-Stat	Prob
1	-0.006	-0.006	0.0792	0.778
2	-0.031	-0.031	2.5603	0.278
3	-0.018	-0.018	3.3618	0.339
4	-0.019	-0.020	4.2673	0.371
5	-0.019	-0.020	5.1628	0.396
6	0.013	0.011	5.5686	0.473
7	0.021	0.019	6.6534	0.466
8	-0.001	-0.001	6.6553	0.574
9	-0.027	-0.026	8.5655	0.478
10	0.005	0.005	8.6203	0.568
11	0.030	0.029	10.884	0.453
12	0.024	0.024	12.366	0.417
13	-0.000	0.001	12.366	0.498
14	0.010	0.012	12.636	0.555
15	-0.008	-0.005	12.815	0.617
16	0.004	0.007	12.851	0.684
17	0.015	0.015	13.434	0.707
18	0.015	0.014	14.026	0.727
19	0.059	0.060	22.928	0.241
20	0.026	0.030	24.637	0.216
21	0.014	0.020	25.111	0.242
22	0.016	0.020	25.742	0.263
23	0.038	0.042	29.430	0.166
24	0.003	0.007	29.449	0.204
25	0.017	0.020	30.183	0.217
26	-0.005	-0.004	30.260	0.257
27	0.020	0.024	31.340	0.257
28	0.048	0.052	37.343	0.111
29	-0.031	-0.030	39.846	0.086
30	0.062	0.062	49.941	0.013
31	0.023	0.021	51.259	0.012

32	-0.009	-0.004	51.490	0.016
33	-0.021	-0.020	52.644	0.016
34	-0.012	-0.015	53.020	0.020
35	0.025	0.022	54.620	0.018
36	0.008	0.005	54.801	0.023

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USING R FOR ANALYZING FINANCIAL MARKETS

Nicolae-Marius JULA[*]
Nicoleta JULA[**]

Abstract

Financial markets are hard to analyse and almost impossible to predict. The progress in computer technology means also the improvement of the available tools for the analysts to observe the evolution of financial markets. The R software, besides different statistical analysis, offers also the tools to process and analyse the data from these markets, in a free and accessible manner.

Keywords: *financial markets, R, software, financial data, technical indicator.*

1. Introduction

1.1. Introduction

There is a lot of interest in analysing the financial markets. We are not stressing here the advantages of such an analysis. There are a lot of studies that present the importance of anticipating the evolution on these markets. Of course, predicting the evolution is not the easiest type of forecast. For example, when the government of the country where the market is located, announces a new policy measure aimed at deregulating a particularly stifling part of an industry segment, it may have a positive impact on the financial market). Financial market analysts cannot anticipate such factors and therefore the impact of these factors do not come under the main purview of financial market analysis. However, most analysts do set aside some space for the impact of extraneous factors on the market and they do so in equal measure for both positive as well as negative factors.

Financial market analysis has become a highly specialized activity confined to select groups of experts known as technical analysts. In most cases they are professionally trained in financial analysis and are reasonably familiar with the tools used to analyze a particular market. In certain other cases they are economists or veteran investors with a special interest in financial market analysis and market economics. The number of factors that directly or indirectly impact the financial markets are increasing rapidly with more analysts digging deeper into the circumstances that influence financial market behavior. On the other hand, the integration of information technology in market analysis is increasingly meeting the challenge posed by the complexities of financial market analysis.

We start from the need for rigorous analysis of capital markets, individual investors and institutional traders, brokers and other market participants seek to maximize profits earned from their investments. Obviously, these participants will want to find a way how best to reduce the risk of losing money and improve their chance of getting a return as high. The question of identifying timing to buy or sell a share, to trade a futures contract etc.

These market players will use graphical and analytical tools to identify such moments that changes in supply and demand for financial instruments traded will help in forecasting price and formulate trading strategies.

There are a lot of tools for analysing the financial markets, but in this article we are focusing on the solution offered by the R environment. The advantages of using a free solution are detailed in a former article (Jula N.-M., ECONOMETRIC SOFTWARE - FREE VS. PAID SOLUTIONS, CKS 2014).

2. Using R for Analysing Financial Markets

2.1. Why using R?

Out opinion is that you should use the method that gives you the best result, including the cost/outcome ratio. Why we suggest using R and not other solutions? There are a lot of arguments, regarding the costs, the flexibility, the on-going support. And there are big names that trust this solution, like Microsoft, Google, Twitter, Bank of America, Facebook, just to name a few. (Source: http://www.revolutionanalytics.com/companies-using-r).

2.2. R solution

We start with the conclution: there is not a single solution. There are many ways to import and manipulate financial data. We are presenting here just one of the many possibilities offerd by the R environment.

[*] Lecturer, PhD, Faculty of Economic Sciences, "Nicolae Titulescu" University of Bucharest (e-mail: **mariusjula@univnt.ro**).
[**] Professor, PhD, Faculty of Economic Sciences, "Nicolae Titulescu" University of Bucharest (e-mail: **nicoletajula@univnt.ro**).

From the financial analysis packages, we will present the Quantitative Financial Modelling Framework, or *quantmod* package. This is not installed by default in R, and one should install prior to use it (> *install.packages(quantmod)*). As the package creator stipulates, "the *quantmod* package for R is designed to assist the quantitative trader in the development, testing, and deployment of statistically based trading models." (Jeffrey A. Ryan, http://www.quantmod.com/).

To use the functions included in this package, one should import the data first. The software is very versatile, allowing a phletora of sorces to be selected for data importing, like Google of Yahoo Fianance of even Bloomberg):

- Yahoo! Finance (OHLC data)
- Federal Reserve Bank of St. Louis FRED® (11,000 economic series)
- Google Finance (OHLC data)
- Oanda, The Currency Site (FX and Metals)
- MySQL databases (Your local data)
- R binary formats (.RData and .rda)
- Comma Separated Value files (.csv)

(source: http://www.quantmod.com/examples/intro/)

For faster and better display and manipulation of the data, we should import the data in some local variables. For importing, the *getSymbols* function should be used:

>getSymbols("MSF",src="yahoo")

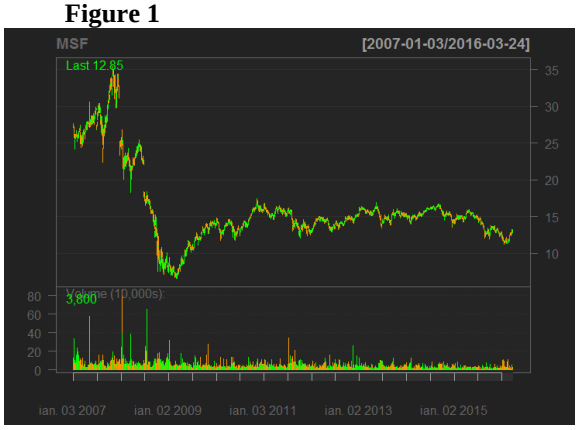
We imported the Microsoft values from Yahoo Fianance.

There are a lot of options for displaying the imported data. For example, we can create a bar chart using the following function:

> barChart(MSF)

And the result is:

Figure 1



Source: Author's calculations in R, Microsoft value, Yahoo Finance data source.

Other options to display the results are:

>candleChart(MSF,multi.col=TRUE,theme="white")

Figure 2

Source: Author's calculations in R, Microsoft value, Yahoo Finance data source.

Capital market analists use a variety of indicators to confirm or strengthen trading strategies that they have settled on the graphs or based on fundamental analysis. Currently, there are a variety of indicators, having from simple to complex mathematical formulas. We must specify that various indicators may be better suited to different types of MBI. A successful trading strategy should use a combination of indicators, not just an isolated indicator. The evolution of computer techniques has allowed the development of composite indices, with the possibility of using them in real time, with access and power to process large volumes of data.

A technical indicator is a series of data that is obtained by applying a formula (equations) on the price action (currency or other traded goods).

When calculating the index values may be used for any opening, closing, minimum or maximum volume.

Usually indicators are using values from several trading days (usually the number of days is introduced as a parameter). Based on numerical analysis, the used historical data series should be as long as possible for a correct interpretation of the result provided by that indicator.

As a mode of representation, some indicators overlaid the chart displayed price, while others are displayed in a separate chart.

For technical analysis, the TTR package should be loaded. This package allows the acces to a wide list of technical indicators, like MACD, Bollinger Bands and so on.

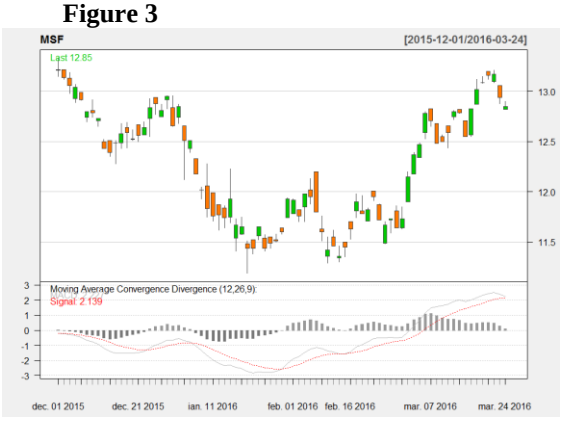
Moving average convergence divergence (MACD) is a trend-following momentum indicator that shows the relationship between two moving averages of prices. The MACD is calculated by subtracting the 26-day exponential moving average (EMA) from the 12-day EMA. A nine-day EMA of the MACD, called the "signal line", is then plotted on top of the MACD, functioning as a trigger for buy and sell signals. (Source: http://www.investopedia.com/terms/m/macd.asp)

As an example, we use the Microsoft data for la last 4 months, no volume and white template. On this graph, we add the MACD indicator:

>chartSeries(MSF, subset='last 4 months', TA=NULL, theme="white")

>addMACD()

Figure 3



Source: Author's calculations in R, Microsoft value, Yahoo Finance data source.

Other intense used indicator is represented by the Bollinger Bands. Bollinger Bands were created by John Bollinger and combine two indicators, a simple moving average and a standard deviation.

The indicator consists of three lines, a simple moving average (usually 20 periods are used) and two lines obtained by subtracting or adding a number of standard deviations (usually 2) to the simple moving average. Bollinger statistically determined that 85% -95% in the evolution of the quotations analyzed is framed by thw two bands.

The use of this indicator:

- narrowing Bollinger bands placed interval occurs due to the decline of the standard deviation. This narrowing (squeeze) precedes a sharp increase in volatility, buying signal being generated when the price breakes the upper band (bullish breakout), while sale signal is when the price strips down the lower line (bearish breakout).

- Bollinger Bands can also be used as a trend indicator, signal being generated, as in the previous case, when the price breaks up the upper band or the lower down. Momentum indicators are used alongside standard Bollinger bands to confirm the generated signals.

- Also, Bollinger Bands indicator can be used as an indicator of reversal, breaking up the top band followed by closure between the strip generates a sell signal, and breaking down the strip below followed by the return within the strip generates a buy signal. Oscillators are used to detect moments suitable for this strategy. Divergences on the oscillators may confirm a reversal scenario.

The indicator for Microsoft share price for la last 12 months is:

>chartSeries(MSF, subset='last 12 months', TA=NULL,theme="white")

>addBBands()

Figure 4

Source: Author's calculations in R, Microsoft value, Yahoo Finance data source.

Awesome Oscillator (AO) indicator was created by Bill Williams and is an indicator of momentum, plotted as histograms.

The oscillator is created using the difference between a moving average of 34 periods and a 5 period moving average Moving averages are calculated using the middle value of a period (maximum + minimum) / 2.

Each line in the histogram which is taller than the previous one is colored in green. Histogram lines that reach a value lower than the previous line shall be colored in red.

The use of this indicator:

- intersections with the midline: AO generates a trading signal when the zero line is cut. A buy signal is generated when the line is cut from the bottom up. A sell signal occurs when the line is cut from top to bottom.
- a buy signal is generated when the oscillator is above the zero line and two lines of red histogram are followed by one green.
- a sell signal is generated when the oscillator is below the zero line and two green histogram lines are followed by a red line.
- a buy signal occurs when the histogram is located below zero line of the indicator and the last minimum is located at a higher value than the previous one. The histogram must remain below zero between these two requirements. When a minimum at a higher value of the indicator is followed by a green line, a buy signal is generated.
- sell signal occurs when the histogram is located above zero line of the indicator and the last maximum is located at a lower value than the previous maximum. The histogram must remain above zero between these maxims. When the maximum set at a lower value is followed by a red line, it generates a sell signal.

There are some analysts that suggest instead of AO, one shoul use Ultimate Oscilator, developed by Larry Williams in 1979.

In R, we can call this indicator:

>ultimateOscillator(MSF, n = c(7, 14, 28), wts = c(4, 2, 1)),

Where :

HLC - Object that is coercible to xts or matrix and contains High-Low-Close prices.

N - a vector of the number of periods to use for each average calculation.

Wts - the weights applied to each average.

Money flow index (MFI)

MFI indicator is a "momentum" indicators that measure the strength of money that "enter" or "exit". It is calculated as the product of volume traded and the typical price for the analyzed period, the price typically defined as the simple median of the high, low and closing price for that interval.

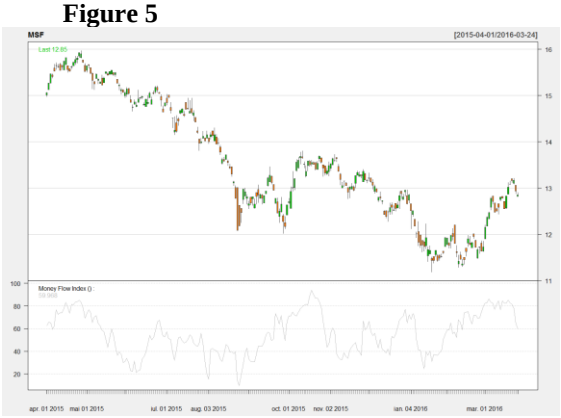
Interpretation:

- Serching for divergence between price developments and the MFI: if prices are in an uptrend when MFI values into a downward, it is possible the trend of prices to change;
- There are two reference levels: values of 20 and 80. If the value exceeds 80, the prices reach new highs, otherwise (drops below 20), the prices are touching new lows.

>ultimateOscillator(MSF, n = c(7, 14, 28), wts = c(4, 2, 1))

>addMFI()

Figure 5



Source: Author's calculations in R, Microsoft value, Yahoo Finance data source.

Another indicator is Momentum. Momentum indicator is a simple indicator that provides an overview of the movement and it was intensely used for a period of time.

Usage:

- as a trend indicator: buy signal is generated when the Momentum stops declining and begins to grow. Sell signal is generated when the Momentum stops growing and begins to decline. It is advisable to use an average short-term indicator for these signals. It is also indicated awaiting confirmation of trend change and price movement.
- as a predictive indicator: this approach assumes that a minimum or maximum values are preceded by a strong acceleration in price developments. When the market reaches a peak, indicator will grow stronger and will begin to decline after the divergence to quote that will continue to grow or will stay in a neutral trend.

Calculation method:

It is calculated as the ratio between current price and the price in the previous period N:

MOMENTUM = CLOSE (i) / CLOSE (i-N) * 100

where

CLOSE (i) - current closing price;

CLOSE (i-N) - the closing price during the previous N.

In R, using quantmod and TTL packages:

>addMomentum()

Figure 6

Source: Author's calculations in R, Microsoft value, Yahoo Finance data source.

4. Conclusions

There are a lot of software packages to import and analyse financial data. We recommended the R solution as being a totally free and multi-platform option. You can even acces R through web interface and there are developers who create PHP support (Ciucu Ș. C., 2014). The on-growing support and the big companies which are using R packages for different data analysis are another proof that the environment is trustworthy and the provided solutions are not only easily accessible, but they may represent the tommorow's approach in data analysis.

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Annex

R source code for importing and anaysing the financial data:

```
#installing Quantitative Financial Modelling Framework package
install.packages(quantmod)
require(quantmod)

#importing Microsoft data from Yahoo! Finance
getSymbols("MSF",src="yahoo")

#displaying last 6 entries
tail(MSF)

#candlestick chart
candleChart(MSF,multi.col=TRUE,theme="white")
chartSeries(MSF ,multi.col=TRUE,theme="white")

#requiring Technical Trading Rules package for technical indicators
require(TTR)

#chart with Microsoft data, last 12 months
chartSeries(MSF, subset='last 12 months', TA=NULL,theme="white")

#MACD
addMACD()

#Bollinger Bands
addBBands()

#Ultimate Oscillator
ultimateOscillator(MSF, n = c(7, 14, 28), wts = c(4, 2, 1))

#Money Flow Index
addMFI()

#Momentum
addMomentum()
```

Other indicators that can be found in TTR package:

TTR-package	*Functions to create Technical Trading Rules (TTR)*
%D	*Stochastic Oscillator / Stochastic Momentum Index*
%K	*Stochastic Oscillator / Stochastic Momentum Index*
adjRatios	*Split and dividend adjustment ratios*
adjust	*Split and dividend adjustment ratios*

ADX	*Welles Wilder's Directional Movement Index*
ALMA	*Moving Averages*
aroon	*Aroon*
ATR	*True Range / Average True Range*
BBands	*Bollinger Bands*
bollingerBands	*Bollinger Bands*
CCI	*Commodity Channel Index*
chaikinAD	*Chaikin Accumulation / Distribution*
chaikinVolatility	*Chaikin Volatility*
changes	*Rate of Change / Momentum*
CLV	*Close Location Value*
CMF	*Chaikin Money Flow*
CMO	*Chande Momentum Oscillator*
DEMA	*Moving Averages*
DI	*Welles Wilder's Directional Movement Index*
Donchian	*Donchian Channel*
DonchianChannel	*Donchian Channel*
DPO	*De-Trended Price Oscillator*
DVI	*DV Intermediate Oscillator*
DX	*Welles Wilder's Directional Movement Index*
EMA	*Moving Averages*
EMV	*Arms' Ease of Movement Value*
EVWMA	*Moving Averages*
garman.klass	*Volatility*
GD	*Moving Averages*
getYahooData	*Fetch Internet Data*
gk.yz	*Volatility*
GMMA	*Guppy Multiple Moving Averages*
growth	*Miscellaneous Tools*
Guppy	*Guppy Multiple Moving Averages*
guppy	*Guppy Multiple Moving Averages*
HMA	*Moving Averages*
KST	*Know Sure Thing*
lags	*Miscellaneous Tools*
MA	*Moving Averages*
MACD	*MACD Oscillator*
MFI	*Money Flow Index*
momentum	*Rate of Change / Momentum*
moneyFlow	*Money Flow Index*
MovingAverages	*Moving Averages*
naCheck	*Miscellaneous Tools*
OBV	*On Balance Volume (OBV)*
parkinson	*Volatility*
PBands	*Construct (optionally further smoothed and centered) volatility bands around prices*
PercentRank	*Percent Rank over a Moving Window*
percentRank	*Percent Rank over a Moving Window*
priceBands	*Construct (optionally further smoothed and centered) volatility bands around prices*
ROC	*Rate of Change / Momentum*
rogers.satchell	*Volatility*
rollFun	*Analysis of Running/Rolling/Moving Windows*
rollSFM	*Analysis of Running/Rolling/Moving Windows*
RSI	*Relative Strength Index*
runCor	*Analysis of Running/Rolling/Moving Windows*
runCov	*Analysis of Running/Rolling/Moving Windows*
runFun	*Analysis of Running/Rolling/Moving Windows*
runMAD	*Analysis of Running/Rolling/Moving Windows*
runMax	*Analysis of Running/Rolling/Moving Windows*
runMean	*Analysis of Running/Rolling/Moving Windows*
runMedian	*Analysis of Running/Rolling/Moving Windows*
runMin	*Analysis of Running/Rolling/Moving Windows*
runPercentRank	*Percent Rank over a Moving Window*
runSD	*Analysis of Running/Rolling/Moving Windows*
runSum	*Analysis of Running/Rolling/Moving Windows*
runVar	*Analysis of Running/Rolling/Moving Windows*
SAR	*Parabolic Stop-and-Reverse*
SMA	*Moving Averages*

SMI	*Stochastic Oscillator / Stochastic Momentum Index*
stoch	*Stochastic Oscillator / Stochastic Momentum Index*
stochastic	*Stochastic Oscillator / Stochastic Momentum Index*
stochastics	*Stochastic Oscillator / Stochastic Momentum Index*
stockSymbols	*Fetch Internet Data*
T3	*Moving Averages*
TDI	*Trend Detection Index*
TR	*True Range / Average True Range*
TRIX	*Triple Smoothed Exponential Oscillator*
TTR	*Functions to create Technical Trading Rules (TTR)*
ttrc	*Technical Trading Rule Composite data*
ultimateOscillator	*The Ultimate Oscillator*
VHF	*Vertical Horizontal Filter*
VMA	*Moving Averages*
volatility	*Volatility*
VWAP	*Moving Averages*
VWMA	*Moving Averages*
WebData	*Fetch Internet Data*
wilderSum	*Analysis of Running/Rolling/Moving Windows*
williamsAD	*Williams Accumulation / Distribution*
WMA	*Moving Averages*
WPR	*William's %R*
yang.zhang	*Volatility*
ZigZag	*Zig Zag*
zigzag	*Zig Zag*
ZLEMA	*Moving Averages*

Table of Contents

PRELIMINARY CHAMBER, A NEW INSTITUTION IN THE ROMANIAN PROCEDURE LAW
Alexandru MARIAN..... 5

UNDERCOVER PARTNER
Alexandru MARIAN.....10

THE PRINCIPLE OF SEPARATION OF JUDICIAL FUNCTIONS
Denisa BARBU 15

PROTECTION OF THREATENED WITNESSES
Nadia Claudia CANTEMIR-STOICA 19

COMPARED LAW ISSUES REGARDING THE JUDGE SUPERVISING THE LIMITATION OF FREEDOM
Gabriela-Nicoleta CHIHAIA 26

ISSUES ON SCIENTIFIC RESEARCH IN PLACES OF HOLDING
Ioan CHIŞ, Oana Alexandra CHIŞ 33

PREVENTIVE MEASURES - EXCEPTION TO THE PRINCIPLE OF THE RIGHT TO LIBERTY AND SECURITY
Marin-Alin DĂNILĂ 39

ACCESS TO A COMPUTER SYSTEM. BETWEEN LEGAL PROVISIONS AND TECHNICAL REALITY
Maxim DOBRINOIU.....44

FIGHTING THE CLASSICAL CRIME-SCENE ASSUMPTIONS. CRITICAL ASPECTS IN ESTABLISHING THE CRIME-SCENE PERIMETER IN COMPUTER-BASED EVIDENCE CASES
Cristina DRIGĂ, Svetlana PURICI.....50

HUNGER STRIKES AND FORCE-FEEDING IN PRISONS
Radu-Florin GEAMĂNU 55

CRIMINAL TERRORIST GROUP IN THE NEW CRIMINAL LEGISLATION OF ROMANIA
Mirela GORUNESCU.....70

SEVERAL CONSIDERATIONS OF COMPARED LAW ON SELF-DEFENSE (I)
Lamya-Diana HĂRĂTĂU, Traian DIMA 74

THE JUDICIAL INDIVIDUALIZATION OF THE PUNISHMENT. ALTERNATIVES TO DETENTION IN THE UNITED KINGDOOM CRIMINAL LAW
Andrei-Viorel IUGAN 81

THE PREVENTIVE ARREST OF A PERSON IN PREVENTIVE DETENTION STATUS
Bogdan MICU 85

THE CRIMINAL OFFENCE OF MONEY LAUNDERING – A SERIES OF THEORETICAL AND PRACTICAL CONSIDERATIONS
Constantin NEDELCU 91

THEORETICAL AND PRACTICAL CONSIDERATIONS RELATING TO THE OFFENSE OF DRIVING A VEHICLE UNDER THE INFLUENCE OF ALCOHOL OR OTHER SUBSTANCES. COMPARATIVE LAW ISSUES
Alin Sorin NICOLESCU 96

THE ARREST PROCEDURE IN ACCORDANCE WITH THE DEMANDS OF THE CONVENTION
George Octavian NICOLAE 110

THEORETICAL ASPECTS REGARDING THE NEW OFFENSE COVERED BY ART. 246 OF THE CRIMINAL CODE MISSAPPROPRIATION OF PUBLIC AUCTIONS AND OFFENCES COVERED BY ART. 65 OF LAW NO. 21/1996 REPUBLISHED. COMPETITION LAW
Rodica Aida POPA 115

THE EVOLUTION OF ROMANIAN CRIMINAL AND CRIMINAL PROCEDURAL RULES APPLICABLE TO JUVENILE OFFENDERS
Andrei-Lucian PUŞCAŞU 120

CODE SETTING TRENDS IN ELECTORAL MATTERS - CODE OF GOOD PRACTICE IN ELECTORAL MATTERS - VENICE 2002
Mircea-Constantin SINESCU, Mihai-Daniel ONIŞOR 128

EU COMPETITION LAW AND THE TELECOMS SINGLE MARKET: NETWORK NEUTRALITY IN THE AFTERMATH OF THE TSM REGULATION
Noemí Angulo GARZARO, Amaya Angulo GARZARO 133

CONSIDERATIONS WITH REGARD TO THE USUFRUCT OVER THE RIGHT OF VOTE AS GUARANTY APPLIED IN THE BUSINESS ACTIVITY
Florin CONSTANTINESCU 141

GOVERNMENT EMERGENCY ORDINANCE NO. 44/2008 BETWEEN INNOVATION AND CHANGE
Gabriela FIERBINŢEANU 149

ALTERNATIVE DISPUTE RESOLUTION
Mihaela Irina IONESCU 155

ISSUERS OF FINANCIAL INSTRUMENTS
Cristian GHEORGHE 159

IN-DEPTH ANALYSIS OF THE HISTORICAL TERMS RELATED TO THE COMMON LAW "TRUST"
Irina GVELESIANI 164

"TREUHAND" AND "FIDUCIE" (TERMINOLOGICAL PROBLEMATICS)
Irina GVELESIANI 170

MORAL DAMAGES IN ACCIDENT INSURANCE (RCA INSURANCE) ARE THERE SUFFICIENT CRITERIA?
Anca-Iulia HÂNC 176

THE DIRECTIVE 85/374/EEC ON DEFECTIVE PRODUCTS: ITS INTERPRETATION BY THE EUROPEAN COURT OF JUSTICE
Inmaculada HERBOSA MARTÍNEZ 182

CONTROVERSIAL LAW ISSUES IN THE ENFORCEMENT OF THE NEW LEGAL PROVISIONS IN FAMILY LAW
Dan LUPAȘCU **190**

HARMONIZATION OF THE CONSUMER CONTRACT DISPOSITIONS WITH THE GENERAL CONTRACT RULES
Alexandru MATEESCU **195**

ADAPTATION OF CONTRACT IN CASE OF VICE OF CONSENT BY ERROR. APPLICATION BEFORE THE COURT OF ARTICLE 1213 CIV. C.
Emilian-Constantin MEIU **200**

THE LEGAL REGIME OF THE UNILATERAL PROMISE REGARDING THE SALE CONTRACT
Livia MOCANU **204**

BRIEF CONSIDERATIONS REGARDING THE PROPERTY TRANSFERRING OR ENGENDERING OF OBLIGATIONS CHARACTER OF THE SALES CONTRACT
Vlad-Victor OCHEA **213**

LEGAL CONSEQUENCES OF MERGERS AND ACQUISITIONS
Amelia-Raluca ONIȘOR **218**

THE RIGHT TO A FAIR TRIAL IN THE DYNAMIC INTERPRETATION OF THE EUROPEAN COURT OF HUMAN RIGHTS
Alexandra PANAIT **227**

IDENTIFYING BEST PRACTICES IN INSURANCE
Răducu Marian PETRESCU **232**

THE EFFICACY OF THE ARBITRATION CLAUSE IN A SIMULATED ACT
Tudor Vlad RĂDULESCU **237**

THE IMPLICATIONS OF THE POLITICS AND OF THE EDUCATIONAL LAW IN THE DEVELOPMENT OF THE ROMANIAN SOCIETY
Andreea RÎPEANU **242**

THE INFLUENCE OF RELIGION ON THE ROMAN LEGAL SYSTEM
Andreea RÎPEANU **249**

CAUSA AND CONSIDERATION – A COMPARATIVE OVERVIEW
Dimitar STOYANOV **254**

A HISTORICAL PERSPECTIVE ON THE SPECIAL AVAILABLE PORTION OF THE SURVIVING SPOUSE PROVIDED BY THE ROMANIAN CIVIL CODE
Silviu-Dorin ȘCHIOPU **267**

STATUTORY CANCELLATION OF THE LEASING CONTRACT - CONDITIONS AND EFFECTS
Raluca Antoanetta TOMESCU **274**

CONSIDERATIONS REGARDING THE SUSPENSION OF THE ENFORCEMENT
Nicolae-Horia ȚIȚ **278**

LATEST AMENDMENTS TO LAW NO 62/2011 ON SOCIAL DIALOGUE ENACTED BY LAW NO 1/2016
Aurelian Gabriel ULUITU **286**

MODERNIZING THE PRIVATE LAW. SOME KEY ISSUES IN THE RECENT DRAFT OF THE SPANISH COMMERCIAL CODE
Dan VELICU 291

ROLE OF THE INSOLVENCY ADMINISTRATOR AND OF THE OFFICIAL RECEIVER IN THE DYNAMICS OF THE CONTRACTS OF DEBTOR IN INSOLVENCY, IN THE REGULATION OF THE INSOLVENCY CODE
Eugenia VOICHECI 296

THE LEGAL PROTECTION OF REFUGEE: WESTERN BALKANS
Elena ANDREEVSKA 305

STABILITY AND CONSTITUTIONAL REFORM NORMATIVE CONTENTS OF CONSTITUTION
Marius ANDREESCU 315

THE LIMITS OF STATE POWER IN A DEMOCRATIC SOCIETY
Marius ANDREESCU 322

GENERAL PRINCIPLES OF LAW
Elena ANGHEL 331

THE NOTIONS OF „GIVEN" AND „CONSTRUCTED" IN THE FIELD OF THE LAW
Elena ANGHEL 338

A PLEADING IN FAVOUR OF THE CONSTITUTIONAL COURT
Valentina BĂRBĂŢEANU 344

CONSIDERATIONS REGARDING THE INFLUENCE OF LEGAL COMMUNICATION FROM THE PERSPECTIVE OF NATURAL LAW
Claudiu Ramon D. BUTCULESCU 357

ORDER OF LAW AND LEGALITY - GUARANTEES OF CONSTITUTIONAL DEMOCRACY
Emilian CIONGARU 361

IMPLICATIONS OF THE RECOURSES IN THE INTERESTS OF LAW ON THE PROVISIONS OF LAW NO. 554/2004
Claudia Marta CLIZA 367

THE INTERACTION OF INTELLECTUAL PROPERTY RIGHTS WITH THE OBJECTIVES AND COMPETENCES OF EUROPEAN UNION
Alina Mihaela CONEA 374

MATTERS REGARDING THE HUMAN RIGHTS' PROTECTION IN THE LEGAL SYSTEM
Maria-Irina GRIGORE-RĂDULESCU, Corina Florenţa POPESCU 381

THE PEACEFUL SETTLEMENT OF INTERNATIONAL CONFLICTS, A RIGHT OR DUTY OF STATES?
Dan GUNĂ 387

BRIEF CONSIDERATIONS ON THE PRINCIPLES SPECIFIC TO THE IMPLEMENTATION OF THE EUROPEAN UNION LAW
Augustin FUEREA 393

UN SECRETARY- GENERAL'S FORMS OF INVOLVEMENT IN THE PEACEFUL SETTLEMENT OF INTERNATIONAL DISPUTES. THE DIPLOMATIC MEANS
Oana-Adriana IACOB 399

ASPECTS REGARDING INTERNATIONAL RESPONSIBILITY BY ANALYSING THE AGENCY RELATIONSHIP BETWEEN THE INTERNATIONAL ORGANIZATION AND THE STATE
Ovidiu-Emilian IVĂNESCU 411

THE LIMITS OF THE COURT OF JUSTICE OF THE EUROPEAN UNION'S JURISDICTION TO ANSWER PRELIMINARY REFERENCES
Iuliana-Mădălina LARION 418

EVOLUTION OF SOURCES IN ROMANIAN LEGAL SYSTEM
Horaţiu MĂRGOI 425

REFLECTIONS ON REGULATION OF PARLIAMENTARY IMMUNITY IN THE ROMANIAN CONSTITUTIONS AND IN COMPARATIVE LAW - SELECTIVE ASPECTS
Nicolae PAVEL 432

THE USE OF AVIATION ACCIDENT INVESTIGATION REPORTS AS EVIDENCE IN COURT
Sorana POP PĂUN, Mihai RADU 441

THE ROMANIAN OMBUDSMAN - PUBLIC INSTITUTION INVOLVED IN THE PROTECTION HUMAN RIGHTS AND THE OBSERVANCE OF THE SEPARATION AND BALANCE BETWEEN THE STATE POWERS
Simina POPESCU 447

THE JURISDICTION OF THE COURT OF JUSTICE OF THE EUROPEAN UNION TO DELIVER A CANCELLATION JUDGMENT REGARDING THE INTERNATIONAL AGREEMENTS TO WHICH THE EU IS PARTY
Roxana-Mariana POPESCU 456

THE INTERPRETATION OF INTERNATIONAL AGREEMENTS BY THE COURT OF JUSTICE OF THE EUROPEAN UNION
Roxana-Mariana POPESCU 462

TRANSITIONAL JUSTICE IN ROMANIA. REPARATIONS FOR THE VICTIMS OF THE COMMUNIST REGIME AND LEGAL ORDER
Bianca Elena RADU 469

THEORETICAL AND PRACTICAL ASPECTS CONCERNING THE ELECTION OF THE PRESIDENT OF ROMANIA
Oana SARAMET 476

EUROPEAN UNION'S COMMITMENT TO FIGHT AGAINST THE HUMAN BEINGS TRAFFICKING, THE MODERN FORM OF SLAVERY
Laura-Cristiana SPĂTARU-NEGURĂ 485

UNITY IN DIVERSITY. THE EUROPEAN UNION'S MULTILINGUALISM
Laura-Cristiana SPĂTARU-NEGURĂ 490

THE EVOLUTION OF ROMANIAN JUDICIAL SYSTEM SEEN THROUGH THE LAST MONITORING REPORT
Florin STOICA 497

DRONE OPERATORS – LEGAL RESPONSIBILITY
Andrei-Alexandru STOICA **503**

DRONE LEGISLATION – A WAR OF ATTRITION
Andrei-Alexandru STOICA **514**

THE ROLE OF THE PRESIDENT OF ROMANIA IN THE GOVERNMENT INVESTITURE PROCEDURE
Cătălina SZEKELY **529**

ACTS EXEMPT FROM THE JUDICIAL CONTROL OF THE CONTENTIOUS ADMINISTRATIVE
Elena Emilia ȘTEFAN **534**

THE REPRESENTATION OF THE ADMINISTRATIVE AND TERRITORIAL DIVISIONS BEFORE THE COURT OF LAW
Elena Emilia ȘTEFAN **539**

MIGRATION AND REFUGEE CRISIS: A MAJOR CHALLENGE FOR THE EUROPEAN UNION. MEASURES AND POSSIBLE SOLUTIONS IN THE CONTEXT OF YEAR 2016
Dan VĂTĂMAN **544**

CYBER HOSTILITIES: CIVILIAN DIRECT PARTICIPATION
Dan-Iulian VOITAȘEC **550**

MEANS AND METHODS OF CYBER WARFARE
Dan-Iulian VOITAȘEC **555**

GETTING TECHNIC WITH COLOR: GRAPHIC REPRESENTATION OF COLOR TRADEMARKS IN THE NEW EUROPEAN LEGISLATION ON TRADEMARKS
Paul-George BUTA **562**

THE DURATION OF RIGHTS CONFERRED BY COPYRIGHT
Cornelia DUMITRU **571**

LEGAL PROTECTION OF COPYRIGHT FOR COMPUTER PROGRAMS
Ramona Anca Denisa DUMITRAŞCU **583**

THE IMPACT OF THE EUROPEAN TRADE MARK LAW REFORM ON THE ROMANIAN LEGISLATION
Sonia FLOREA **589**

COPYRIGHT-OVERVIEW; COPYRIGHT CONTENTS-PARTICULARITIES
Ovidia IONESCU **599**

THE INDIVIDUAL CHARACTER FOR DESIGN'S PROTECTION ACCORDING TO ROMANIAN LAW
Andreea LIVĂDARIU **604**

LEGAL IMPLICATIONS OF OPEN LICENSES
Monica Adriana LUPAŞCU **608**

THE PUBLISHING CONTRACT FOR WRITTEN WORKS
Ana-Maria MARINESCU **615**

THE COPYRIGHT IN THE INFORMATION SOCIETY
Cristinel Ioan MURZEA **629**

THE LEGAL PROTECTION OF DATABASES
Viorel ROŞ **634**

NEGOTIATION OF REMUNERATION PAYABLE TO PERFORMERS AND PHONOGRAMS PRODUCERS FOR PUBLIC COMMUNICATION OF PHONOGRAMS AND AUDIOVISUAL ARTISTIC PERFORMANCES
Mariana SAVU **647**

LABOR MARKET IN ROMANIA DURING TRANSITION. FORMING AND CHARACTERISTICS
Viorel CORNESCU, Anca Monica ARDELEANU **659**

THE MAIN PRINCIPLES OF TOTAL QUALITY MANAGEMENT
Andrei DIAMANDESCU **672**

HARMONIZATION, HISTORICAL COST AND INVESTMENTS
Valentin Gabriel CRISTEA **679**

FAIR VALUE ILLUSTRATED IN OMFP 1802/2014
Valentin Gabriel CRISTEA **684**

KNOWLEDGE VERSUS CREATIVITY: WHICH OF THEM REALLY MATTER?
Daniele GIAMPAOLI, Massimo CIAMBOTTI **690**

ENTREPRENEURSHIP IN TERMS OF THE LEVEL OF ECONOMIC COMPETITIVENESS
Elena Mihaela ILIESCU **699**

THE ROLE OF THE INSTITUTE OF FISCAL CONSTITUTION IN THE SYSTEM OF PUBLIC BUDGETS IN THE CZECH REPUBLIC
Richard POSPÍŠIL **706**

SOVEREIGN DEBT RESTRUCTURING AND "VULTURE FUNDS"
Emilia Cornelia STOICA **712**

THE PROMOTION OF THE ACCOUNTING SERVICES WITHIN THE LIMITS OF PROFESSIONAL ETHICS
Mihaela SUDACEVSCHI **718**

COMPREHENSIVE APPROACH OVER THE PROFESSIONAL JUDGMENT OF THE FINANCIAL ANALYST
Viorica Mirela ŞTEFAN-DUICU **723**

ROLE OF THE SALESPERSON IN "TOTAL DESIGN"
Nelu DORLE **728**

SALES STRATEGIES CENTERED ON ELABORATING QUESTIONS
Nelu DORLE **733**

THE IMPORTANCE OF STRATEGIES IN THE SALE PROCESS
Nelu DORLE **739**

THE IMPORTANCE OF BENCHMARKING IN MAKING MANAGEMENT DECISIONS
Adriana-Mihaela IONESCU, Cristina Elena BIGIOI **746**

THEORETICAL FEATURES REGARDING THE EVOLUTION OVER TIME OF THE MAIN COMMUNICATION MODELS USED FOR THE STUDY OF MASS COMMUNICATION
Irina IOSUB, Otilia-Elena PLATON **751**

URANIUM MARKET TRENDS
Serghei MĂRGULESCU, Elena MĂRGULESCU.....759

PERSPECTIVES UPON CONSUMPTION AND HAPPINESS
Andreea Mihaela STROE.....767

SOCIAL MEDIA – VITAL INSTRUMENT IN GAINING CONSUMERS CONFIDENCE
Mirela-Cristina VOICU 772

TIME MANAGEMENT FOR ACCOUNTANTS
Cristina Elena BIGIOI, Adriana-Mihaela IONESCU.....779

APPLICATION OF CASH FLOW RETURN ON INVESTMENT IN TERMS OF FINANCIAL PERFORMANCE MEASUREMENT
Kristína Jančovičová BOGNÁROVÁ 784

THE INFLUENCE OF ACCOUNTANCY ERRORS ON FINANCIAL AND TAX REPORTS
Mariana GURĂU, Maria Zenovia GRIGORE.....790

MUTUAL INFLUENCE BETWEEN MONETARY POLICY AND INVESTMENT
Valentin Mihai LEOVEANU 795

BANK LENDING EVOLUTION IN ROMANIA DURING 2008-2015
Valentin Mihai LEOVEANU 801

EXCHANGE RATE DIFFERENCES-THE ACCOUNTING TREATMENT AND ITS INFLUENCE ON THE FINANCIAL PERFORMANCE OF AN ECONOMIC ENTITY
Nicoleta Cristina MATEI, Andreea Paula DUMITRU.....808

CONSIDERATIONS ON ACCESS TO FINANCE FOR NON-FINANCIAL COMPANIES IN ROMANIA
Nicoleta Georgeta PANAIT 814

THE NEED TO IMPLEMENT BASED III IN THE AFTERMATH OF THE GLOBAL FINANCIAL CRISIS
Mădălina Antoaneta RĂDOI, Alexandru OLTEANU.....819

THE U.S. NATIONAL INTEREST REDEFINITION AND THE FUTURE OF ITS LEADERSHIP IN CRITICAL REGIONS. STRONG AND SUSTAINABLE AMERICAN LEADERSHIP?
Iñigo ARBIOL OÑATE.....829

ROMANIAN KNOWLEDGE SOCIETY DEVELOPMENT. A PROPOSAL
Mirela CERKEZ 835

POLITICAL PSYCHOLOGY – NEW CHALLENGES IN ANALYZING FOREIGN POLICY
Karin MEGHEŞAN, Teodora DOBRE.....842

CONSERVATISM IN A POAST-SOCIALIST COUNTRY: THE INTELLECTUAL ELITE AND THE EXTREME RIGHT IN ROMANIA
Valentin Quintus NICOLESCU.....848

A TOOL FOR A DYNAMIC ADAPTATION OF THE OBJECTIVES AT THE LEVELS OF EUROPEAN UNION, NATIONAL AND SECTORAL, UNDER SECTORAL AND ACROSS SECTORS
Speranţa-Liliana NEAGU 854

TO BE IS NOT-TO-BE: NIHILISM, IDEOLOGY AND THE QUESTION OF BEING IN HEIDEGGER'S POLITICAL PHILOSOPHY PART II: TRUTH, HUMANISM AND TECHNOLOGY
Mihai NOVAC **862**

ENERGY RELATIONS BETWEEN RUSSIA AND UKRAINE AFTER THE EUROMAIDAN: TRAPPED BETWEEN THE CONTRACTUAL SPACE AND THE SPACE OF SPACES
Eric PARDO SAUVAGEOT **876**

THE ROLE OF THE PUBLIC ADMINISTRATOR - MAIN TENDENCIES IN MANAGEMENT AND LEADERSHIP SKILLS OF PUBLIC ADMINISTRATOR IN ROMANIA
Constantin BRĂGARU **886**

THE EVOLUTION OR INVOLUTION OF POLICIES TO COMBAT YOUTH UNEMPLOYMENT?
Ştefania Cristina GHIOCANU **892**

NEW POLITICAL, ECONOMIC AND SOCIAL CHALLENGES IN A COMPLICATED INTERNATIONAL CONTEXT
Liviu RADU, Carmen RADU **896**

THE REFORM OF NATIONAL SOCIAL-ECONOMIC SYSTEMS AND EUROPEAN REFORM
Carmen RADU, Liviu RADU **904**

LEARNING GERMAN AS A THIRD LANGUAGE THROUGHS ESL. STRATEGIES TO DEVELOP VOCABULARY
Carmen-Daniela CARAIMAN, Camelia NEAGU **913**

CONSOLIDATING FEMINISMS IN ROMANIA – A CONTERFACTUAL ANALISIS
Diana Elena NEAGA **918**

BUSINESS SUCCESS IN TODAY'S ROMANIA: OPINIONS EXPRESSED BY STUDENTS AND ENTREPRENEURS
Elena NEDELCU **927**

THE STUDENTS' VALUE-BASED CHOICES AND ATTITUDES - A SUPPORT FOR THEIR SOCIAL AND PROFESSIONAL INVOLVEMENT?
Elena NEDELCU, Mihai NEDELCU **931**

THE ELITES AND THE MASSES IN 2016
Mirela Cristiana NILĂ-STRATONE **938**

PAST AND PRESENT IN THE ROMANIAN PRIMARY EDUCATION CURRICULUM
Oana RICA POPA, Norica Felicia BUCUR **943**

THE ACTUALITY OF NIETZSCHE'S CRITICISM OF EDUCATIONAL SYSTEM REGARDING MODERN KNOWLEDGE SOCIETY
Andreas SCHREIBER **953**

OUTCOMES OF ALTERNATIVE ASSESSMENT IN ADULT LANGUAGE TRAINING
Brânduşa Elena Octavia ŢEICAN **961**

THE GLOBAL MARKET OF SMALL BUSINESSES BY E-COMMERCE PLATFORMS
Domenico CONSOLI **966**

INTELLIGENT MULTI-AGENT PLATFORM WITHIN COLLABORATIVE NETWORKED ENVIRONMENT
Adina-Georgeta CREŢAN **975**

MODELING EXCHANGE RATES USING ARCH FAMILY OF MODELS
Ştefan Cristian CIUCU 982

USING R FOR ANALYZING FINANCIAL MARKETS
Nicolae-Marius JULA, Nicoleta JULA.....990